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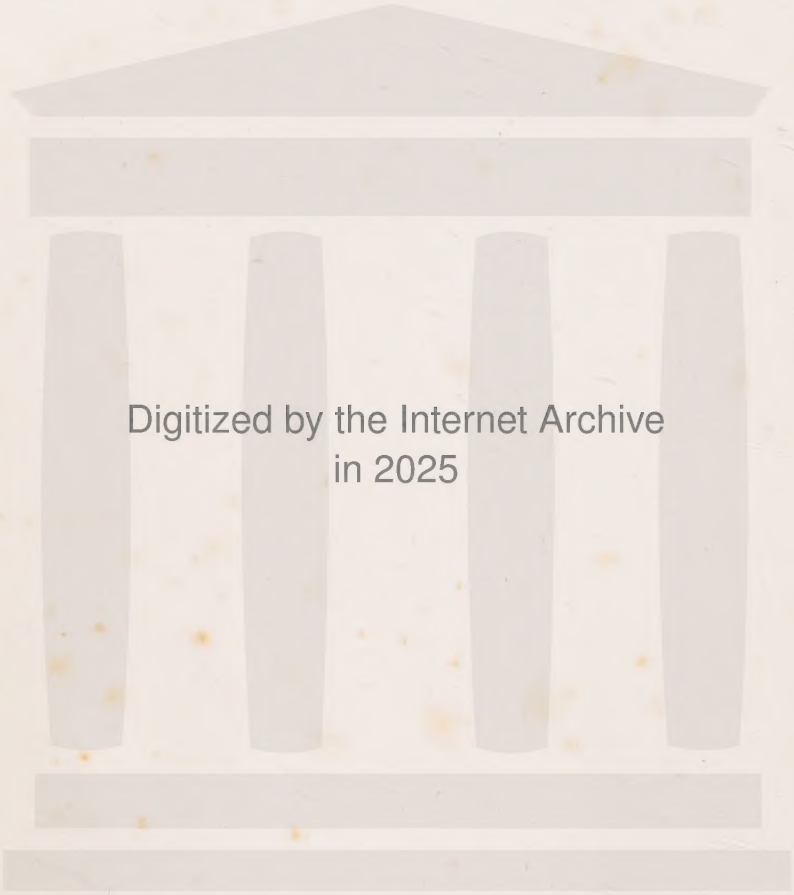
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A

CONCISE, PRACTICAL ABRIDGMENT

OF THE

Common and Statute Law,

AS AT PRESENT ADMINISTERED

IN

THE COMMON-LAW, PROBATE, DIVORCE, AND ADMIRALTY COURTS;

EXCLUDING ALL THAT IS OBSOLETE, OVERRULED, OR SUPERSEDED.

COMPRISING A

Series of Condensed Treatises on the different Branches of the Law,

WITH DETAILED DIRECTIONS, FORMS, AND PRECEDENTS.

AN ALPHABETICAL DICTIONARY OF TECHNICAL LAW TERMS AND MAXIMS, AND A COLLECTION OF WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

THE WHOLE ILLUSTRATED BY REFERENCES TO THE PRINCIPAL CASES IN EQUITY, AND IN THE SCOTCH, AMERICAN, AND IRISH REPORTS, AND THE MOST EMINENT TEXT WRITERS.

SECOND EDITION, RE-MODELLED, AND NEARLY RE-WRITTEN.

BY CHARLES PETERSDORFF,

SERJEANT-AT-LAW;

ASSISTED BY

CHARLES W. WOOD, ESQ. AND WALKER MARSHALL, ESQ.

BARRISTERS-AT-LAW.

VOL. V.

LONDON:

BUTTERWORTHS, 7 FLEET STREET,

Law Publishers to the Queen's Most Excellent Majesty;

AND

SIMPKIN, MARSHALL, AND CO.

EDINBURGH: OLIVER AND BOYD. DUBLIN: HODGES, SMITH, AND CO.

1863.

LONDON:
STRANGEWAYS AND WALDEN, 28 CASTLE STREET, LEICESTER SQUARE.

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A Dictionary

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TECHNICAL LAW TERMS AND MAXIMS,

AND WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

HACKNEY and STAGE CARRIAGES.

See ante, Carriers, vol. iii. p. 29; *post*, Railways.

These are regulated by the 1 & 2 Wm. 4, c. 22; 6 & 7 Vic. c. 86; 13 Vic. c. 7; 16 & 17 Vic. c. 33; and 16 & 17 Vic. c. 127.

I. 1 & 2 Wm. 4, c. 22: *Requisitions of, still in force*, p. 1.
II. 6 & 7 Vic. c. 86: „ „ p. 4.
III. 13 Vic. c. 7: „ „ p. 8.
IV. 16 & 17 Vic. c. 33: „ „ p. 8.
V. 16 & 17 Vic. c. 127: „ „ p. 12.
VI. Liability of Driver, p. 13.
VII. „ Proprietor for Loss of Luggage, p. 13.
VIII. Defacing License, p. 13.

I. 1 & 2 Wm. 4, c. 22.—"An Act to Amend the Laws relating to Hackney Carriages, and to Waggons, Carts, and Drays used in the Metropolis, and to place the Collection of the Duties on Hackney Carriages, and on Hawkers and Pedlars in England, under the Commissioners of Stamps."

(A) *Requisitions of, still in force.*[1]

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[1] By sect. 5, horses used in drawing hackney carriages not to be subject to the duties imposed by 4 Geo. 4, c. 62, on horses let for hire.

By sect. 18, carriages, horses, harness, &c. to be liable for duties and penalties, and may be distrained.

By sect. 19, duties may be recovered by distress.

Sect. 20. *Numbered Plates to be placed on Hackney Carriage.*—"Upon every hackney carriage which shall be used for the purpose of standing or plying for hire, or which shall be let for hire, within the distance of five miles from the General Post Office in the city of London, the Stamp-office plate shall be fixed in a conspicuous place on the outside of the back of such hackney carriage; and there shall also be fixed upon every such hackney carriage, in the manner hereinafter directed, three other numbered plates, of the description hereinafter men-

tioned, to be provided for this purpose by the proprietor of such hackney carriage: that is to say, a plate having thereon the number of the Stamp-office plate, placed upon such hackney carriage, denoted by projecting figures, of one inch and a-half at least in length, and of a proportionate breadth, and without any other figure or letter or device thereon, shall be fixed in a conspicuous place on the inside of the back of such hackney carriage; and two other plates, upon which there shall be painted, in letters and figures of black upon a white ground, the Christian name and surname of the proprietor, or one of the proprietors, of such hackney carriage, and the number of the said Stamp-office plate, shall respectively be fixed in some conspicuous place on each side of such hackney carriage; and if it shall happen that the Commissioners of Stamps, or their authorised officer, shall be dissatisfied with the position of any plate fixed or placed upon such hackney carriage, and shall direct such plate to be placed upon some other conspicuous part of any such hackney carriage, such plate shall be placed and fixed accordingly upon any part of such hackney carriage, in compliance with such direction; and every such plate shall be fixed and placed upon every such hackney carriage in such manner that the number thereon shall be at all times plainly and distinctly visible and legible; and if any proprietor or driver of any hackney carriage shall permit or suffer any such plate, or the number on any such plate, placed or fixed upon such hackney carriage, to be in any manner, or by any means, concealed from public view, or to be inverted; or if such proprietor or driver, or any waterman or assistant to the drivers of hackney carriages, shall molest or oppose, or by any means endeavour to prevent any person in or from any such plate fixed or placed upon such hackney carriage, or in or from taking or noting the number thereof, or if any such proprietor, driver, or waterman, or assistant, shall, by word of mouth, give or declare to any person a wrong number as or for the number of such plate, or of such hackney carriage, such proprietor, driver, waterman, or assistant, shall forfeit five pounds."

By sect. 21, plates may be changed when expedient. Where plate wilfully obliterated, new license to be taken out.

By sect. 22, penalty for using hackney carriage without license or plates, and for not delivering up recalled plates, 10*l.*

By sect. 23, penalty on the driver of a hackney carriage plying for hire without plates, 5*l.* If the proprietor, 10*l.*

By sect. 24, carriages having plates to be deemed hackney carriages.

By sect. 25, forgery of plates, or wilfully using forged plates, a misdemeanor.

By sect. 33, procuring, or attempting to procure, license in fictitious name, or by other misrepresentation, a misdemeanor.

By sect. 35, hackney carriages standing in a street to be deemed plying for hire, and driver refusing to go, liable to penalty of 40*s.*

By sect. 36, compensation to be made to drivers improperly summoned for refusing to carry.

By sect. 37, drivers may ply on Sundays, and if they do so, are compellable to drive as on week-days.

By sect. 40, for purposes of act, limits of metropolis to be circle round General Post Office, with three-mile radius.

Sect. 41. *Fares and Compensation for Injury to Carriage, how Enforced.*—"If any person shall refuse or omit to pay the driver of any hackney carriage the sum justly due to him for the hire of such hackney carriage, or if any person shall deface or in any manner injure any such hackney carriage, it shall be lawful for any justice of the peace, upon complaint thereof made to him, to grant a summons, or, if it shall appear to him necessary, a warrant for bringing before him, or any other justice, such defaulter or offender, and, upon proof of the facts made upon oath before any such justice, to award reasonable satisfaction to the party so complaining for his fare or for his damages and costs, and also a reasonable compensation for his loss of time in attending to make and establish such complaint; and upon the refusal of such defaulter or offender to pay or make such satisfaction, it shall be lawful for such justice to commit him to prison, there to remain for any time not exceeding one calendar month, unless the amount of such satisfaction shall be sooner paid; and it shall also be lawful for such justice, if he shall think fit, to order such defaulter or offender to be kept to hard labour during such imprisonment."

By sect. 42, drivers refusing to go, driving improperly, or exacting or demanding more than the legal fare, liable to penalty of 40*s.*

By sect. 43, no agreement to pay more than the legal fare shall be binding on hirer. Sum overpaid may be recovered back, and driver forfeit as penalty for exaction 40*s.*

By sect. 44, but agreement to pay less than legal fare for distance in discretion of driver binding on driver, and if driver exceeds distance he shall not demand more than sum agreed on, under penalty of 40*s.*

By sect. 45, penalty for demanding more than sum agreed for, though less than legal fare, 40*s.*

By sect. 47, if required to wait, driver may demand reasonable deposit; if driver refuse to wait, or does not account for deposit, penalty 40*s.*

By sect. 48, proprietors to provide check-strings; drivers to hold same in their hands. Penalty, 20*s.*

By sect. 50, penalty for permitting persons to ride without consent of hirer.

Sect. 51. *Improperly Standing with Carriage, or Obstructing other Driver.*—"If any proprietor or driver of any hackney carriage shall stand or ply for hire with such hackney carriage, or suffer the same to stand across any street, or common passage,

or alley, or alongside of any other hackney carriage, or two in a breadth, or within eight feet of the kerbstone of the pavement in any such street, or common passage, or alley; or if any such proprietor or driver, or any waterman or other person, shall feed the horses of or belonging to any hackney carriage in any street, road, or common passage, save only with corn out of a bag, or with hay which he shall hold or deliver with his hands; or if the driver of any hackney carriage shall refuse to give way, if he conveniently can, to any private coach or other carriage, or shall obstruct or hinder the driver of any other hackney carriage in taking up or setting down any person into or from such other hackney carriage; or if any such proprietor or driver shall wrongfully, in a forcible or clandestine manner, take away the fare from any other such proprietor or driver, who in the judgment of any justice of the peace, before whom any complaint of such offence shall be heard, shall appear to be fairly entitled to such fare; every such proprietor, driver, waterman, or other person so offending, shall forfeit 20*s.*"

By sect. 52, carriages may stand two in breadth in Palace Yard.

By sect. 53, space of ten feet to be left between every four hackney carriages on stand. Penalty, 20*s.*

By sect. 54, mayor and aldermen of city of London to regulate hackney carriages in London and Southwark. Penalty for disobedience, 5*l.*

By sect. 55, penalty for leaving carriages unattended at places of public resort, 20*s.*

By sect. 58, notice to be given of revocation of license, to be left for person named in license at address mentioned therein.

Sect. 59. *Names and Places of Abode of Owners of Waggons, Carts, &c. to be painted thereon.*—"The owner of every waggon, wain, cart, car, dray, or other such carriage which shall be driven or used in any public street or road within the distance of five miles from the General Post Office in the city of London, shall, before such waggon, wain, cart, car, dray, or other such carriage, shall be so driven or used as aforesaid, paint or cause to be painted, in words at full length, and in one or more straight line or lines, upon some conspicuous place on the right or off-side of such waggon, wain, cart, car, dray, or other such carriage, clear of the wheel or wheels thereof, or upon the right or off side thereof, the true Christian name and surname and place of abode of the owner, or (if there be more than one) of the principal owner of such waggon, wain, cart, car, dray, or other such carriage; and the letters of all such words shall be painted in legible and conspicuous characters of black upon a white ground, or white upon a black ground, and shall be at least one inch in height, and of a proper and proportionate breadth; and all such words shall be repainted or renewed in like manner from time to time as often as the same or any part thereof shall become obliterated or defaced."

By sect. 60, penalty for using waggons, &c. upon which the names and places of abode are not painted, 5*l.*

By sect. 61, duties, &c. may be recovered as any other duties, &c. imposed by any act relating to stamp duties, as well as by the particular mode directed by this act.

By sect. 65, summonses, convictions, warrants, &c. to be drawn up according to forms in Schedule D., and conviction need not state the facts or evidence.

By sect. 69, penalty on constable refusing to serve summons or execute warrant, 5*l.*

By sect. 73, limitations of actions; venue; notice of action; three calendar months after fact committed; venue in county where cause of action arises; one calendar month's notice; plead general issue.

Schedule (D).

Containing the Forms and Proceedings for the Recovery of Duties and Penalties under this Act.

No. 1.

Form of a Warrant of Distress for the Recovery of Duties.

To A. B., of &c.

Whereas a license [*or* licenses] hath [*or* have] been granted, under the provisions of the statute in that behalf made, to C. D., of, &c. to keep, use, employ, and let to hire a hackney carriage [*or* hackney carriages] at any place within the distance of five miles from the General Post Office in the city of London, with plates numbered (respectively) [*here specify the number or numbers of the plates appertaining to the license or licenses granted to C. D.*]; and the said C. D. hath made default in payment of the sum of for the weekly duty which hath become due and payable to his majesty in respect of such license [*or* licenses] contrary to the statute in that case made and provided: Therefore we and esquires, two of the Commissioners of Stamps, do hereby authorise you to distrain the said C. D., by his goods and chattels, and also to seize and take all or any of the carriages, horses, harness, and other things made subject and liable to the said duty by the statute in that behalf, and to levy thereon the said sum of being the amount of such duty so due and payable as aforesaid; and if within the space of five days next after the taking of such distress the said sum of together with the reasonable costs and charges of taking and keeping such distress, shall not be paid, then we do hereby order and direct that you shall sell and dispose of the said goods and chattels, carriages, horses, harness, and other things which shall be so distrained, seized, and taken, and that you shall levy and raise thereout the said sum of and all reasonable costs and charges of taking, keeping, and selling such distress, rendering the overplus (if any) to the owner of the said goods and chattels, and you are to certify to the Commissioners of Stamps what you shall have done by virtue of this our warrant.

Given under our hands this day of

II. 6 & 7 Vic. c. 86.—"An Act for Regulating Hackney and Stage Carriages in and near London." 22d August, 1843.

(A) *Requisitions of.*[1]

No. 2.

Form of a Conviction on Proceedings for the Recovery of a Penalty.

County [*or as the case may be*] of } Be it remembered, that on the day of at C. D. of, &c. was duly convicted before me one of his majesty's justices of the peace for in pursuance of an act passed in the second year of the reign of his present majesty King William IV., intituled "An act," &c. [*title of this act*] for that C. D. on the day of did [*here state the offence, as the case may happen to be*], contrary to the form of the statute in that case made and provided; for which offence I do adjudge that the said C. D. hath forfeited the sum of and [*if the justice mitigate the penalty*] which sum of I do hereby mitigate to the sum of over and above the sum of for the costs and charges of E. F. the informer in prosecuting this conviction.

Given under my hand and seal the day of

No. 3.

Form of a Warrant of Distress founded on the foregoing Conviction.

To A. B. of, &c.

County [*or as the case may be*] of } Whereas C. D. of, to wit. } &c. has been duly convicted of a certain offence, for that [*here state shortly the offence*] whereby he hath forfeited the sum of [*and in case of mitigation,* which hath been mitigated to the sum of over and above the sum of for the costs and charges of the informer, making together the sum of]: Therefore I command you to levy the said sum of by distraining the goods and chattels of the said C. D., and by seizing and taking all or any of the carriages, horses, harness, and other things, made subject and liable by the statute in that behalf to be seized and taken, to satisfy the penalty, costs, and charges aforesaid; and if within the space of five days next after such distress taken the said sum of together with the reasonable costs and charges of taking and keeping such distress, shall not be paid, then I order and direct that you shall sell and dispose of the said goods and chattels which shall be so distrained, seized, and taken as aforesaid, and shall levy and raise thereout the said sum of and all reasonable costs and charges of taking, keeping, and selling such distress, rendering the overplus (if any) to the owner of the said goods and chattels; and you are to certify to me what you have done by virtue of this my warrant.

Given under my hand and seal the day of

(Signed) ———
One of his majesty's justices of the peace for

No. 4.

Form of Warrant of Commitment for want of a sufficient Distress founded on the foregoing Conviction.

To A. B., of, &c. and to the keeper of the common gaol [*or* house of correction] at

County [*or as the case may be*] of } Whereas C. D. of, to wit. } &c. has been duly convicted of a certain offence, for that [*here state shortly the offence*] whereby he hath forfeited the sum of [*in case of mitigation,* which hath been mitigated to the sum of over and above the sum of for the costs and charges of]: And whereas it has been duly made to appear to me that no sufficient distress can be found whereon to levy the said sum : Therefore I command you, the said A. B., to apprehend and take the said C. D. and safely to convey him to the common gaol [*or* house of correction] at and there to deliver him to the keeper thereof, together with this warrant. And I do hereby command you, the said keeper, to receive into your custody in the said gaol [*or* house of correction] him the said C. D., and him therein safely to keep for the space unless the said sum of shall be sooner paid.

Given under my hand and seal the day of

(Signed) ———
One of his majesty's justices of the peace for

[1] Sect. 1 repeals 1 & 2 Vic. c. 79.

Sect. 2. *Meaning of words* "*Hackney Carriage,*" "*Metropolitan Stage Carriage,*" "*Proprietor,*" "*Conductor,*" "*Waterman,*" "*Passenger,*" "*Horse,*" &c.—"The words hereinafter mentioned, which, in their usual signification, have a more confined or different meaning, shall in this act (except where the nature of the provision or the context of the act shall exclude such construction) be interpreted as follows (that is to say): the words 'hackney carriage' shall include every carriage (except a stage carriage) which shall stand on hire, or ply for a passenger for hire, at any place within the limits of the city of London and the liberties thereof, and metropolitan police district; and the words 'metropolitan stage carriage' shall include every stage carriage, except such as shall on every journey go to or come from some town or place beyond the limits aforesaid; and the word 'proprietor' shall include every person who, either alone or in partnership with any other person, shall keep any hackney carriage, or any metropolitan stage carriage, or who shall be concerned otherwise than as a driver or attendant in employing for hire any hackney carriage, or any metropolitan

stage carriage; and the word 'conductor,' shall include every director or other person, except the driver, who shall attend upon the passengers in any metropolitan stage carriage; and the word 'waterman,' shall include every person supplying water to the drivers of hackney carriages at the standings or places where hackney carriages usually stand or ply for hire, and every person assisting the drivers at such standings in managing or taking care of the horses or carriages, and every attendant upon any metropolitan stage carriage at places where such carriages usually stop or ply for passengers; and the word 'passenger' shall include every person carried by any hackney carriage, or by any metropolitan stage carriage, except one driver, and where there shall be a conductor to such metropolitan stage carriage, one conductor; and the word 'horse' shall include every mare and gelding; and every word importing the singular number only shall extend and be applied to several persons and things, as well as to one person and thing; and every word importing the masculine gender only shall extend to a female as well as a male."

By sect. 3, certain provisions of 1 & 2 Wm. 4, c. 22, as to hackney carriages and watermen, extended to this act.

By sect. 4, the title and place of abode of a peer painted on any carriage, &c. to be deemed a compliance with the provisions of the 1 & 2 Wm. 4, c. 22, s. 59, *ante*, p. 3.

Sects. 5 and 6 repealed by 13 Vic. c. 7.

Sect. 7. *Particulars to be painted on Stage Carriages.*—"The proprietor of every metropolitan stage carriage shall keep distinctly painted, both on the outside and inside of the same, in such a manner and in such a position as shall from time to time be directed by the the Commissioners of Police of the metropolis, the words, 'metropolitan stage carriage,' or such other words as the Commissioners of Police of the metropolis shall direct, together with the number of the Stamp-office plate relating to such carriage; and shall also on the inside of every such carriage keep distinctly painted, in a conspicuous manner, a table of fares to be demanded of passengers by such carriage; and the fares therein specified shall be deemed to be the only lawful fares, and may be recovered by the driver or conductor, as in the case of hackney carriages, in a summary way, before any justice of the peace; and every proprietor making default in the premises shall forfeit the sum of twenty shillings for every offence."

By sect. 8, Commissioners of Police to grant licenses.

By sect. 9, stamp duty of 5*s.* on every license, and regulations respecting same.

Sect. 10. *Penalty of 5l. for acting as Driver, &c. without License and Ticket, and 10l. on Proprietor for allowing Person to do so.*—"It shall not be lawful for any person to act as driver of any hackney carriage, or driver or conductor of any metropolitan stage carriage, whether such person shall or shall not be the proprietor of such carriage, or for any person to act as a waterman, within the limits of this act, unless in each case such person shall have a license so to do, and a numbered ticket granted to him under the authority of this act, and remaining in force; and every person who shall act as such driver, or conductor, or waterman, without such license and ticket, and every licensed waterman acting at any other standing or place than those mentioned in his license, and also every person to whom a license and ticket shall have been granted, who shall, except in compliance with the provisions of this act, transfer or lend such license, or permit any other person to use or wear such ticket, shall for every such offence forfeit the sum of five pounds; and every proprietor who shall knowingly suffer any person not duly licensed under the authority of this act to act as driver of any hackney carriage, or as driver or as conductor of any metropolitan stage carriage, of which he shall be the proprietor, shall for every such offence forfeit the sum of ten pounds: Provided always, that nothing hereinbefore contained shall subject to any penalty any proprietor who shall employ any unlicensed person to act as such driver or conductor as aforesaid for any time not exceeding twenty-four hours, or any unlicensed person who shall be so employed for the said time, upon proof being adduced by the proprietor, to the satisfaction of the justice of the peace before whom such proprietor, driver, or conductor, shall be required to attend to answer for such offences respectively, that such employment was occasioned by unavoidable necessity; and that every proprietor who shall so employ such unlicensed driver or conductor, and every such licensed driver or conductor, shall be subject to all the powers, provisions, and proceedings of and under this act, or the said recited act of his late majesty, for any act done by such driver or conductor during such employment, in like manner as if such driver or conductor had been duly licensed."

By sect. 11, watermen may be removed to other standings, and must produce their licenses to have such removal indorsed thereon, under penalty of forty shillings.

By sect. 12, temporary watermen may be appointed.

Sect. 13. *For obtaining Water at Hackney Stands.*—"It shall be lawful for the Commissioner of Police of the metropolis, if he shall think fit, on the application of any waterman who shall be willing to render himself liable to the water-rates, to procure water to be laid on in some convenient situation, adjacent to any standing of hackney carriages, or at places where metropolitan stage carriages usually stop or ply for hire, and to pay the expenses of the watercock and other necessary apparatus for laying on the water; and the water supplied at every such watercock shall be under the control of the Commissioners of Police

of the metropolis; and any waterman, or person who has been a waterman, refusing or neglecting to deliver up the key of any such watercock, when required to do so by the Commissioners of Police of the metropolis, shall forfeit five pounds, and so from time to time until he shall deliver up the same."

By sect. 14, persons applying for licenses to sign requisition.

By sect. 15, notice of change of abode to be given by drivers, conductors, and watermen.

By sect. 16, particulars of license to be entered in book at office of Commissioners of Police, and certified copy of such entry to be evidence, and deemed sufficient proof of all things therein registered. Certified copy to be granted without fee.

By sect. 17, every driver, conductor, and waterman to wear ticket on his breast conspicuously. Penalty for not so wearing, or for refusing to produce same for inspection, or to permit person to note the writing thereon, 40*s.*

By sect. 18, licenses and tickets to be given up on expiration of license.

By sect. 19, new ticket to be delivered instead of defaced or lost tickets. Penalty of 40*s.* imposed for not delivering up lost ticket, if afterwards found, for three days, or for wearing defaced ticket.

By sect. 20, forgery of license or ticket, or knowingly uttering a forged license or ticket, made a misdemeanor, and any person may detain such license or ticket, or any constable may seize the same in order to produce it in evidence against the offfender."

By sect. 21, proprietor to retain in his possession license of person employed by him, and is to produce it in cases of complaint when summoned to produce the servant. Indorsement of conviction to be made by the justice on the license. Penalty of proprietor for not returning or producing such license, 3*l.*

Sect. 22. *Magistrates empowered to hear Disputes between Proprietor and Driver, &c.*—"It shall be lawful for any justice of the peace to hear and determine all manners of complaint between any proprietor of a hackney carriage or metropolitan stage carriage, and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages, or for the earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage or loss which shall have arisen through the neglect or default of any driver or conductor to the property of his employer entrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a justice of peace to pay, and which has been actually paid pursuant to such order, on account of the negligence or wilful misconduct of his driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them as to such justice shall seem proper."

By sect. 23, no claim by proprietor for earnings to be enforced, unless agreement in writing signed by driver, &c. in presence of a witness. No stamp duty necessary.

By sect. 24, proceedings with respect to licenses on quitting service.

By sect. 25, on conviction of any offence justice may revoke or suspend license, and require the same to be delivered up for such purpose on penalty of 5*l.* Such license is then to be sent to the Commissioners of Police, who are to cancel same if revoked, or if suspended to re-deliver it to the party at expiration of term of suspension.

By sect. 26, plates may be seized where the license is discontinued or revoked, or where the same are used without license; for which purpose, or for seizing any forged or counterfeit plate, the officer may stop any carriage. Penalty for obstructing officer, 5*l.* If plate found in possession of unlicensed person, used with consent of person to whom license was granted, relating to the same, &c. license may be revoked.

By sect 27, person driving without the consent of the proprietor, or driver or conductor permitting him so to drive, to forfeit 40*s.* Driver, &c. permitting him to state his name and place of abode, and person so driving, may be taken into custody.

Sect. 28. *Punishment for Furious Driving and Wilful Misbehaviour.*—"Every driver of a hackney carriage, or driver or conductor of a metropolitan stage carriage, who shall be guilty of wanton or furious driving, or who, by carelessness or wilful misbehaviour, shall cause any hurt or damage to any person or property being in the street or highway, and also every driver, conductor, or waterman who during his employment shall be drunk, or shall make use of any insulting or abusive language, or shall be guilty of any insulting gesture or any misbehaviour, shall for every such offence forfeit the sum of three pounds; or it shall be lawful for the justice before whom such complaint shall be brought, if in his discretion he shall think proper, instead of inflicting such penalty, forthwith to commit the offender to prison for any period not exceeding two calendar months, with or without hard labour, as the justice may direct; and in every case where any such hurt or damage shall have been caused, the justice, upon the hearing of the complaint, may adjudge, as and for compensation to any party aggrieved as aforesaid, a sum not exceeding ten pounds, and may order the proprietor of the hackney carriage or metropolitan stage carriage, the driver or conductor of which shall have caused such hurt or damage, forthwith to pay such sum, and also such costs as shall have been incurred, and payment thereof may be enforced against such proprietor as any penalty or sum of money may be recovered under and by virtue of this act, and any sum which shall be so paid by the proprietor shall in like manner be recovered in a summary way before a justice of the peace from the driver or conductor, through whose default such sum shall have been

paid, upon proof of the payment thereof, pursuant to the order of the justice, or it shall be lawful for the justice, in the first instance, to adjudge the amount of such compensation to be paid by such driver or conductor to the party aggrieved."

By sect. 29, standings for carriages in metropolitan district, except in the borough of Southwark, may be appointed and regulated by Commissioners of Police, who are also to regulate places at which stage carriages are to stop, and the time of stopping. *See* 13 Vic. c. 7, s. 4, *post*, p. 8.

By sect. 30, standings to be in centre of street, unless where houses only on one side.

By sect. 31, no carriage to ply opposite Post Office.

By sect. 32, Lord Mayor to make regulations in the city and borough of Southwark as to metropolitan stage carriages. Penalty for disobedience, 40*s*.

Sect. 33. *Penalty on Drivers, &c. for Different Sorts of Misbehaviour.*—"Every driver of a hackney carriage who shall ply for hire elsewhere than at some standing or place appointed for that purpose, or who, by loitering or any wilful misbehaviour, shall cause any obstruction in or upon any public street, road, or place, and also every driver or conductor of any metropolitan stage carriage who, by loitering or any wilful misbehaviour, shall cause any obstruction in or upon any public street, road, or place, or shall improperly delay such carriage on any journey, or wilfully deceive any person in respect to the route or destination thereof, or who shall refuse to admit and carry, at the lawful fare, any passenger for whom there is room, and to whose admission no reasonable objection is made, or who shall demand more than the legal fare for any passenger, or who, for the purpose of taking up or setting down a passenger, or, except in case of accident or other unavoidable necessity, shall stop such carriage opposite to the end of any street, or upon any place where foot passengers usually cross the carriage way, or who shall ply for hire or passengers by blowing a horn, or by using any other noisy instrument within the limits of the metropolis, as defined by the said act of the second year of the reign of his late majesty, and every conductor of a metropolitan stage carriage who shall allow any person beside himself to ride upon the steps or in the place provided for him, and every driver of a hackney carriage, whether hired or unhired, allowing any person beside himself, not being the hirer or a person employed by such hirer, to ride on the driving-box, and every driver or conductor of any metropolitan stage carriage who shall smoke whilst acting in such capacity, after an objection taken by any person riding in or upon such carriage, shall, for every such offence, forfeit the sum of twenty shillings."

By sect. 34, property left in stage carriages to be given up to conductor, on penalty of 20*l*., who is, within four days, to deliver it to the head officer for stamps, on penalty of 20*l*. Property to be dealt with in same way as that left in hackney carriages. *See post*, 16 & 17 Vic. c. 33, s. 11, p. 9.

By sect. 35, in case of complaint, proprietor of hackney or stage carriage may be summoned to produce driver, &c., and if not produced, justice may proceed to determine and adjudge payment by proprietor of penalty, who may recover same summarily from driver, &c. Proprietor failing to produce, liable to penalty of 40*s*. Proceedings to enforce attendance of driver, &c. under penalty of 40*s*., from time to time, so often as he shall refuse to attend.

By sect. 36, magistrates empowered to hear and determine complaints.

By sect. 37, magistrate may take evidence of complainant in any dispute about fares, or between the proprietor and driver, &c. concerning wages, or complaint of personal injury done by driver, &c., or where complainant shall not be entitled to pecuniary compensation, or where, if so entitled, he shall give up such claim, or shall not be the only witness in the case.

By sect. 38, complaints to be made within seven days.

Sect. 39. *How Awarded and Enforced.*—"It shall be lawful for any justice of the peace to determine all complaints under the provisions of this act, or of the said recited act of the reign of his late majesty, and to adjudge the payment of any penalty, or of any sum of money under either of the said acts, or of the orders and regulations made pursuant to either of them, and to order payment of the same, with or without costs, either immediately, or at such time and place, and by such instalments, as he shall think fit; and in case of non-payment of the sum so ordered to be paid, or of any one instalment thereof, to adjudge the party making default to be imprisoned in the common gaol or house of correction for any term not exceeding two calendar months, with or without hard labour, such imprisonment to cease on payment of the sum so adjudged or ordered to be paid, or to issue his warrant for the levying of any such sum of money, together with the costs and expenses of such warrant, or of levying the same, on the goods of the party making default, and to cause sale to be made of such goods in case they shall not be redeemed within five days, rendering to the party the overplus (if any), and where goods of such party making default cannot be found sufficient to answer the penalty, or sum ordered to be paid, and all such costs and expenses, to commit such party to prison, there to remain for any time not exceeding two calendar months, unless such penalty or sum of money, and all such costs and expenses, shall be sooner paid; and every such imprisonment shall be with or without hard labour, as such justice shall direct: Provided always, that no imprisonment for non-payment of any sum ordered to be paid on account of wages, or the earnings of any carriage, or any deposit of money, shall be for a longer period than one calendar month, or with hard labour; and all proceedings whatsoever before any justices of the peace under any of the provisions of

III. 13 Vic. c. 7.—"An Act for Consolidating the Office of the Registrar of the Metropolitan Public Carriages with the Office of Commissioners of Police of the Metropolis, and making other Provisions in regard to the Consolidated Offices."

(A) *Requisitions of.*[1]

IV. 16 & 17 Vic. c. 33.—"An Act for the better Regulation of Metropolitan, Stage, and Hackney Carriages, and for Prohibiting the use of Advertising Vehicles."

(A) *Requisitions of.*[2]

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this act, or the recited act of the reign of his late majesty, and the judgment of the said justice thereon, shall be final and conclusive between the parties, and shall not be quashed or vacated for want of form, and shall not be removed by *certiorari* or any other writ or process into any superior court."

Sect. 40. *How Distress to be Conducted.*—"In all cases where any goods or chattels distrained or otherwise seized or taken under any of the provisions of this act, or the recited act of the late reign, are directed to be sold, the same shall be sold by public auction, and notice of the time and place of such sale shall be given to the owner of such goods and chattels, or left at his usual place of abode three days, at least, prior to such sale: Provided always, that if the owner of any such goods or chattels shall give his consent, in writing, to the sale thereof at an earlier period than is by this act, or shall be by any such notice appointed for such sale, or in any other manner than is by this act directed, it shall be lawful to sell such goods or chattels according to such consent: Provided also, that if the owner of such goods and chattels shall, at any time before the sale thereof, pay or tender to the person who, by any warrant or other process, shall be directed or authorised to cause such goods or chattels to be sold, the sum which he shall by such warrant or process be directed to levy or raise by the sale of such goods or chattels, together with all reasonable costs and expenses incurred, no sale of such goods or chattels shall be made."

By sect. 41, summonses and notices may be served by leaving them at place of abode mentioned in license.

By sect. 42, persons summoned as witnesses refusing to attend or give evidence, to forfeit 5*l.*

By sect. 43, summonses and warrants of distress to be in form in schedule. Convictions, &c. need only state the offence, &c., without the facts in evidence.

By sect. 44, where more than one proprietor, it will be sufficient to name one.

By sect. 45, justice may mitigate penalty, or lessen term of imprisonment.

By sect. 46, appropriation of penalties.

Sect. 47. *Limitation of Actions — Venue — Notice of Action — Amends, tender of, &c., Costs.*—"All actions and prosecutions which shall be brought or commenced against any person for anything done under the authority of this act, or of such orders and regulations as aforesaid, shall be commenced and prosecuted within three calendar months next after the fact committed, and not afterwards, and shall be brought and tried in the city of London, or the county of Middlesex, and not elsewhere; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month, at least, before the commencement of the action; and if a verdict shall pass for the defendant, or if the plaintiff shall become non-suit, or shall discontinue any such action, or if, on demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs of suit as between attorney and client, and shall have the like remedy for the same as any defendant may have for costs of suit in other cases of law; and although a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be had shall, at the time of such trial, certify, in writing, his approbation of the action, and of the verdict obtained thereupon."

[1] The 13 Vic. c. 7, s. 1, abolishes office of Registrar of Metropolitan Public Carriages.

Sect. 2 transfers duties, &c. of abolished office to Commissioners of Police.

Sect. 3 provides for retiring allowance or compensation for abolished offices.

By sect. 4, Commissioners of Police to appoint and regulate the standings for hackney carriages. Such regulations to be advertised in *Gazette*, and copy hung up in office of Commissioners, which copy is to be evidence.

Sects. 5 and 6 repeal local acts as to regulating standings, except Bloomsbury Square Act, 46 Geo. 3, c. 134.

By sect. 7, one Commissioner of Police may act.

By sect. 8, act to be construed with 6 & 7 Vic. c. 86.

[2] By sect. 1, to obtain license for hackney carriage, certificate of fitness of carriage must be obtained from Commissioners of Police.

By sect. 2, carriages may be inspected from time to time.

Sect. 3. *Penalty for using Carriage in Unfit Condition.*—"Every proprietor or driver of a metropolitan, stage, or hackney carriage, who shall use or let to hire within the limits of this act any carriage as a me-

tropolitan, stage, or hackney carriage, which has not been certified by the said Commissioners of Police, to be in a fit and proper condition for public use, or who shall use or let to hire within the limits of this act any carriage as a metropolitan, stage, or hackney carriage, for which such a certificate had been granted, after notice given to him as hereinbefore required by the said Commissioners that such carriage was no longer in a fit and proper condition for public use, shall be liable to a penalty not exceeding three pounds for each day that he shall so use or let to hire such carriage, or in default of payment may be imprisoned for any time not exceeding one month."

Sect. 4. *What Fares to be taken by Hackney Carriages.*—"The proprietor or driver of any hackney carriage within the limits of this act shall be entitled to demand and take for the hire of such carriage the fares set forth in the Schedule A. to this act annexed: Provided always, that when the proprietor or driver of any hackney carriage, to be paid a fare calculated according to the distance, shall be required by the hirer thereof to stop such carriage for fifteen minutes, or for any longer time, it shall be lawful for the proprietor or driver to demand and receive from the hirer so requiring him to stop a further sum (above the fare to which he shall be entitled, calculated according to the distance) of sixpence for every fifteen minutes completed that he shall have been so stopped; and no proprietor or driver shall demand or receive, over and above the said fare, any sum, for or by way of back-fare, for the return of such carriage from the place at which such carriage shall be discharged."

Sect. 5. *Table of Fares to be put up Inside and Outside of Carriage.*—"The proprietor of every hackney carriage within the limits of this act shall put up, and at all times keep, distinctly painted or marked, in such a manner and in such a position as shall be directed by the said Commissioners of Police, both on the inside and outside of such hackney carriage, the amount of fare according to distance and time which may legally be demanded and taken from the hirer of such carriage; and the driver of every hackney carriage within the limits of this act shall have with him at all times when plying for hire, a book or table, in such form as shall be directed by the said Commissioners of Police, of the fares for the hire of such carriage, which book and table the driver shall produce when required for the information of any person hiring or intending to hire such carriage."

Sect. 6. *Settlement of Disputes as to Distance.*—"In case of disputes as to the fare to be calculated according to the distance, any table or book signed by the said Commissioners of Police shall, on proof of such signature, be deemed and taken to be conclusive evidence of all the distances therein stated to have been measured by the authority of the said Commissioners of Police; and it shall be lawful for the said Commissioners to cause to be placed or erected at the several standings for hackney carriages or elsewhere within the metropolitan district, as they may deem convenient, tables of distances and fares, and such other information as may be useful to persons hiring such carriage."

Sect. 7. *What Distance Carriage shall be required to Drive.*—"The driver of every hackney carriage which shall ply for hire at any place within the limits of this act shall (unless such driver have a reasonable excuse, to be allowed by the justice before whom the matter shall be brought in question) drive such hackney carriage to any place to which he shall be required by the hirer thereof to drive the same, not exceeding six miles from the place where the same shall have been hired, or for any time not exceeding one hour from the time when hired: Provided always, that when any hackney carriage shall have been hired by time, the driver thereof may be required to drive at any rate not exceeding four miles within one hour; and if the driver of such carriage shall be required to drive more than four miles within one hour, then in every such case the driver thereof shall be entitled to demand, in addition to the fare regulated by time in Schedule A. to this act annexed, for every mile, or any part thereof exceeding four miles, the fare regulated by distance as set forth in the same schedule."

Sect. 8. *Driver to Deliver a Ticket to Hirer.*—"Every driver of a hackney carriage within the limits of this act shall, on each occasion when such carriage shall be hired, deliver to the hirer thereof a card, on which shall be printed, in legible letters and figures, the words 'hackney carriage,' and the number of the Stamp-office plate fixed on such hackney carriage, or such other words or figures as the said Commissioners of Police may direct."

Sect. 9. *Number of Persons to be carried to be marked on Carriage.*—"The proprietor of every hackney carriage within the limits of this act shall put up and at all times keep distinctly painted or marked on such carriage, in such a manner and in such a position as shall be directed by the said Commissioners of Police, the number of persons to be carried thereby as specified in the certificate granted by the said Commissioners for such hackney carriage, and the driver of any such hackney carriage shall, if required by the hirer thereof, carry in and by such carriage the number of persons painted or marked thereon, or any less number of persons."

Sect. 10. *What quantity of Luggage to be carried without Extra Charge.*—"The driver of every hackney carriage within the limits of this act shall carry in or upon such carriage a reasonable quantity of luggage for every person hiring such carriage, without any additional charge, except as provided in Schedule A. to this act annexed."

Sect. 11. *As to Property left in Hackney Carriage.*—"The driver of every hackney carriage within the limits of this act wherein

any property shall be left by any person shall, within twenty-four hours, carry such property, if not sooner claimed by the owner thereof, in the state in which he shall find the same, to the nearest police-station, and shall there deposit and leave the same with the inspector or other officer upon duty, upon pain that every such driver making any default herein shall be liable to a penalty of not more than ten pounds, or at the discretion of the magistrate may be imprisoned for any time not exceeding one month; and the said officer with whom any such property shall be deposited shall forthwith enter in a book, to be kept for that purpose, the description of such property, and the name and address of the driver who shall bring the same, and the day on which it shall be brought; and the property so entered shall be returned to the person who shall prove, to the satisfaction of the Commissioners of Police, that the same belonged to him, such person previously paying all expenses incurred, together with such reasonable sum to the driver who brought the same as the said Commissioners shall award: Provided always, that if such property shall not be claimed by and proved to belong to some person within one year after the same shall have been deposited, the said Commissioners shall cause such property to be sold or otherwise disposed of, and the proceeds thereof to be paid over to the Receiver-General of Inland Revenue, to be carried to the public account, all expenses incurred about such property, together with such reasonable sum to the driver who brought the same, as the said Commissioners shall award, being first paid thereout; and all property left by any passenger in any metropolitan stage carriage shall be given up to the conductor of such carriage, or, if there be no conductor, to the driver, upon pain of a penalty of ten pounds, to be paid by any person refusing or neglecting to give up any such property belonging to another person; and the conductor or driver of every such carriage to whom any such property shall be given up, or who shall himself find it in the carriage, shall, within twenty-four hours, carry the property, if not sooner claimed by the owner thereof, in the state in which he shall find the same, to the nearest police station, and shall there deposit and leave the same with the inspector or other officer on duty, upon pain that every such driver or conductor making default herein shall be liable to a penalty not more than ten pounds, or at the discretion of the magistrates may be imprisoned for any time not exceeding one month; and the property so deposited by any conductor or driver shall be dealt with in the same manner as property left in hackney carriages and deposited by the drivers of such carriages."

By sect. 12, persons to be appointed to keep order at stands, &c.

By sect. 13, power to pay wages to such persons, and to direct water-rates to be paid.

Sect. 14. *Lamps to be placed inside Metropolitan Stage Carriages.*—"The proprietor of every metropolitan stage carriage shall cause to be placed inside such carriage a lamp, in such a position and manner as shall be directed by the said Commissioners of Police; and the conductor, or if there be no conductor, the driver of such carriage, shall keep the said lamp properly lighted whenever such carriage shall be used to ply for hire or carry passengers at any time after sunset or before sunrise."

Sect. 15. *Bills not to be put on Carriage, so as to Obstruct Light.*—"It shall not be lawful for the proprietor of any metropolitan stage or hackney carriage to suffer any notice, advertisement, or printed bill, or any names, letters, or numbers, to appear upon the outside of any such carriage in such a manner as to obstruct the light or ventilation of such carriage, or on the inside of any such carriage, in such position that any such notice, advertisement, or printed bill shall obstruct the light or ventilation of such carriage, or cause annoyance to any passenger therein."

Sect. 16. *Advertising Vehicles prohibited.*—"It shall not be lawful for any person to carry about on any carriage, or on horseback or on foot, in any thoroughfare or public place within the limits of this act, to the obstruction or annoyance of the inhabitants or passengers, any picture, placard, notice, or advertisement, whether written, printed, or painted upon, or posted or attached to any part of such carriage, or on any board or otherwise."

Sect. 17. *Offences for which Drivers and Conductors liable for Penalties.*—"The driver or conductor of any metropolitan stage carriage, or the driver of any hackney carriage, who shall respectively commit any of the following offences within the limits of this act, shall be liable to a penalty not exceeding forty shillings for each offence, and in default of payment to imprisonment for any time not exceeding one calendar month:

(1.) "Every driver of a hackney carriage who shall demand or take more than the proper fare as set forth in Schedule A. to this act annexed, or who shall refuse to admit and carry in his carriage the number of persons painted or marked on such carriage, or specified in the certificate granted by the said Commissioners of Police in respect of such carriage, or who shall refuse to carry by his carriage a reasonable quantity of luggage for any person hiring or intending to hire such carriage:

(2.) "Every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of this act, not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage, or who shall refuse to drive any such carriage for any time not exceeding one hour, if so required by any person hiring or intending to hire such carriage, or who shall not drive the same at a reasonable and proper speed, not less than six miles an hour, except in cases of unavoidable delay, or when required by the hirer thereof to drive at a slower pace:

(3.) "Every driver of a hackney carriage who shall ply for hire with any carriage or horse which shall be at the time unfit for public use, or who shall refuse or neglect to deliver to the hirer of his carriage a ticket with the number of the Stamp-office plate on such carriage printed thereon."

Sect. 18. *Magistrate may determine Offences. In case of Dispute, Driver may be required to drive to Police Court or Station.*—"It shall be lawful for any of the police magistrates, at any of the metropolitan courts, to hear and determine all offences against the provisions of this act, and also all disputes and causes of complaint that may arise out of the same; or if the offence, dispute, or cause of complaint, shall be committed or occur in any place not comprised within the limits of a police-court district, the same may be heard and determined by two justices of the peace for the county; or if the offence, dispute, or cause of complaint, shall be committed or occur within the city of London, the same shall be heard and determined by one justice of the peace for the said city, or by a metropolitan police magistrate sitting at the police-court in Bow Street; and in case of any dispute between the hirer and driver of any hackney carriage, the hirer may require the driver forthwith to drive to the nearest metropolitan police-court or justice-room, where complaint may be made to the magistrate then sitting, who shall hear and determine the same, without requiring any summons to be issued for that purpose; and if such dispute should arise at a time when the police-court or justice-room shall not be open, the hirer may require the driver to drive to the nearest police-station or justice-room, where the complaint shall be entered, and notice given to both parties that the matter in dispute shall be heard by the magistrate at his next sitting."

Sect. 19. *Penalty for Offences for which no Special Penalty has been appointed.*—"For every offence against the provisions of this act, for which no special penalty is herein-before appointed, the offender shall be liable to a penalty not exceeding forty shillings, or in default of payment be imprisoned for any time not exceeding one month, in any gaol or house of correction within the jurisdiction of the magistrate before whom the conviction shall take place."

Sect. 20. *Meaning of words "the Limits of this Act."*—"All things herein authorised to be done by the said Commissioners of Police of the metropolis, shall be done by such one of the said Commissioners as one of her majesty's principal secretaries of state shall from time to time be pleased to appoint; and the words 'the limits of this act,' shall include every part of the metropolitan police district and city of London."

By sect. 21, act to be construed with 6 & 7 Vic. c. 86, and 13 & 14 Vic. c. 7.

By sect. 22, act to commence 10th July, 1853.

Schedules referred to in the foregoing Act.

Schedule (A).

Rates and Fares to be paid for any Hackney Carriage hired at any place within the limits of this Act.

Description of Carriage.	Fare by Distance.		Fare by Time.	
	For any distance within, and not exceeding one mile.	For any distance exceeding one mile.	For any time within, and not exceeding one hour.	
With four or two wheels, drawn by one horse.	Sixpence.	After the rate of sixpence for every mile, and for any part of a mile over and above any number of miles completed.	Two shillings.	And for every hackney carriage drawn by two horses, one-third above the rates and fares hereinbefore mentioned.

"The above fares to be paid according to distance or time, at the option of the hirer, to be expressed at the commencement of the hiring; if not otherwise expressed, the fare to be paid according to distance: Provided that no driver shall be compellable to hire his carriage for a fare to be paid according to time, at any time after eight o'clock in the evening, and before six o'clock in the morning.

"When more than two persons shall be carried inside any hackney carriage, one sum of sixpence is to be paid for the whole hiring, in addition to the above fares. Two children under ten years of age to be counted as one adult person.

"When more than two persons shall be carried inside any hackney carriage, with more luggage than can be carried inside the carriage, a further sum of twopence for every package carried outside the said carriage is to be paid by the hirer in addition to the above fares."

Schedule (B).

Certificate.

I do hereby certify, that on the application of now living at I have caused the carriage known by the following marks or description [*here state marks or description by which the carriage may be identified*] to be inspected, which the said

V. 16 & 17 Vic. c. 127.[1]

desires to use and let to hire as a [metropolitan stage carriage, *or* as a hackney carriage]: And I certify that the said carriage is in a fit and proper condition for public use, and that persons are to be carried thereby [*if the carriage be a metropolitan stage carriage, the number of passengers to be carried inside and outside thereof respectively is to be specified, exclusive of the driver and conductor*].

(Signed) ———
Commissioner of the Police
of the Metropolis.

SCHEDULE (C).

Certificate.

I do hereby certify that I have caused the carriage now used and let to hire as a [*state whether a metropolitan, stage, or hackney carriage*], and known by the following marks or description [*here state marks or description by which the carriage may be identified*] to be inspected, and find the said carriage not to be in a fit and proper condition for public use: And I do hereby suspend the license granted to to keep and use the said carriage as a [*state whether a metropolitan or hackney stage carriage*] for the period of from this date.

(Signed) ———
Commissioner of the Police
of the Metropolis.

[1] Sect. 1 repeals the duties payable under the 1 & 2 Wm. 4, c. 22.

Sect. 2. *Imposes fresh Duties.*—"In lieu of the said duties hereby repealed, there shall be granted, raised, levied, collected, and paid, from and after the respective times hereinafter appointed in that behalf, unto and for the use of her majesty, her heirs and successors, for and in respect of every hackney carriage which shall be kept, used, or let to hire within the limits of this act, as hereinafter defined, the several duties following; (that is to say,)

"For and upon every license to be taken out yearly to keep, use, and let to hire, any such hackney carriage	£1	0	0
"And for and in respect of every such hackney carriage as aforesaid, weekly and every week, where the license for such carriage shall authorise the using and letting to hire of the same on every day of the week, the sum of . . . (weekly duty)	0	7	0
"And where such license shall authorise the using and letting to hire of such carriage on every day of the week, except Sunday, the sum of (weekly duty)	0	6	0

Sect. 3 fixes time for operation of new duties.

Sect. 4, duties granted by this act to be duties of excise under the Commissioners of Inland Revenue.

By sect. 5, licenses granted under 1 & 2 Wm. 4, c. 20, to cease on 10th October, 1853, and hackney carriages to be licensed under this act.

Sect. 6 obsolete.

By sect. 7, licenses granted on or after January 2d, 1854, are to expire on the first Sunday in the following January, and may be renewed from year to year on payment of the duty by this act imposed.

Sect. 8 obsolete.

Sect. 9. *Notice of Renewal to be given.*—"Every person who shall be desirous of renewing any such license shall give notice in writing twenty-one days at least before the expiration of the current license to him granted, of his intention to renew the same, to the proper collector, supervisor, or other officer authorised to grant such licenses; and where such notice shall have been given, the new license shall bear date on the day next after the day of the expiration of the former license, but if such notice shall not have been given, the license shall bear date on the day of the application for the same."

By sect. 10, numbered plate to be delivered up on expiration of licenses, or in default duty to continue payable.

Sect. 11. "*Plates not Licensed on Sundays to be Distinguished.*—"The numbered plates to be provided by the Commissioners of Inland Revenue, and to be fixed on hackney carriages not authorised by license to be used or let to hire on Sundays, shall be distinguished in such manner as the said Commissioners may think proper, from the numbered plates to be fixed on hackney carriages authorised by license to be used and let to hire on every day of the week; and if any hackney carriage which shall be authorised by license to be used or let to hire on every day of the week, except Sunday, shall be used or let to hire on any Sunday, or if any hackney carriage shall be used or let to hire on Sunday having fixed or placed thereon any such numbered plate as aforesaid provided for any hackney carriage not authorised to be used or let to hire on Sunday, every such hackney carriage shall be deemed to be used and let to hire without a license in that behalf; and the owner of such hackney carriage, if there shall be no such plate as aforesaid, fixed or placed thereon, or the person to whom such plate (if any be fixed or placed thereon) shall have been delivered, with any license relating thereto, shall be deemed to be the person using and letting to hire such hackney carriage, without having a license in force so to do, and shall incur and be liable to the penalty imposed by law in that behalf."

By sect. 12, Commissioners of Inland Revenue to fix where licenses for hackney carriages and metropolitan stage carriages are to be granted, and the duties paid.

By sect. 13, one shilling a mile to be paid for every mile beyond the circumference of

VI. Liability of Driver.[1]
VII. ,, Proprietor for Loss of Luggage.[2]
VIII. Defacing License.[3]

HAIR-Powder. *See post*, Stamps.

a circle four miles from Charing Cross, if carriage be discharged beyond such circumference.

By sect. 14, where more than two persons are conveyed in a hackney carriage drawn by one horse, sixpence in addition to the fare to be paid for each person above two for the whole hiring.

By sect. 15, when carriage hired by time, sixpence to be paid for every fifteen minutes or portion thereof over the hour.

Sect. 16. *Proprietors withdrawing Carriages from Hire liable to Penalty.*—"The proprietor of every hackney carriage or metropolitan stage carriage licensed to ply for hire within the limits of this act, who shall withdraw his carriage for hire for two consecutive days, or for any two days in one week, without just cause, of which the magistrate before whom the complaint is heard shall be judge, shall be liable to a penalty of a sum not exceeding twenty shillings in respect of every carriage for each day he shall so withdraw the same, and the license of such proprietor shall be suspended or recalled and taken away at the discretion of the said Commissioners of Police: Provided always, that it shall be lawful for such proprietor, upon giving ten days' notice to the Commissioners of Police, to withdraw his carriage from hire."

Sect. 17. "*The Limits of this Act* shall be deemed to be and to include every part of the metropolitan police district and the city of London; and all provisions of any former act in force referring to hackney carriages licensed under the said act, 1 & 2 Wm. 4, c. 22, or to hackney carriages kept, used, employed, or let to hire within the distance of five miles from the General Post-Office in the City of London, or to any act, matter, or thing, committed or done, in relation to such hackney carriages within the said distance, shall from and after the passing of this act be deemed to refer and apply to hackney carriages licensed under this act, or to hackney carriages kept, used, or employed, or let to hire, within the limits of this act, and to any act, matter, or thing, committed or done in relation to hackney carriages within the said limits."

By sect. 18, none but officers of inland revenue or of the metropolitan police to prosecute before justices for penalties.

[1] In an action against a cab-driver for the loss of the plaintiff's luggage, the declaration alleged a promise by the defendant to convey the plaintiff and his luggage safely and securely:—*Held*, that these words do not necessarily mean safely and securely at all events, but are sufficiently by proof of the want of due care, and that the meaning of these words varies according to the different species of bailments. *Ross v. Hill*, 2 C. B. 877; 15 L. J. C. P. 182.

[2] In an action against the registered proprietor of a cab for the loss of a portmanteau by the negligence of the licensed driver, it appeared that the arrangement between the proprietor and the driver was, that the driver paid each morning a fixed sum for the use of the cab and two horses a-day, and was allowed to keep for himself all the money which he received. The cab had upon it a plate with the name of the defendant as the proprietor, in pursuance of sect. 20 of the 1 & 2 Wm. 4, c. 22; but the proprietor did not exercise any control over the driver as to where he should ply with the cab:—*Held*, that under the circumstances proved, and the 1 & 2 Wm. 4, c. 22, and 6 & 7 Vic. c. 86, the driver was the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor was liable, and therefore the action was rightly brought against him. *Powles v. Hider*, 6 El. & Bl. 207; 2 Jur. N. S. 472; 25 L. J. Q. B. 331.

[3] By the 8th sect. of 6 & 7 Vic. c. 86, the registrar appointed under that act is empowered to grant a license to parties to act as drivers of hackney carriages.

By the 21st sect., the proprietor of every such hackney carriage "who shall permit or employ any licensed person to act as driver, shall require to be delivered to him, and shall retain in his possession, the license of such driver whilst such driver shall remain in his service."

In an action brought by the driver of a hackney carriage against the proprietor for defacing his license, whilst so retained in the possession of such proprietor, the declaration was in case, and alleged that the defendant "wrongfully and unjustly wrote in ink, in and upon the license, certain words purporting to give, and being intended to give, a character of the plaintiff as an improper person to act as a driver of hackney carriages (that is to say, 'Discharged, having been guilty of the most reckless, careless act, &c.')"—*Held*, on a motion in arrest of judgment, that case was the proper form of action; that it was unnecessary to allege that the defendant "maliciously" wrote the words in question, and that the declaration was therefore good. *Hurrell v. Ellis*, 2 C. B. 295; 9 Jur. 1013; 15 L. J. C. P. 18.

The proprietor of a metropolitan stage carriage, before returning to a conductor employed by him the license of such conductor, granted under the 6 & 7 Vic. c. 86, wrote on such license words signifying that the conductor had been dismissed from his service for dishonesty. To an action brought by the conductor for thus writing on the license, complaining that it had been thereby damaged and rendered of no value to him:—*Held*, to be no answer for the proprietor to

HALF-Pay. *See* Annuity, vol. i. p. 360; Army, id. p. 514; Bankruptcy, vol. ii. p. 141.

HAND-Bills. *See* Carriers, vol. ii. p. 29; *post*, Indictment; Libel.

HANDWRITING. *See* Attesting Witness, vol. ii. p. 3.

I. Proof of, p. 14. II. Comparison of, p. 15.

I. Proof of.

Doe v. Suckermore, 5 Ad. & E. 730.

Knowledge of handwriting may be obtained by seeing party write, or by correspondence, &c.[1]

Per Cur. "The knowledge of handwriting may be acquired either by seeing the party write, in which case it will be stronger or weaker, according to the number of times and the periods, and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some

plead, by way of justification, the truth of what he had written. *Rogers v. Macnamara*, 17 Jur. 1166; 23 L. J. C. P. 1.

[1] If a party has received letters from another, and has acted on them, it is sufficient to justify him in swearing as to his belief of the handwriting of such person (*Tharpe v. Gisburne*, 2 C. & P. 21); but where the witness had never seen the party write, nor corresponded with him, but had only seen papers in the Master's office, which were admitted by his attorney to be in his handwriting, and on which the witness had acted: —*Held*, that it was not a sufficient knowledge to enable him to speak to the handwriting. *Greaves v. Hunter*, 2 C. & P. 477. *Batchelor v. Honeywood*, 2 Esp. 714. However, having seen the party sign his surname is sufficient ground for the witness's belief in the party's handwriting. *Lewis v. Sapio*, 1 M. & M. N. P. 39, overruling *Powell v. Ford*, 2 Stark. N. P. 164.

Where the plaintiff used an affidavit signed by a party, and the defendant's attorney swore that he had observed it, and formed an opinion which enabled him to state his opinion as to the signature to an agreement attested by the party: —*Held*, that it was evidence of handwriting; the plaintiff was precluded from questioning the genuineness of the former signature. *Smith v. Sainsbury*, 5 C. & P. 196.

In an action on a joint and several promissory note against A., B., and C., the only evidence as to the handwriting of C. was a retainer to the attorney to defend the action, bearing the signatures of all three defendants, upon which the attorney had acted, without having ever seen C., or being acquainted with his handwriting: —*Held*, there was no evidence of the writing of C. *Drew v. Prior*, 5 Man. & G. 264. To prove the handwriting of a defendant named F. W. to a letter, a clerk of a banker stated that a person of that name kept an account with the banker, and had signed his name in a book, and had drawn cheques which the witness had paid, and that he believed the letter to be of the handwriting of that person. The defendant's attorney proved that the defendant had desired him to address him at No. 12 Tower Street, and another witness proved that he had written two letters to "Mr. F. W., 12 Tower Street," and had received answers, and that he believed the letter offered in evidence to be of the same handwriting as the answers he had received to his letters: —*Held*, sufficient proof that the letter was in the defendant's handwriting. *Murieta v. Wolfhagen*, 2 C. & Kir. 744.

Mr. S., the managing clerk of the plaintiff's attorney, wrote a letter to the defendant, addressed to him at his residence, which letter was proved to have been put into the post. Mr. S. proved that he received an answer to his letter: —*Held*, that the letter thus received in answer was admissible in evidence without proof of the defendant's handwriting. *Overston v. Wilson*, 2 C. & Kir. 1. It was proved by Mr. S. that he received a letter of earlier date, and in the same handwriting as the letter last before-mentioned: —*Held*, that this letter was also admissible in evidence without proof of the defendant's handwriting. (Id.) *Held*, also, that a copy of a letter, written by Mr. S., of still earlier date, to which the last-mentioned letter was an answer, might be given in evidence (the original not having been produced after a notice to produce) without any proof that the original had been put into the post, or had reached the defendant. (Id.)

In the case of ancient documents, where it is impossible for any witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same

matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being, of course, added *aliunde*, if the witness be not personally acquainted with him."

II. Comparison of.

A writing in dispute may be compared with a genuine one.

By C. L. P. Act, 1854, 17 & 18 Vic. c. 125, s. 27, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."[1]

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signature, and preserved as authentic documents. Bull. N. P. 236. *Taylor v. Cook*, 8 Price, 652. *Doe v. Suckermore*, 5 Ad. & E. 736. *Fitzwalter Peerage case*, 10 Clark & Fin. 193. *Lindsay Peerage*, 2 H. L. C. 557. *Doe v. Turver*, R. & M. 143. *Roe v. Rawlings*, 7 East, 282. In these cases, the question often becomes one of skill, the character of the writing varying with the age, and the discrimination of it being assisted by antiquarian studies. *Doe v. Suckermore*, *supra*.

On a claim to a peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before 1751, was offered in evidence, on proof of the handwriting by a witness who had been for many years an inspector of franks and official correspondence, and who said that, from a few inspections he had of two or three other documents, which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with these documents, to say whether any other document produced to him was not in the same handwriting: — *Held* admissible. *Fitzwalter Peerage*, *supra*. The claimant's solicitor, who said he had acquired a knowledge of the ancestor's handwriting from having had occasion from time to time, in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant together with property formerly belonging to that ancestor, was held to be a competent witness to prove the handwriting of the pedigree. (Id.)

A person accustomed to ancient manuscripts, saying that, by a careful examination of certain signatures, he had in his mind such a distinct knowledge of the handwriting as to be able to say, without immediate reference to them, whether any letter shown to him was or was not written by the same person:—*Held*, a competent witness. *Crawford and Lindsay Peerages*, 2 H. L. C. 557. *Taylor v. Cook*, 8 Price, 652; see 1 R. & M. 143; 5 B. & A. 330.

A document purported to be a certificate of a marriage at Bristol in 1761, written and signed by W. D., curate of St. James's:— *Held*, that the handwriting of W. D. might be proved by the opinion of a witness, formed by comparing it with various signatures of W. D. in the original register of St. James's, by which he appeared to be the officiating curate in 1761, without any proof of his death, or of search for witnesses who might have seen him write. *Doe d. Jenkins v. Davies*, 10 Q. B. 314; 11 Jur. 607; 16 L. J. Q. B. 218.

If a witness who is called to disprove the signature of the defendant to an acceptance states that he believes the signature is not that of the defendant, and gives, as his reason for that belief the absence or presence of certain peculiarities, which he says do or do not exist in the genuine signatures of the defendant, the opposite counsel may put into his hand a paper unconnected with the cause, and ask if, in his opinion, that contains a genuine signature of the defendant; and if he answer in the affirmative, he may then be asked, "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities (as the case may be) which you have before stated as your reasons that the signature in dispute is not genuine?" And *semble* that, if the witness says that it does not, it would be competent to lay that paper before the jury that they might judge of that answer. *Young v. Honner*, 1 C. & Kir. 51; 2 M. & Rob. 536.

[1] Under this provision it seems that the genuine writing used for the purpose of comparison may be put in, or even written, for the express purpose of comparison. In such cases, however, the evidence will be less satisfactory to the jury, for a document written under such circumstances, though genuine, cannot be relied on as fairly representing the writer's ordinary handwriting. *See* 5 Ex. 929. *Hughes v. Dimshen*, 32 L. T. 271. In cross-examination of an attesting witness to a codicil, he denying it was in his writing, other documents admitted by him to be in his writing were allowed to be submitted to the jury for the purpose of comparison, under the above sect. *Cresswell v. Jackson*, 2 F. & F. 24.

In the ecclesiastical courts, witnesses skilled in the examination of writings and detection of forgeries have always been permitted to depose to their opinion. So in France, and in some of the States of America; and now the courts of common law and equity adopt the same practice. *See* 5

HARBOURS.

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VIII. Harbour and Port Dues. *See post*, Shipping.

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X. Power of Harbour-Master to Remove Obstructions, p. 25.

I. In General, how Regulated.

In general, harbours authorised and to be authorised after the 11th May, 1847, are and will be regulated by their special acts, and some one or more of the public and general acts following; (that is to say,) "The Harbour, Docks, and Pier Clauses Act, 1847" (10 Vic. c. 27); "The General Pier and Harbour Act, 1861" (24 & 25 Vic. c. 45); "The Harbours and Passing Tolls Act, 1861" (Id. c. 47); the 24 & 25 Vic. c. 80, "An Act to authorise Advances of Money out of the Consolidated Fund for carrying on Public Works and Fisheries for the Employment of the Poor, and *for Facilitating the Construction and Improvement of Harbours*, and for other purposes;" "The General Pier and Harbour Act (1861), Amendment Act" (25 & 26 Vic. c. 19); and "The Harbours Transfer Act, 1862" (Id. c. 69).

Those established before that period are regulated by the prescriptions, charters, or private acts under which they originated, and "The Harbours and Passing Tolls Act, 1861" (24 & 25 Vic. c. 47).

Besides the above-mentioned, the other public and general statutes relating to harbours are the 9 & 10 Vic. c. 3; 10 & 11 Vic. c. 75. The 20 & 21 Vic. c. 32, and the 22 & 23 Vic. c. 28, relating to Ireland. The 16 & 17 Vic. c. 93; the 23 & 24 Vic. c. 39; the 23 & 24 Vic. c. 48, relating to Scotland. The 23 & 24 Vic. c. 56, relating to the Isle of Man. The 20 & 21 Vic. c. 32, relating to the supply of water for the use of vessels resorting to the Harbour of Refuge at Portland, and for other purposes; and the 25 & 26 Vic. c. 51 ("An Act for confirming, with amendments, certain Provisional Orders made by the Board of Trade under 'The General Pier and Harbour Act, 1861,' and 'The General Pier and Harbour Act, 1861, Amendment Act') relating to Carrickfergus, Deal, Oban, St. Ives, Tobermory, and Hastings.

For these last-mentioned statutes, as well as for the 24 & 25 Vic. c. 80, the reader is referred to the statutes at large.

II. 10 Vic. c. 27.—"The Harbours, Docks, and Piers Clauses Act, 1847:" *Requisitions of.*[1]

Ad. & E. 718: *per Coleridge, J. Tracey Peerage*, 10 Clark & Fin. 154.

[1] By sect. 1, act to extend only to harbours, &c. authorised by act hereafter to be passed, which shall declare this act to be incorporated therewith.

Sect. 11. *Interpretation:* "*Special Act*," "*Prescribed*," "*the Prescribed Limits*," "*the Lands*," "*the Harbour, Dock, or Pier*," "*the Harbour-Master*," "*Undertakers*."—"The expression, 'the special act,' used in this act, shall be construed to mean any act which shall be hereafter passed, authorising the construction or improving of an harbour, dock, or pier, and with which this act shall be incorporated; and the word 'prescribed,' used in this act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the

special act; and the sentence in which such word occurs shall be construed as if, instead of the word 'prescribed,' the expression 'prescribed for that purpose in the special act' had been used; and the expression 'the prescribed limits,' used with reference to the harbour, dock, or pier, or other local limits (if any) beyond the harbour, dock, or pier, within which the powers of the harbour-master, dock-master, or pier-master, for the regulation of the harbour, dock, or pier, shall, by the special act, be authorised to be exercised; and the expression 'the lands,' shall mean the lands which shall by the special act be authorised to be taken or used for the purposes thereof; the expression 'the harbour, dock, or pier,' shall mean the harbour, dock, or pier, and the works connected therewith, by the special act authorised to be constructed; the expression 'the harbour-master,' shall mean, with reference to any such harbour, the harbour-master, and with reference to any such dock, the dock-master, and with reference to any such pier, the pier-master, respectively appointed by virtue of this or the special act, and with respect to all acts authorised or required to be done by such harbour-master, dock-master, or pier-master, shall include the assistants of every such harbour-master, dock-master, or pier-master; and the expression, 'the undertakers,' shall mean the persons by the special act authorised to construct the harbour, dock, or pier, or otherwise carry into effect the purposes of the special act with reference thereto."

Sect. 3. *Interpretation in this and Special Act:* "*Person*," "*Lands*," "*Vessel*," "*Master*," "*Owner*," "*Goods*," "*Rate*," "*Collector of Rates*," "*Month*," "*Oath*," *&c.* — The following words and expressions, in both this and the special act, and any act incorporated therewith, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,)

"Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number:

"Words importing the masculine gender only shall include females:

"The word 'person' shall include corporation, whether aggregate or sole:

"The word 'lands' shall include messuages, lands, tenements, and hereditaments, or heritages of any tenure:

"The word 'vessel' shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise:

"The word 'master,' when used in relation to any vessel, shall be understood to mean the person having the command or charge of the vessel for the time being:

"The word 'owner,' when used in relation to goods, shall be understood to include any consignor, consignee, shipper, or for sale or custody of such goods, as well as the owner thereof:

"The word 'goods' shall include wares and merchandise of every description, and all articles in respect of which rates or duties are payable under the special act:

"The word 'rate' shall mean any rate or duty or other payment in the nature thereof payable under the special act:

"The expression, 'the collector of rates,' shall mean the person authorised by the undertakers to collect the rates by the special act authorised to be levied by them, and shall include the assistants of such collector:

"The word 'month' shall mean calendar month:

"The expression 'superior courts,' where the matter submitted to the cognisance of the superior courts arises in England or Ireland, shall mean her majesty's superior courts of record at Westminster or Dublin, as the case may require, and shall include the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county of Durham; and where such matter arises in Scotland, shall mean the Court of Session:

"The word 'oath' shall include affirmation in the case of Quakers, and any declaration lawfully substituted for an oath in the case of any other persons allowed by law to make a declaration instead of taking an oath:

"The word 'county' shall include any riding or other division of a county having a separate commission of the peace; and in Scotland shall include stewartry, and any ward or other division of a county or stewartry having a separate sheriff, and shall also include county of a city and county of a town:

"The word 'justice' shall mean justice of the peace acting for the place where the matter requiring the cognisance of any such justice arises; and where such matter arises in respect of lands situate not wholly in any one jurisdiction, shall mean a justice acting for the place where any part of such lands shall be situate; and where any matter shall be authorised or required to be done by two justices, the expression 'two justices' shall be understood to mean two or more justices met and acting together:

"The word 'sheriff' shall mean the sheriff-depute of the county or ward of a county in Scotland, and the steward-depute of the stewartry in Scotland, in which the matter submitted to the cognisance of the sheriff arises, and shall include the substitute of each sheriff-depute and steward-depute respectively:

"The expression 'quarter sessions' shall mean quarter sessions, as defined in the special act; and if such expression be not there defined, it shall mean the general or quarter sessions of the peace which shall be held at the place nearest to the situation of the harbour, dock, or pier, or where the principal office thereof is situate, or for some division of such county having a separate commission of the peace:

"The expression 'the Lords of the Admiralty' shall mean the Lord High Admiral

of the United Kingdom of Great Britain and Ireland, or the Commissioners for executing the office of Lord High Admiral."

And with respect to citing this act, or any part thereof, be it enacted as follows:

Sect. 4. *Short Title of Act.*—"The Harbours, Docks, and Piers Clauses Act, 1847."

Sect. 5. *Forms in which portions of this Act may be Incorporated in other Acts.*—"For the purpose of incorporating part only of this act with any act hereafter to be passed, it shall be enough to describe the clauses of this act with respect to any matter in the words introductory to the enactment with respect to such matter, and to enact that the clauses so described shall be incorporated with such act, and therefore all the clauses of this act so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act; and such act shall be construed as if such clauses were set forth therein with reference to the matter to which such act relates.

And with respect to the construction of the harbour, dock, or pier, be it enacted as follows:

Sect. 6. *Construction of Harbour, Dock, or Pier, to be subject to the Provisions of this Act, and one of the Lands Clauses Consolidation Acts.*—"Where by the special act the undertakers shall be empowered, for the purpose of constructing the harbour, dock, or pier, to take or use any lands otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject, if the harbour, dock, or pier, be situate in England or Ireland, to the provisions and restrictions contained in this act, and in 'The Lands Clauses Consolidation Act, 1845;' and if the harbour, dock, or pier, be situate in Scotland, to the provisions and restrictions contained in this and in 'The Lands Clauses Consolidation (Scotland) Act, 1845:' and the undertakers shall make compensation to the owners and occupiers of, and all other parties interested in any lands taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers vested in the undertakers by this or the special act, or any act incorporated therewith; and, except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the Lands Clauses Consolidation Acts, for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the last-mentioned acts shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

By sect. 7, errors and omissions in plans, &c. may be corrected by justices, &c., who shall certify the same.

By sect. 8, works not to be proceeded with until plans of all alterations authorised by Parliament have been deposited.

By sect. 9, clerks of the peace, &c. to receive plans of alterations and allow inspection.

By sect. 10, copies of plans, &c. to be evidence.

By sect. 11, no deviation beyond the limits defined upon plans.

By sect. 12, works on the shore of the sea not to be constructed without the authority of the Commissioners of Woods, &c. and of the Admiralty.

By sect. 13, before alterations in plans are executed, to be approved of by the Admiralty and the Commissioners of Woods, &c.

And with respect to the construction of works for the accommodation of the officers of Customs:

By sect. 14. Undertakers, when required by the Commissioners of Customs, to erect watch-house and boat-house for custom-house officers, and keep same in repair.

By sect. 15, penalty for not providing or repairing watch-house, &c. within three months after notice to do so given by Commissioners of Customs, 100*l.* for every month till thing required done.

And with respect to life-boats:

By sect. 16, life-boats, &c. to be provided.

By sect 17, penalty for not providing things or any of them required in last section not exceeding 2*l.* for every twenty-four hours during which things or any of them not provided.

With respect to keeping a tide and weather-gauge:

By sect. 18, tide-gauge and barometer to be provided, and monthly accounts of wind and weather to be sent to Admiralty.

By sect. 19, penalty for not providing things mentioned in last section not exceeding 2*l.* for every twenty-four hours, and not exceeding 10*l.* for every month for not sending monthly accounts.

With respect to the construction of warehouses, wharfs, &c.:

Sect. 20. *Power to Purchase Land for.*—"The undertakers, in addition to the lands authorised to be compulsorily taken by them under the powers of the special act, may contract with any party willing to sell the same for the purpose of any lands adjoining or near to the undertaking for extraordinary purposes; (that is to say,)

"For making and providing additional yards, wharfs, and places for receiving, depositing, and loading or unloading goods, and for the erection of weighing-machines, toll-houses, offices, warehouses, sheds, and other buildings and conveniences:

"For making convenient roads to the harbour, dock, or pier, or any other purpose which may be requisite or convenient for the formation or use thereof."

Sect. 21. *Power to Construct.*—"The undertakers may, as well upon the said lands as upon any other lands acquired by them under the provisions of this and the special act, construct such warehouses, sheds, and other buildings and works, as they may

deem necessary for the accommodation of goods shipped or unshipped within the harbour, dock, or pier, and may erect or provide such cranes, weighing and other machines, conveniences, weights, and measures as they think necessary for loading, unloading, measuring and weighing such goods."

Sect. 22, undertakes to hire persons to work cranes.

By sect. 23, power to lease wharfs, warehouses, &c.

Sect. 24. *Legal Quays to be Approved by Treasury.*—"The quays of the harbour, dock, or pier, shall not be deemed to be legal quays for the shipping and unshipping of goods until the same have been approved of by the Commissioners of Her Majesty's Treasury and the Commissioners of Her Majesty's Customs respectively for that purpose; and such quays, and the use thereof, shall be subject to all the same rules, regulations, and restrictions to which legal or lawful quays are or may be by law subject."

With respect to the rates to be taken:

By sect. 25, rates not to be taken until the works shall be completed.

By sect. 26, certificate of magistrate to be evidence that the harbour, &c. is completed.

By sect. 27, tonnage of British registered vessels to be ascertained according to law; of other vessels, according to established rules.

By sect. 28, exemption of vessels in her majesty's service, &c. from rates.

By sect. 29, vessels returning from stress of weather not to pay rates again.

By sect. 30, power to vary the rates from time to time.

By sect. 31, rates on foreign vessels where treaty of reciprocity exists.

By sect. 32, power to compound for tolls.

By sect. 33, harbour, dock, and pier free to the public on payment of rate.

Collection and recovery of rates:

By sect. 34, collector may enter vessels to ascertain rates payable.

By sect. 35, master to report arrival of vessel within twenty-four hours. Penalty for neglect not exceeding 10*l.*

By sect. 36, master of vessel to produce certificate of registry.

By sect. 37, masters of vessels to give account of goods intended to be unshipped within the limits, &c.

By sect. 38, penalty not exceeding 10*l.* on masters giving no account, or a false account, of goods to be unshipped.

By sect. 39, shippers to give an account of goods intended to be shipped, under penalty not exceeding 10*l.*

By sect. 40, in case of dispute between collector and master, &c. goods to be weighed or measured.

Sect. 41. *Expenses of Weighing, &c.*—"If the weight or quantity of such goods be greater than that shown by the manifest, bill of lading, account, or statement delivered by the master of the vessel or by the owner of the goods, the expenses on such weighing or measuring shall be paid to the undertakers, and shall be recoverable by the same means as are herein or in the special act provided for the recovery of rates; but if the weight or quantity of such goods be the same or less than that shown by the manifest, bill of lading, account, or statement so delivered, the undertakers shall pay all the expenses of such weighing or measuring, and shall also pay to the master of the vessel, or to the owner of the goods, all the expenses occasioned by such weighing or measuring, or by the detention of the vessel for that purpose."

Sect. 42. *Rates when Payable.*—"The rates payable to the undertakers in respect of any goods shipped or unshipped within the limits of the harbour, dock, or pier, shall be paid as follows; (that is to say,) if such goods are to be shipped they shall be paid before the shipment, or if such goods are to be unshipped, they shall be paid before the removal of the goods from the premises of the undertakers, and before the expiration of two months next after they were unshipped."

By sect. 43, penalty on evading payment of rates, three times the amount of rate evaded.

By sect. 44, tonnage-rates may be recovered by distraint of ship and tackle.

By sect. 45, rates payable on goods may be recovered by distraint on such goods, or if such goods have been removed, on any other goods of the owner within the limits of the harbour, or on the premises of the undertakers.

By sect. 46, disputes concerning rates or charges occasioned by distress to be settled by a justice in England or Ireland, and in Scotland by the sheriff.

By sect. 47, list of rates to be set up in large and legible characters.

By sect. 48, collector of customs may withhold a clearance to any vessel until the rates paid.

And with respect to the accounts to be kept of the rates, and of the vessels in respect of which they are payable:

By sect. 49, undertakers to keep account of rates and vessels, &c.

By sect. 50, annual account to be prepared and transmitted to the clerk of the peace in England or Ireland, or to the sheriff in Scotland.

And with respect to the appointment of harbour-masters, dock-masters, and pier-masters, and their duties:

Sect. 51. *Appointment of Harbour, Dock, or Pier-master.*—"The undertakers may appoint such harbour-masters as they think necessary (including in such expression dock-masters and pier-masters as hereinbefore defined, and from time to time, as often as they think fit, may remove any such harbour-master."

By sect. 52, powers of harbour, dock, or pier-master.

By sect. 53, penalty not exceeding 20*l.* on not complying with the directions of the harbour-master.

By sect. 54, penalty not exceeding 5*l.* on harbour-master for misbehaviour.

By sect. 55, penalty of 20*l.* on offering bribes to dock officers, and on officers taking bribes.

By sect. 56, harbour-master may remove wrecks, or other obstructions.

By sect. 57, unserviceable vessels to be altogether removed from harbour.

By sect. 58, harbour-master may remove vessels within docks, &c.

By sect. 59, vessels entering harbour or dock to be dismantled, as harbour-master shall direct.

By sect. 60, vessels to have their sails lowered when entering and navigating dock.

By sect. 61, vessels to have hawsers, &c. fixed to moorings.

By sect. 62, penalty not exceeding 5*l.* for wilfully cutting moorings.

By sect. 63, penalty not exceeding 5*l.* on vessels lying near the entrance of harbour or dock without permission.

By sect. 64, for purpose of repairing harbour, &c. the master must remove vessel within three days after notice by harbour-master, under penalty not exceeding 10*l.*

By sect. 65, harbour-master may remove such vessel if the master thereof neglect or refuse so to do.

With respect to discharging vessels and removal of the goods:

By sect. 66, delivery of cargoes and placing of discharged vessels.

By sect. 67, penalty not exceeding five pounds on wharfingers or other servants giving undue preference in loading, unloading, &c.

By sect. 68, goods may be removed from the quays, &c. after lying there longer than allowed by bye-laws.

And with respect to the protection of the harbour, dock and pier, and the vessels therein, from fire or other injury:

By sect. 69, combustible matter on quays, &c. to be removed.

By sect. 70, combustibles to be guarded during the night.

By sect. 71, penalties against offences herein named—boiling or heating pitch, &c. —fires in vessels—fires within docks—loaded guns, gunpowder, &c.

By sect. 72, power of harbour-master to enter ship, and search for and extinguish fires or lights. Penalty for obstructing him not exceeding 10*l.*

By sect. 73, penalty not exceeding 5*l.* for throwing ballast, &c. into harbour or dock.

By sect. 74, owner of vessel answerable for damage to works done by such vessel.

By sect. 75, as to the recovery of amount of damage to quays, &c.

By sect. 76, owner may recover damages paid by him from his servants.

And with respect to buoys, lighthouses, and beacons:

By sect. 77, power to erect lighthouses and lay down buoys, with consent of Trinity House.

By sect. 78, lights, beacons, or sea-marks, not to be exhibited or altered without sanction of Trinity House.

And with respect to the police of the harbour, dock, or pier:

By sect. 79, justices to appoint special constables named by the undertakers.

By sect. 80, dismissal of constables may be by two justices.

And with respect to the appointment of meters and weighers, and their duties:

By sect. 81, power for undertakers to appoint and remove meters and weighers, to make regulations for their government, and for their wages.

By sect. 82, licensed meters and weighers only to be employed. Penalty on unlicensed persons not exceeding 5*l.*

And with respect to the bye-laws to be made by the undertakers:

By sect. 83, bye-laws may be made and altered from time to time for all or any of the purposes herein named.

By sect. 84, bye-laws may be enforced by imposition of reasonable penalties, not exceeding 5*l.*

By sect. 85, no bye-laws to come into operation until allowed in the manner prescribed and approved by one of the judges.

By sect. 86, notice of allowance of bye-laws to be given in one or more newspapers.

By sect. 87, a copy of proposed bye-laws to be open to inspection for one month before application for confirmation.

By sect. 88, publication of bye-laws.

By sect. 89, bye-laws, when confirmed, to be binding on all parties.

By sect. 90, proof of publication of bye-laws. The production of a written or printed copy of the bye-laws to suffice.

By sect. 91, tender of sufficient amends before action, good defence.

And with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter, referred to justices or the sheriff:

By sect. 92, Railway Clauses Consolidation Acts, 1845, as to damages, &c. to be incorporated with this and the special act.

By sect. 93, in Ireland, part of the penalties to be paid to guardians of unions.

By sect. 94, all things required to be done by two justices in England and Ireland may, in certain cases, be done by one, and in Scotland, by the sheriff, &c.

By sect. 95, penalties, &c. imposed in respect of any offence committed within the metropolitan police district to be paid to receiver, and applied under 2 & 3 Vic. c. 71.

By sect. 96, persons giving false evidence liable to penalties of perjury.

And with respect to access to the special act:

By sect. 97, copies of special act to be kept by undertakers at their office, and deposited with the clerks of the peace, &c. and be open to inspection. 7 Wm. 4, and 1 Vic. c. 83.

By sect. 98, penalty on undertakers failing to keep or deposit such copies, 20*l.* for every offence, and 5*l.* for every day during which such copy shall be not so kept or deposited.

And with respect to the saving of rights:

By sect. 99, nothing in this or the special act to affect the rights of the Crown.

III. "The General Pier and Harbour Act, 1861," 24 & 25 Vic. c. 45: *Requisitions of.*[1]

IV. "The Harbours and Passing Tolls Act, 1861," 24 & 25 Vic. c. 47: *Requisitions of.*[2]

By sect. 100, nor the rights of the Crown as to revenue.

By sect. 101, nor rights of the city of London.

By sect. 102, nor the rights of Trinity House, &c.

By sect. 103, act not to exempt the undertakers from the provisions of any general act.

[1] Sect. 1. *Short Title.*—"The General Pier and Harbour Act, 1861."

Sect. 2. *Interpretation of Terms:* "*The Lords of the Admiralty*," "*Board of Trade*," "*Person*," "*Promoter*," "*Works*," *&c.*—"The following words and expressions in this act shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,)

"The expression, 'the Lords of the Admiralty,' shall mean the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral:

"The expression, 'Board of Trade,' shall mean the Lords of the Committee of her Majesty's Privy Council for Trade and Plantations:

"The expression, 'person or persons,' shall include companies, corporations, commissioners, trustees, undertakers, conservators, or individuals:

"The word 'promoter' shall apply to and include any person or persons who shall make application for a provisional order under this act:

"The word 'works' shall include any pier, harbour, quay, wharf, jetty, or excavation, whether complete or incomplete, on or near the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith:

"The several words and expressions contained in the clauses of any acts incorporated with this act shall have the meanings assigned to them by such act or acts, except in cases in which other meanings are expressly assigned to them by this act."

By sect. 3, persons may apply to Board of Trade to grant provisional orders.

By sect. 4, subscribers to memorial to be promoters.

Sect. 5 repealed, as to applications after 16th May, 1862, by 25 Vic. c. 19, s. 2.

Sect. 6 repealed by id. and 25 & 26 Vic. c. 69, s. 11.

Sect. 7 repealed by 25 & 26 Vic. c. 69, s. 11.

Sect. 8 repealed by id.

Sect. 9 repealed by 25 Vic. c. 19, s. 2.

Sect. 10. *Consent of Commissioners of Woods, &c. to be obtained.*—"No provisional order, except such as relates to the levying and recovery of rates only, shall be made under this act without the consent in writ- of the Commissioners for the time being of her Majesty's Woods, Forests, and Land Revenues, being first had and obtained."

Sect. 11 saves all rights of the Crown and of the Duchy of Lancaster.

Sect. 12 saves rights of the Duchy of Cornwall.

By sect. 13, saving rights of conservators of the Rivers Thames and Mersey, &c.

By sect. 14, promoters not to do any act which shall prejudice any right acquired by royal charter, &c.

By sect. 15, Board of Trade may grant provisional orders.

By sect. 16, order to be deposited with clerk of the peace; notice of deposit by advertisement; Board of Trade to obtain confirmation of provisional order by parliament.

By sect. 17, where petition presented against an order, bill confirming same may be referred to select committee.

By sect. 18, orders, &c. to be signed by one of the Secretaries, &c. of Board of Trade, or by Secretary of the Admiralty.

By sect. 19, Board of Trade to report to parliament.

By sect. 20, power to Secretary of State for War to take and hold land, &c. for batteries, &c.

[2] Sect. 1. *Short Title.*—"The Harbours and Passing Tolls, &c. Act, 1861."

Sect. 2. *Interpretation of Terms.*—"In the construction of this act the following expressions shall have the meanings hereby assigned to them, unless such meanings are inconsistent with the context; (that is to say,)

Board of Trade.—"The expression 'Board of Trade,' shall mean the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations."

Harbour.—"The word 'harbour' shall include harbours properly so called, whether natural or artificial, estuaries, navigable rivers, piers, jetties, and other works, in or at which ships can obtain shelter, or ship and unship goods and passengers."

Harbour Authority.—"'Harbour authority' shall include all persons, or bodies of persons, corporate or incorporate, being proprietors of, or intrusted with, the duty of constructing, improving, managing, maintaining, or lighting any harbour."

Limited Estate.—"The expression 'limited estate' shall mean the estate of any person entitled under any settlement at law or in equity, for his own benefit, to the possession or receipt of the rents and profits of land of any tenure for the term of his own life, or of the life of any other person, whether such land is or is not subject to incumbrances."

Settlement.—"The word 'settlement' shall include any act of parliament, will, deed, or other assurance, whereby particular estates or particular interests in land are created, with remainders or interests expectant thereon, and any deed of entail, and every estate and interest created by appointment made in the exercise of any power contained in any settlement, or derived from any settlement, shall be considered as having been created by the same settlement; and an estate or interest, by way of resulting use or trust to or for the settlor, or his heirs, executors, or administrators, shall be deemed to be an estate or interest under the same settlement."

Pilotage Authority.—"'Pilotage authority' shall include all bodies and persons authorised to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage."

Shipping Purposes.—"The expression 'shipping purposes' shall include the constructing or doing any work or thing that conduces to the safety or convenience of ships, or that facilitates the shipping or unshipping of goods, and the management and superintending the same, and shall also include the maintenance of any life-boat or other means of preserving life in case of shipwreck."

Differential Dues.—"The expression 'differential dues' shall include any dues, rates, or taxes levied on foreign ships, or on goods carried in foreign ships, which are not levied under like circumstances on British ships; and shall also include any excess of dues, rates, or taxes levied on foreign ships, or on goods carried in foreign ships, over the dues or taxes levied under like circumstances on British ships, or on goods carried in British ships; excepting always such duties as the Commissioners of Customs may be empowered to levy for the use of her majesty, under any act of parliament in the events therein mentioned."

By sect. 3, advances of money to harbour authorities.

Sect. 4. *Abolition of Passing Tolls.*—"From and after the 1st day of January, 1862, all tolls and rates ordinarily known by the name of passing tolls, leviable, in respect of any harbours, on ships which pass but do not enter such harbours, or on goods carried away in any such ships, shall cease to be levied."

By sect. 5, indemnity to creditors on passing tolls.

Sect. 6. *Abolition of Dues leviable by Charitable Authorities.*—"All rates, dues, duties, and imposts (hereinafter included in the term shipping dues) leviable by any of the charitable authorities named in the first schedule annexed hereto on ships, or on goods carried in ships, shall, except so far as the same may be required for the execution of such shipping purposes as have hitherto been executed by means of the said dues, cease to be levied on and after the 1st day of January, 1872."

Sect. 7. *Dues levied for Shipping Purposes on Ships or Goods which derive no Benefit.*—"Whenever any of the said shipping dues, leviable by any of the said authorities named in the first schedule, are applicable to shipping purposes, but such shipping purposes are not for the benefit of ships or goods carried therein at the port or place at which such dues are levied, such dues shall cease to be levied on and after the 1st day of January, 1872."

By sect. 8, provision for payment of pensions granted before 15th March, 1861, and for application of surplus.

By sect. 9, list of pensions to be made out and sent to Board of Trade.

By sect. 10, abolition of differential dues.

By sect. 11, compensation for differential dues, when to cease.

By sect. 12, compensation, whilst continued, to be limited.

By sect. 13, commutation of compensation.

By sect. 14, indemnity to public authorities.

By sect. 15, power to recover increased dues.

By sect. 16, saving rights of creditors.

By sect. 17, power to transfer dues.

By sect. 18, notice of intended transfer to be given.

Sect. 19. *Evidence of Transfer.*—"Upon the completion of the transfer, a copy of the order in council approving of the transfer, accompanied with a copy of the instrument of transfer, shall be published in the *London Gazette;* and the production of the *London Gazette* containing such copy shall be evidence that the said transfer has been effected."

By sect. 20, power to borrow money in order to effect such transfer.

Sect. 21. *Abolition of Special Taxes at Dublin.*—"All taxes on ships, or goods carried in ships, leviable within the port of Dublin, which are mentioned in the third schedule hereto, shall cease to be levied on and after the 1st day of January, 1862."

By sect. 22, transfer of Ramsgate Harbour to Board of Trade.

By sect. 23, transfer of powers to Board of Trade.

By sect. 24, debts, &c. of trustees enforceable against Board of Trade.

By sect. 25, accounts of trustees of Ramsgate harbour to be made up.

By sect. 26, indemnification of trustees of Ramsgate harbour.

By sect. 27, rates to be taken in Ramsgate harbour.

By sect. 28, Board of Trade to receive percentage on salvage.

By sect. 29, gross sum of 2000*l.* to be paid to mayor, &c. of Sandwich, in lieu of annual payment of 200*l.*

By sect. 30, application of the said 2000*l.*

By sect. 31, income of Ramsgate harbour to be carried to Ramsgate harbour account.

By sect. 32, Ramsgate harbour accounts to be rendered to the Treasury, and signed by Accountant of Board of Trade.

V. "The General Pier and Harbour Act (1861), Amendment Act, 1862," 25 & 26 Vic. c. 19: *Requisitions of*.[1]

By sect. 33, such accounts to be laid before parliament.

By sect. 34, Board of Trade may continue Ramsgate Harbour Superannuation Fund, or wind up the same.

By sect. 35, Board of Trade may allow compensation to persons deprived of offices.

By sect. 36, deficiency of income to be supplied by monies voted by parliament.

By sect. 37, harbour to be free from rates.

By sect. 38, town dues on coal not to be levied in certain cases. 1 & 2 Vic c. 70 (local).

By sect. 39, provisions of 10 & 12 Vic. c. 17, incorporated with this act.

By sect. 40, certain parts of property of trust to be within Ramsgate police jurisdiction. 1 & 2 Vic. c. 59 (local).

By sect. 41, harbour of Dover to be vested in a board of trustees, to be called "The Dover Harbour Board."

By sect. 42, rights of imposing rates transferred to Dover Harbour Board.

By sect. 43, existing debts, &c. enforcable by or against board.

By sect. 44, after 1st January, 1862, board may impose rates for harbour purposes.

By sect. 45, debts incurred prior to 15th March, 1861, and secured on passing tolls, shall be paid by board out of rates.

By sect. 46, compensation to officers not re-appointed by board, to offices of equal value.

By sect. 47, constitution of Dover Harbour Board.

By sect. 48, members of board not to hold places of profit, or be concerned in contracts. Penalty for so offending. Contracts and bargains made contrary hereto to be void.

By sect. 49, if the debts are paid out of public monies, they may be recovered as debts due to the Crown.

By sect. 50, no new debts to be incurred till existing debts are discharged without Treasury consent.

By sect. 51, power to corporation of Dover to transfer dues to harbour.

By sect. 52, Corporation and Harbour Board may apportion debts as between themselves.

By sect. 53, reservation of rights of creditors.

By sect. 54, debts on harbours to be paid out of Consolidated Fund.

By sect. 55, compensation to servants of Whitby trustees.

By sect. 56, trustees and commissioners not to charge passing tolls with further debts.

By sect. 57, power of trustees of Whitby harbour to levy rates.

By sect. 58, power to town commissioners of Whitby to transfer dues to harbour.

By sect. 59, reservation of rights of creditors.

By sect. 60, trustees and commissioners may apportion debt as between themselves.

By sect. 61, vessels using Whitby harbour to pay toll for support of tide-lights.

By sect. 62, power to commissioners of Bridlington harbour to levy rates.

By sect. 63, incorporation of "Harbours, Docks, and Piers Clauses Act."

By sect. 64, nothing in 22 & 23 Vic. c. 29, deemed to receive taxes, &c. which but for 9 & 10 Vic. c. 346, would have been payable to Marine Society.

By sect. 65, title of Board of Trade.

By sect. 66, vesting of property in Board of Trade.

By sect. 67, execution of instruments.

By sect. 68, disposition of monies arising from sale.

By sect. 69, power of Board of Trade to purchase lands.

[1] By sect. 1, this act shall be read (as near as may be) with the "General Pier and Harbour Act, 1861," in this act called "the principal act," and may be cited as "The General Pier and Harbour Act, 1861, Amendment Act."

Sect. 1, future application for provisional orders.

By sect. 2, provisions of principal act mentioned in Schedule A. repealed as to future application.

By sect. 3, notice by advertisement.

By sect. 4, deposit of documents in Schedule B. part 2.

Sect. 5. *Subsequent Deposit of Documents in Schedule B. part* 3.—"On or before the 23rd of December in the same year, the promoters shall deposit the documents mentioned in Schedule B. part 3, to this act, according to the regulations therein contained."

Sect. 6. *Extent of Part* 2 *of this Act.*—"The provisions of this part of this act shall apply to every provisional order of the Board of Trade, on any application already made or to be hereafter made."

By sect. 7, approval of works by Admiralty.

By sect. 8, abandonment, disuse, &c. of works.

By sect. 9, power to Admiralty to cause local survey to be made.

By sect. 10, recovery of expenses from undertakers.

By sect. 11, lights to be exhibited at night during construction of works.

By sect. 12, limitation of time for completion of works.

By sect. 13, pier, &c. open to public on payment of rates.

By sect. 14, power to Board of Trade to revise rates.

By sect. 15, company to send copy of annual account in abstract as to rates, vessels, &c. to Board of Trade.

By sect. 16, as to audit of accounts on complaint to Board of Trade.

VI. "The Harbours Transfer Act, 1862," 25 & 26 Vic. c. 69: *Requisitions of.*[1]

VII. Harbours may be Created by the Crown.[2]

By sect. 17, rates to be equally levied.

By sect. 18, mode of recovery of rates.

By sect. 19, 10 & 11 Vic. c. 27, incorporated.

Sect. 20. *Water-pipes.*—"The undertakers may grant or allow to any persons the right of laying down, or constructing and maintaining, pipes or channels for the conveyance of water to, on, and within the pier or harbour, and may demand and receive such sums in consideration of such grant or allowance as they may think reasonable."

Sect. 21. *Application of Merchant Shipping Act, &c.*—"The undertaking authorised by any provisional order shall be subject to the provisions of the Merchant Shipping Act, 1854, and of every general act relating to harbours or dues on shipping, or on goods carried in ships, now in force or hereafter to be passed, and to any future revision or alteration, under the authority of parliament, of the rates authorised by the order."

Sect. 22. *Costs of the Order.*—"The costs of, and connected with, the preparation and making of each provisional order, shall be paid by the promoters."

By sect. 23, proceedings under sect. 9 of principal act for fixing schedule of rates. Power to Board of Trade to authorise schedule as published, though differing from schedule referred to in principal act.

By sect. 24, provisions of principal acts as in Schedule C. to this act repealed.

By sect. 25, order not to be made affecting powers under local acts without consent.

By sect. 26, power to Board of Trade to impose terms, &c.

Sect. 27. *Application of 7 Wm. 4, and 1 Vic. c. 83, to Act.*—"The provisions of the Act, 7 Wm. 4, and 1 Vic. c. 83, 'to compel clerks of the peace for counties and other persons to take the custody of such documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament,' shall (as far as may be) apply to all cases of deposit of documents made or to be made with any person under the principal act or this act."

[1] Sect. 1. *Short Title.*—"The Harbours Transfer Act, 1862."

Sect. 2. *Interpretation of Terms.*—"In this act the the term 'the Admiralty' shall be taken to mean the Lord High Admiral of the United Kingdom for the time being, or the Commissioners for executing the office of Lord High Admiral; and when the said term is used in reference to any other act, it shall be taken to comprise any term whatsoever used in such other act to designate such Lord High Admiral or Commissioners.

"The term 'the Board of Trade,' shall be taken to mean the Lords of the Committee of Privy Council for the time being appointed for the consideration of matters relating to trade and foreign plantations."

By sect. 3, Board of Trade may exercise powers under Preliminary Inquiries Act, 14 & 15 Vic. c. 49.

By sect. 4, Board of Trade to inform Admiralty of pending schemes. Admiralty may intervene where necessary for protection of interests of naval service.

By sect. 5, consent, &c. of Board of Trade as to harbour-works on tidal lands, lifeboats, &c.

By sect. 6, consent and approval of Board of Trade to railway works in tidal lands.

By sect. 7, plans, &c. to be deposited with Board of Trade under 23 & 24 Vic. c. 152, s. 41.

By sect. 8, powers for protection of navigation, &c. under local acts for harbours, railways, and other works on tidal lands, &c. to be exercised by Board of Trade.

By sect. 9, power to Admiralty to retain authority over ports, &c. where dockyards, &c. are situate.

By sect. 10, exception as to Mersey and Thames.

By sect. 11, parts of 24 & 25 Vic. c. 45, relative to Admiralty, repealed.

By sect. 12, Pier and Harbour Act Amendment Act repealed as to deposit at Admiralty office.

By sect. 13, Board of Trade to furnish to Admiralty information as to applications for provisional orders.

By sect. 14, provisions of same act made applicable to Board of Trade.

By sect. 15, notices of piers, &c. to be given to the Board of Trade.

By sect. 16, provisions as to ballast to be administered by Board of Trade.

By sect. 17, transfer of harbours in schedule. Powers, &c. under acts in schedule and other acts to be exercised by Board of Trade.

By sect. 18, not to affect prerogative of Crown and general conservancy powers of Admiralty.

By sect. 19, acts done, contracts and appointments made, proceedings pending, &c. under provisions of former acts, not to be prejudicially affected.

By sect. 20, power to borrow, whether authorised by special act or not.

By sect. 21, borrowing power not restrained by limitation of amount in special act.

By sect. 22, maximum limits of rates mentioned in 24 & 25 Vic. c. 47, s. 3, p. 22, repealed.

[2] The Crown is entitled, except where vested rights would be interfered with, to create a port for the landing of goods, and to assign its limits, though the soil be in a subject; and such creation is a good consideration for the receipt of petty customs and port dues throughout the port so assigned. And such petty customs and port dues

IX. Liability of Trustees of.[1]

X. Power of Harbour-Master to Remove Obstructions.[2]

HARE. *See* Game, vol. iv. p. 571.

HAWKER and PEDLAR.

I. What is.[3]

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might, in ancient times, be granted away by the Crown. *Exeter (Mayor, &c.) v. Warren*, 5 Q. B. 773; D. & M. 524; 8 Jur. 441. But *see* "The Harbours, Docks, and Piers Clauses Act, 1847," p. 16; "The General Pier and Harbour Act, 1861," p. 21; and "The General Pier and Harbour Act (1861), Amendment Act, 1862," p. 23.

[1] In an action against trustees of docks, a count alleged, first, that they were the proprietors of a dock, which was made by them under the powers of a local statute, and that under that act and other acts they received from vessels tolls, which under the acts they were bound, and it was their duty to apply in and about the maintaining, cleansing, and supporting the dock, so as to be in a fit state for vessels entering and navigating the same; that the funds in the hands of the trustees arising from the tolls were fully sufficient for maintaining, cleansing, and supporting the dock, in addition to the satisfaction and discharge of all other liabilities and incumbrances. *Breach:*—That the trustees did not take reasonable or any care in or about maintaining, cleansing, and supporting the dock, insomuch that the plaintiff's vessel, in endeavouring to enter, struck on the mud, which by the negligence of the trustees lay at the entrance of the dock, and in consequence the cargo was damaged. A second count alleged that the trustees, well knowing that the dock and entrance were, by reason of accumulated mud, in an unfit state to be navigated, and used by vessels accustomed to navigate and use the same, did not take reasonable or any care to put the same into a fit state for that purpose, but negligently permitted the dock and the entrance to continue, while the same was by their permission navigated and used by such vessels, in an unfit state, for want of reasonable cleansing; insomuch that the vessel in question, being such vessel as was used and accustomed to navigate the dock, in endeavouring to enter struck against the bed of mud, and was damaged, together with the cargo. On demurrer to the declaration:—*Held*, that the trustees were liable, since, though it might be doubted whether the declaration did not disclose a state of facts under which they had a positive duty to perform, and not merely a discretion to exercise, as to removing the danger; at all events, if they had a discretion under the circumstances to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public; and they had no right, with a knowledge of its dangerous condition, to keep it open, and invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls, might enter and navigate the dock. *Gibbs v. Liverpool Docks (Trustees)*, 3 H. & N. 164; 4 Jur. N. S. 636; 27 L. J. Ex. 321. *Held*, also, that under such circumstances the duty is equally cast on those who have the receipt of the tolls and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose. (Id.)

A local act for better preserving a harbour. Trustees were appointed to carry the act into execution. They may elect a harbour-master, who may direct any person having the command of any vessel entering into or being within the harbour, to anchor and place the same in such situation within the harbour as he shall direct.

After the passing of the act some coals were shot into a berth in the harbour, which rendered it dangerous. The trustees at a board meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed; and the coals were accordingly partly, but not sufficiently, removed at their expense. After this the harbour-master, without the knowledge of the trustees, directed the plaintiff to place his vessel in the berth. He did so, and the vessel, while lying there, sustained damage in consequence of the berth being unsafe. The harbour-master knew that the berth had been unsafe, and what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed the plaintiff to place his vessel in it:—*Held*, that there was no evidence to warrant a verdict against the trustees. *Metcalfe v. Hetherington*, 5 H. & N. 719; 8 W. R. 475. As to qualifications of commissioners, see *Easton v. Alce*, 31 L. J. Ex. 115.

[2] The 63d sect. of the "Harbours, Docks, and Piers Clauses Act" (10 & 11 Vic. c. 27), which imposes a penalty upon the master of any vessel who shall, without permission of the harbour-master, moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, over-rides and extinguishes all local and private property therein. *Gardner v. Whitford*, 4 C. B. (N. S.) 665.

[3] A hawker is, properly, an itinerant trader, who carries his wares through the street, or from town to town. A pedlar is a hawker who deals in trifling or inferior

II. 50 Geo. 3, c. 41: Provisions of.[1]

III. Articles that may be Sold without License.[2]

IV. Cases decided on the Statute.[3]

commodities. Either from a regard to the revenue laws, or from a desire to encourage the more open and settled pursuits of the local trader, the legislature has shown considerable jealousy of hawkers and pedlars, and placed their avocations under a system of penal regulation and surveillance.

[1] By the 50 Geo. 3, c. 41, hawkers and pedlars are to pay an annual license duty of 4*l.*; and if they travel with a horse, ass, or other beast, bearing or drawing burden, they are subject to an additional duty of 4*l.* for each beast so employed. The granting of licenses and management of the duties are under the control of the Commissioners of Hackney Coaches.

Hawkers and pedlars, unless householders or residents in the place, are not allowed to sell by auction, whereby the highest bidder is deemed the purchaser. Penalty, 50*l.*; one-half to the informer, the other half to the king. But nothing in the act extends to hinder any person from selling, or exposing to sale, any sort of goods in any public market or fair.

Every hawker, before he be licensed, must produce a certificate of good character and reputation, signed by the clergyman and two reputable inhabitants of the place where he usually resides.

Every hawker must have inscribed, in Roman capitals, on the most conspicuous part of every pack, box, trunk, case, cart, or other vehicle in which he shall carry his wares, and on every room and shop in which he shall trade, and likewise on every handbill which he shall distribute, the words "licensed hawker." Penalty in default, 10*l.* Unlicensed persons wrongfully using this designation forfeit 10*l.*

Hawkers dealing in smuggled goods, or in goods fraudulently or dishonestly procured, are punishable by forfeiture of license, and incapacity to obtain one in future.

Hawkers trading without a license are liable to a penalty of 10*l.* So, also, if they refuse to show their license, on the demand of any person to whom they offer goods for sale, or on the demand of any justice, mayor, constable, or other peace-officer, or any officer of the customs or excise.

To forge or counterfeit a hawker's license incurs a penalty of 300*l.* To lend or hire a hawker's license, subjects lender and borrower to a penalty of 40*l.* each, and the license becomes forfeited.

Hawkers trading without a license are liable to be seized and detained by any person, who may give notice to a constable, in order to their being carried before a justice of peace. Constables refusing to assist in the execution of the act are liable to a penalty of 10*l.*

[2] Nothing in the act extends to prohibit any person from selling any printed papers licensed by authority, or any fish, fruit, or victuals, nor to hinder the real worker or maker of any manufacture of Great Britain, or their children, apprentices, or servants, from carrying, or exposing to sale, any manufacture of their own making, in any market, or fair, and in every city, borough, town corporate, and market-town; nor any tinkers, coopers, glaziers, plumbers, harness menders, or other persons, usually trading in mending kettles, tubs, household goods, or harness whatsoever, from going about, and carrying with them proper materials for mending the same.

And by the 52 Geo. 3, c. 108, "no person, being a wholesale trader in lace, woollen, linen, silk, cotton, or mixed goods, or of any of the goods, wares, or manufactures of Great Britain, and selling the same by wholesale, shall be deemed a hawker, pedlar, or petty chapman; and all such persons, or their apprentices, servants, or agents, selling by wholesale only, shall go from house to house, and from shop to shop, to any of their customers who sell again by wholesale or retail, without being subject to any of the penalties contained in any act touching hawkers, pedlars, and petty chapmen."

Neither does this or any other act prohibit any person from carrying about and selling coals in carts or otherwise.

Also balm or yeast is within the exemption. *R. v. Hodgkinson*, 10 B. & C. 74.

And by 22 & 23 Vic. c. 36, s. 3, nothing in the 50 Geo. 3, c. 41, or 55 Geo. 3, c. 71, respectively contained, shall extend to hinder the real worker or workers, maker or makers, of any goods, wares, or manufactures of Great Britain, or his, her, or their children, apprentices, or known agents, or servants, usually residing with such real worker or makers only, from carrying abroad, or exposing to sale, and selling by retail or otherwise, any of the said goods, wares, or manufactures of his, her, or their own making, at any place whatever; and by 23 & 24 Vic. c. 111, s. 20, any license shall be sufficient to authorise the trading according to the tenor of it in any part of Great Britain. By sect. 21, the Commissioners of Inland Revenue may remit the whole or any part of the penalty, notwithstanding a portion may be payable not to the Crown. Postage-stamps may be carried about for sale by letter-carriers. 23 & 24 Vic. c. 111, s. 22.

[3] A single act of selling does not make a man a hawker, so as to require a license. *Rex v. Little*, 1 Burr. 609. *Rex v. Buckle*, 4 East, 346. *Johnson v. Hudson*, 11 East, 181. But where a cabinet-maker, residing at L., and having a shop there,

HEADBOROUGH, or Head-Borrow. Formerly signified him who was the head of the frank pledge in boroughs; now it is a kind of constable. *See* Corporation, vol. iii. p. 267.

HEARSAY Evidence. *See* Evidence, vol. iv. p. 313.

HEIR. *See* Alien, vol. i. p. 288; Bastard, vol. ii. p. 385; Copyhold, vol. iii. p. 223; Descent, vol. iv. p. 47; Executors, id. pp. 366, 367; *post*, Warranty; Waste; Will.

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sent goods to A. in a cart, which he accompanied on foot part of the way, and then went on to A. by the mail, where he employed an auctioneer, and sold the goods by auction, it was held that he was a trading person going from town to town, within this act. *Attorney-General v. Woodhouse*, 1 Y. & J. 463.

An information charging a defendant as a trading person going from town to town, &c. with selling at S. (by sale at auction), goods, &c., was held to be supported by evidence that the defendant lived at B., and was a trader there; that he went to S., and took up a temporary abode at an inn there, and that he employed an auctioneer living at S. to sell for him there goods from B. (part of which were proved to be of his own manufacture), who sold them by the defendant's order, and under his directions and authority, the defendant remaining at S. during the sale; the objection being that the evidence did not establish a going from town to town, so as to bring the defendant within the statute. *Attorney-General v. Longue*, 12 Price, 51.

Exposing tea to sale as a hawker, without a particular license, subjects the offender to the 10*l.* penalty; and by 12 Geo. 3, c. 46, s. 6, with a license, it must be done in an entered place; and an agent is equally liable to the penalty as the principal. *Rex v. M'Gill*, 3 D. & R. 377; 2 B. & C. 142.

The attorney and solicitor-general advised that a tea-dealer may send out servants to obtain orders from samples of tea, and afterwards supply the tea so ordered, without incurring the penalty for hawking. *See* Pope's Excise. *See* also *Rex v. M'Gill*, 2 B. & C. 142. *Rex v. M'Knight*, 10 id. 734.

A manufacturer who hawks his goods in different places from those mentioned in the 23d section, without a license so to do, may be convicted in a penalty of 10*l.* only under this section, although the 20th section imposes a 40*l.* penalty for an offence apparently similar. *Rex v. Websdell*, 3 D. & R. 360; 2 B. & C. 136. See *Rex v. M'Gill*, *supra*.

A hawker's license does not give the privilege of selling goods in a borough where, by a bye-law, made pursuant to charter and ancient custom, strangers are not permitted to trade. *Simson v. Moss*, 2 B. & Ad. 543.

A person who goes from the town in which he resides, and takes a room at another town, and there sells goods which are brought direct from the town of his residence, is liable to a penalty, under the 50 Geo. 3, c. 41, s. 17, as a "trading person" going from town to town without a hawker's license. *Manson v. Hope*, 31 L. J. M. C. 191.

Under the 50 Geo. 3, a licensed hawker may sell by retail in a hired room, where he is not a householder, provided it be without outcry. *Allen v. Sparkhall*, 1 B. & A. 100.

To entitle a man to exemption from penalties under the act, on the ground of the place being a public market, it must be shown that the market was legally established by grant from the Crown, and not merely a market *de facto*. *Benjamin v. Andrews*, 5 C. B. (N. S.) 299; 27 L. J. M. C. 310.

It has been held that a servant may hawk with his master's license, on his master's account. *Hodgson v. Flower*, 2 Camp. 288. *Chamberlain v. Hill*, cited id. 292. And the *letting to hire or lending a license* is not proved by showing that the hawker's servants used it. *Hodgson v. Flower*, 2 Camp. 290. But a refusal by a hawker to produce his license on demand, is proof that he has not one. *Rex v. Smith*, 3 Burr. 1475.

(F) *What Personal Property or Effects of Ancestor he may take. See* Executors, vol. iv. pp. 366–7 ; *post*, Heir-loom, p. 32.

(G) *He may support Action for Injuries to Ancestor's Monument, &c.* p. 29.

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(A) *On Bonds and Obligations of Ancestor. See* Bond, vol. ii. pp. 509, 528–9.

(B) *On Covenants and Conditions of Ancestor. See* vol. iii. p. 403 ; Conditions, id. p. 166.

(C) „ *Judgments or Recognisances of Ancestor*, p. 29.

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II. Who may be Heir. *See* Descent, vol. iv. p. 49.

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(B) „ *enter on the Lands of Ancestor.*[2]

(C) „ *take Profits of Lands of Ancestor.*[3]

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[1] An heir is the party upon whom the law casts the estate immediately on the death of the ancestor ; and an estate so descending is called the inheritance. *See* Descent, vol. iv. p. 48.

[2] The entry of the heir upon any part of the estate will give him a seisin in deed of all the lands lying in the same county ; for, since the freehold in law is cast upon him by the death of his ancestor, and no person is in possession, so that no particular estate is to be defeated, a general entry in part will be sufficient to reduce the whole into actual possession ; but where lands lie in different counties, there must be an entry in each county. If the heir be deterred from entering by bodily fear, he may make claim as near as he can. Such claim is, however, only in force for a year and a day ; but, if it be repeated once in the space of every year and day, which is called continual claim, it will have the same effect as a legal entry. The entry of the heir is only necessary where the lands were in the actual occupation of the ancestor at the time of his death ; for if the lands are held under a lease for years, and the lessee has entered under the lease, the heir will be considered as having seisin in deed, before entry or receipt of rent, because the possession of the lessee for years is his possession. *See* Smith's R. & P. Property, 418, 2d ed.

[3] The right to a rent-service is real property, and descendible to the person entitled to the reversion of the lands out of which it issues ; but, from the moment that a payment of rent becomes due, it is then personal property : therefore, where the person entitled to rent outlives the day on which it becomes due, it will go to his executor or administrator ; but if the lessor dies on the day preceding the day of payment, the rent will go to the heir, as incident to the reversion. Although rent must be demanded at sunset of the day on which it is payable, if the lessor intends to take advantage of a condition, yet rent is not due till the last minute of the natural day. In the case of leases made by tenants in fee or under a power, if the lessor dies on the day of payment, but before midnight, the rent will go along with the land to the heir, or the person in remainder or reversion, because the lessee has till the last instant to pay his rent ; consequently the lessor dying before it was completely due, his personal representatives can make no title to it. But where a lease is made by a bare

(D) *To have Possession of Title-Deeds.*[1]

(E) *As to Covenants, Conditions, and Contracts made with Ancestor.*[2]

(F) *What Personal Property or Effects of Ancestor he may take.* *See* Executors, vol. iv. pp. 366, 367; *post*, Heir-loom, p. 32.

(G) *He may support Action for Injuries to Ancestor's Monument, &c.*[3]

IV. Liabilities of Heir.

(A) *On Bonds and Obligations.* *See* Bond, vol. ii. pp. 509, 528, 529.

(B) *On Covenants and Conditions of Ancestor.* *See* Covenants, vol. iii. p. 493; Conditions, id. p. 166.

(C) *On Judgments or Recognisances of Ancestor.*[4]

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tenant for life, which determines at his death, then if the person entitled to the rent lives to the beginning of the day on which it is payable, it will vest in his personal representative. But *see* the Statutes of Apportionment, 11 Geo. 2, c. 19, and 4 & 5 Wm. 4, c. 22. A posthumous heir is entitled to the rents of a descended estate only from the date of his birth, whether the prior rents have been actually received or not. *Richards v. Richards*, 1 Johns, 754; 6 Jur. N. S. 1145; 29 L. J. Ch. 836. An estate which, by virtue of settlement, devolves on a posthumous heir as tenant in tail by descent, is not a settled estate within the operation of 10 & 11 Wm. 3, c. 16. (Id.) *See* 2 Smale & Giff. 375.

[1] The heir is entitled to all the title-deeds and muniments connected with the estate of the ancestor. *See post*, Heir-loom, p. 32.

[2] Covenants real, or such as are annexed to estates, shall descend to the heir; and he alone shall take advantage of them; and this not only where there are express words, but also where there are none, for the law by implication reserves to the heir of the feoffor, &c.; for, being prejudiced by the disposition, it is but reasonable he should take the same advantages which his ancestor whom he represents might. If a man, seised of land in right of his wife, makes a feoffment in fee upon condition and dies, and after the condition is broken the heir of the husband shall enter.

In the case of a covenant or contract relating to and running with an estate in land, &c., of which the covenantee was seised in fee, the executor or administrator should, under the 32 Hen. 8, c. 37, sue for a breach in the covenantee's life-time, occasioning him particular damage, unless in the case of a joint tenancy, and his heir or devisee, though not named in the covenant with the lessor, &c., will respectively be the proper parties to sue for a breach of the covenant after the death of the lessor, or which, though committed before, still continues to his prejudice; and if the breach were in the time of the deceased, but he did not sustain any personal damage, the executor cannot sue, but the action must be in the name of the heir or devisee. Upon the death of a tenant for life, his executor is, in different cases, authorised to sue. As to condition, *see* Conditions, vol. iii. p. 166; Covenants, id. p. 488.

[3] The heir may support an action for defacing his ancestor's gravestone, monument, or tomb; for although the freehold of the church be in the parson, and these memorials be annexed thereto, yet the parson cannot deface or remove them. 3 Inst. 186; Cro. Jac. 366. And it has been recently determined (*Spooner v. Brewster*, 10 Moore, 494; S. C. 3 Bing. 136; 2 C. & P. 34); that trespass may be maintained for taking away a tombstone from a churchyard, and obliterating an inscription made upon it, at the suit of the party by whom it is erected, as the right to a tombstone vests in the person who erects it, or in the heirs of the deceased in whose memory it is set up. But although the heir has a property in the monuments and escutcheons of his ancestor, yet he has none in their bodies or ashes, nor can he bring any civil action against such who disturb their remains. 2 Bl. Com. 429.

An heir cannot, in general, support an action for an injury to the personal or real property of his ancestor. Hence, he cannot sustain an action for waste committed in the time of his ancestor, nor can he before entry and actual possession support trespass for an injury to the land. The heir, however, may support *detinue* for the recovery of an heir-loom, or an heir, who is entitled to an estate *per autre vie*, or special occupant, may, in such action, recover the title-deeds relating to the estate. 4 T. R. 229, 231. *See* 2 Saund. 47, a, n.

[4] If the ancestor bind himself in a statute, recognisance, &c. the heir is liable, not only as ter-tenant, but also as heir, but he cannot oblige a purchaser, whether for valuable consideration or without, to contribute; but one heir may compel another to contribute, as if a man seised of two acres, the one descendible according to the course of the common law, the other in borough-English, acknowledge a statute, &c., the heir-at-law shall oblige the heir in borough-English to contribute. So one coparcener shall oblige the other to contribute; or if the conuzor hath lands, some descendible to the heirs of

(D) *On Simple Contracts of Ancestor.*[1]

(E) *For Torts by Ancestor.*[2]

(F) *Extent of Liability of Heir.*[3]

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the father, and some descendible on the heirs of the mother, the heir on the part of the father shall compel the heir on the part of the mother to contribute, and *sic vice versâ*. By the common law, if the heir before an action brought against him had aliened the assets, the obligee was without any remedy; but it seems that before the statute 3 & 4 Wm. & M. c. 5, s. 5, *post*, 31 n., he was responsible in equity for the value of the land aliened before action brought. 1 P. Wms. 777. Upon a motion for a new trial in *Smith v. Higgins*, 3 Bac. Ab. 459, *Twisden* said, that in his practice, the heir in an action of debt against him upon a bond of his ancestor pleaded *riens per descent:* the plaintiff knew the defendant had levied a fine, and at the trial it was produced; but because they had not a deed to lead the uses, it was urged that the use was to the cognizor and his heirs, and so the heir in by descent; whereupon there was a verdict against him, and being a just debt they could never after get a new trial.

In consequence of the doctrine that the lien on the land shall have relation to the time of the writ, it has been adjudged, that where there were two creditors to J. S., whose heir was bound, viz. A. and B., and filed an original in C. B., and had judgment thereon (2 Jac. 2) by default, and thereupon a general *elegit* issued against all the lands of the heir, and a moiety thereof was delivered to A.; and B. on a bill filed in B. R. (1 and 2 Jac. 2), had a special judgment against the assets confessed by the heir (3 Jac. 2); though B.'s judgment be subsequent to A.'s, the judgment should have relation thereto, and therefore he was to be first satisfied. Carth. 245. So it seems in the above case, that though A.'s judgment had been on a writ actually filed before B.'s, B. must have been preferred, because his judgment was general against the heir, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; and therefore such a general judgment will not operate by way of relation to the writ, but binds only as in common cases, from the time of the judgment given. Carth. 245, 246.

[1] The heir is not liable to the simple contract-debts of the ancestor. To render an heir liable to *assumpsit* on bond of his ancestors, in consideration of forbearance, it must appear that he was expressly named in the bond, and had assets by descent. *Barber v. Fox*, 1 Vent. 159: cited T. Raym. 128. *Jones v. Ashburnham*, 4 East, 455. But where the plaintiff declared that the defendant, in consideration that the plaintiff would deliver the bond to him, and discharge the debt, promised, &c., it was holden a good declaration. *Hunt v. Swain*, 1 Lev. 165; T. Raym. 127; 1 Sid. 248. And for the payment of simple contract-debts of an ancestor, his real estate is not available, except in a court of equity; nor is his real estate liable, even in equity, to the payment of his simple contract-debts, until after all the creditors by specialty, in which the heirs are bound, have been paid in full. 3 & 4 Wm. 4, c. 104.

[2] The heir is in no case liable for the torts of his ancestor.

[3] Whenever the ancestor binds himself and his heirs, all his lands of freehold which descend in fee-simple are assets by descent, and shall be liable, as far as they extend, to answer the ancestor's obligations. *See* Bro. Assets; Fit. Assets; Roll. Abr. 269, Assets. But if a copyhold descends to an heir, this shall not be assets, because it is an inheritance created by custom, and the common law directs the descent, but not that it shall have any other collateral qualities which do not concern such descent, and which other inheritances at common law have. 4 Co. 22, a. But lands by descent in ancient demesne shall be assets. 7 Hen. 4, 14; Bro. Assets, 11. So an advowson is assets, and may be extended at the rate of a shilling for every mark of the yearly value of the living. Co. Litt. 374, b. *Robinson v. Tonge*, 3 Bro. P. C. 556; 3 P. Wms. 401; 2 Stra. 879. *Westfaling v. Westfaling*, 3 Atk. 460. For what shall be assets to make a lineal warranty a bar to an estate tail, *see* Co. Litt. 374, b; 2 Inst. 293; Kiln. 104, b. 124; 2 Roll. Abr. 774. A reversion after lease for years, made by the ancestor, is present assets. Salk. 354. In debt against the heir, if he plead *riens per descent*, the plaintiff may have judgment presently, and a *scire facias* when assets descend. 8 Co. 134, in *Mary Shepley's case;* Hob. 199; Vent. 94, 95; Sid. 448. *Dorchester v. Webb*, Cro. Car. 372 So, in a warranted charter against an heir who pleads *riens per descent*, or that the plaintiff is not impleaded, the plaintiff may pray judgment presently. F. N. B. 134; 8 Co. 134; Vent. 194; Hob. 199, S. P. When a man obtains judgment against an heir, who has a reversion in fee descended to him, the judgment is only of assets, *quando acciderent*, and the creditor cannot, by a bill in equity, compel the heir to sell the reversion, but must expect until it falls (*Fortrey v. Fortrey*, 2 Vern. 134); so a reversion expectant upon the determination of an estate for life, *in quasi* assets, and ought to be pleaded specially by the heir; and the plaintiff in such case may take judgment of it, *cum accident*. Carth. 129; 1 Ld. Raym. 53. But a reversion in fee expectant upon an estate tail is not assets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure (6 Co. 58; Roll. Abr. 269; 2 Roll. Rep. 129, S. P.; 3 Lev. 287; 3 Mod. 257; Carth. 129, S. P.), agreed, and that it shall not charge the heir upon the general issue,

V. Proceedings against Heir.

(A) *Process.*[1]

(B) *Declaration.*[2]

riens per descent, but after the tail is spent it is assets. 3 Mod. 257. That such a reversion is assets, for the debt of the first person who was in possession, and who created the reversion, hath been expressly determined by *Lord Hardwick* in *Kinaston v. Clark*, 2 Atk. 204; but whether it be so for the debt of any immediate takers is a point which hath already been much agitated, but hath received no decision. *Tweedle v. Coventry*, 1 Br. Ch. Rep. 240. *Arundle v. Knight*, 1787; id. 260. The case of *Smith v. Parker*, 2 Bl. Rep. 1230, purports to have decided that such a reversion is assets. In this case, however, *Lord Thurlow* observes, in *Tweedle v. Coventry*, the contingent uses never came into possession, so that it was not a reversion after an estate tail, but after an estate for life only. See *Gifford v. Barber*, Vin. Abr. Charge, A. pl. 17. By the Statute of Frauds it is enacted, that if lands come to the heir by reason of a special occupancy, they shall be chargeable in his hands as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. 10 Co. 98, a. An estate *per autre vie*, limited to heirs, is within the Statute of Fraudulent Devises (3 & 4 Wm. & M. c. 14), and liable to specialty debts. *Westfaling v. Westfaling*, 3 Atk. 460. *Marwood v. Turner*, 3 P. Wms. 164. Also by the said statute (ss. 10 and 11), where lands are settled in trust, and descend in fee to the heir of *cestui que trust*, the same shall be assets in the same manner as lands in possession; but the heir shall not, by reason of any plea or other matter, be chargeable to pay the condemnation out of his own estate. An equity of redemption of an inheritance is assets, for the heir having a right in equity, that ought in equity to be liable to satisfy a bond-debt; but the equity of redemption of a mortgage that is forfeited is not assets at law, for at law there is no redemption. 2 Vern. 61.

At the common law, if the heir had *bonâ fide* aliened the lands which he had by descent before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of suing out the writ, and the obligee had no remedy at law, though in equity the heir was responsible for the land. *Coleman v. Wynch*, 1 P. Wms. 777; S. C. Prec. in Ch. 512; 1 Roll. Abr. 269, pl. 2. *Redshaw v. Hester*, 5 Mod. 123. *Gree v. Oliver*, Carth. 245. *Kinast on v. Clark*, 2 Atk. 204. But now, by stat. 3 & 4 Wm. & M. c. 5, s. 5, reciting, "that several persons, being heirs-at-law, to avoid the payment of such just debts as, in regard of the lands, tenements, and hereditaments descending to them, they have by law been liable to pay, have sold, aliened, or made over such lands, &c. before any process was or could be issued against them, it is enacted, that in all cases where any heir-at-law shall be liable to pay the debts of his ancestor, in regard of any lands, &c. descending to him, and shall sell, alien, or make over the same before any action brought or process sued out against him, that such heir-at-law shall be answerable for such debt or debts, in an action or actions of debt, to the value of the said land so by him sold, aliened, or made over, in which case all creditors shall be preferred, as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts, saving that the lands, *bonâ fide* aliened before the action brought, shall not be liable to such execution." And by sect. 6 it is enacted, "that where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him; and the plaintiff may reply that he had lands, &c. from his ancestor before writ. Whenever the plaintiff replies according to this statute, he is not entitled to a general judgment, as he was at common law, but can recover only the value of the land sold, as found by the jury, be it what it may (*Redshaw v. Hesther*, Carth. 354; S. C. Comb. 344; 5 Mod. 119, 122, 123); and the jury must find the value; for if they neglect to do so, the court will award a *venire de novo*. *Jeffry v. Barrow*, 10 Mod. 18, 19. That which the jury is directed to find is the gross value, in which respect it differs from the writ of inquiry at common law, for that was to inquire the annual value. By 11 Geo. 4, and 1 Wm. 4, c. 47, s. 6, the heir is made liable in regard to assets descended, though he has sold before action brought, to the value of the lands sold; and by the same statute (ss. 2, 3, 4), whenever a deceased person shall have devised any real estate without making it subject to his debts, such devise shall be void as against the covenanters, &c. of the testator, and in such cases the creditor may sue the heir and devisee (or the devisee of the devisee) jointly, or sue the devisee alone where there is no heir liable.

[1] If there be no devisee the action should lie against the heir alone; but if there be a devisee he should be joined. 11 Geo. 4, and 1 Wm. 4, c. 47, s. 3; Ch. Arch. Pr. 1118. *See* 3 Ad. & E. 839. An heir cannot be held to bail for a debt of his ancestor. *Palmer v. Staveley*, 12 Mod. 495; 1 Salk. 24; 1 Ld. Raym. 669.

[2] The declaration is filed or delivered as in ordinary cases. As to form, *see post*, Pleading.

(C) *Plea, and subsequent Pleadings.*[1]

(D) *Evidence.*[2]

(E) *Issue and Judgment.*[3]

(F) *Execution.*[4]

HEIR-LOOM.[5]

HERIOTS.[6]

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[1] The defendant, besides the defences which the ancestor might have set up to the action, may plead that he is not heir, or that he has paid other bond or judgment-creditors to the full extent of the value of the lands descended, before the commencement of the action (1 Stra. 665); or that he retains in order to pay judgment-debts; or that he retains to pay his own bond or judgment-debts; or that he has nothing by descent, excepting a reversion expectant on the life of another, in which case the plaintiff may take judgment of assets, *quando acciderent* (Dy. 373, b; Carth. 129; 2 Ld. Raym. 784; Lil. Prac. 208, pl. 218), and afterwards proceed by *scire facias*, when the estate has come into possession; but if the reversion were expectant on an estate for years, the defendant should confess assets in possession to the amount of the value of the reversion. 2 Saund. 7, c. The defendant cannot plead that there is an executor who has assets, for the obligee may, at his election, sue either the heir or executor. Bro. Abr. Assets per Descent; 33 Plowd. 439, b; Dy. 204, b; 3 Lev. 139; 2 Atk. 426; 1 P. Wms. 203. *See* also Bond, vol. ii. pp. 528, 529.

[2] We have already seen what are assets, and their nature and extent must be proved. If the defendant pleads *riens per descent*, and the jury find that he has something, however small it may be, and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt. 2 Saund. 7, n. a. It is therefore unnecessary to prove the value of the assets descended. On this issue the defendant may show a bond to the king by his ancestor, and an extent thereon to the amount of the assets; but proof of the extent alone is not sufficient. *Sherwood v. Adderley*, 1 Ld. Raym. 734. And when the defendant has paid another bond-creditor to the value of the land descended, he should plead it. *Buckley v. Nightingale*, 1 Stra. 665.

[3] The issue is made up, and the subsequent proceedings to judgment are the same as in ordinary cases.

[4] We have before seen, that in debt against an heir on the obligation of his ancestor, the judgment for the plaintiff is general for the debt and damages, or special, directing them to be levied of the lands descended. On a general judgment, the execution may be general also against the defendant, his goods and chattels, his lands by *fieri facias*, *capias ad satisfaciendum*, or *elegit* (2 Roll. Abr. 71); but when the judgment is special, the execution is so likewise. *See* 1 & 2 Vic. c. 110.

[5] Comprehends divers implements of household, such as the first best bed and other things, which by the custom of some counties have belonged to a house for certain descents, and are never inventoried after the decease of the owner as chattels, nor do they go to the executor, but accrue to the heir with the house itself; by custom, and not by the common law, these are not devisable by will, for the law prefers the custom before a devise, which takes not effect till after the death of the testator, and then they are vested in the heir by the custom (Co. Litt. 18, 185; 2 Bl. Com. 429); but sale in a man's lifetime is lawful. The ancient jewels of the crown are heir-looms, and shall descend to the next successor, and are not devisable by will. 1 Inst. 185. And heir-looms in general are said to extend to all such things as cannot be moved without damaging the freehold, as chimney-pieces, &c.; and deer in a real authorised park, fishes in a pond, rabbits in a warren, and doves in a dove-house, are held to be part of the inheritance, and belong to the heir, not to the executor. It is the same of charters, court-rolls, deeds, and other evidences of the land, together with the chests and boxes in which they are contained; and where an ancient horn had immemorially gone with the estate, and had been delivered to the plaintiff's ancestors to hold their lands by it, it was held that it should go with the land as an heir-loom. See *Pusey v. Pusey*, 1 Vern. 273; *ante* Executors, vol. iv. pp. 366–368. *See* 1 F. & H. 40; 3 L. T. (N. S.) 129.

[6] A heriot signifies a tribute to the lord of the manor of the best chattel which the tenant dies possessed of. As to the several kinds of heriots, some are due by custom, some by tenure, and some by reservation on deeds executed within time of memory: those due by custom are the most frequent, and arose by the contract or agreement of lord and tenant, in consideration of some benefit or advantage accruing to the tenant, and for which an heriot, as the best beast, best piece of household furniture, &c., became due and belonged to the lord, either on the death or alienation of the tenant; and which the lord may seize, either within

HIGHWAYS.

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I. Of the Ownership of the Soil.[1]

the manor or without, at his election. Dyer, 199, b; Bro. Heriot, 23. Heriots are now, therefore, to be considered as usually divided into two sorts — heriot service, and heriot custom. The former, being such as are due upon a special reservation in a grant or lease of lands, therefore amount to little more than a mere rent. 2 Saund. 166. The latter arise upon no special reservation whatsoever, but depend merely upon an immemorial usage and custom. For heriot service, the lord may distrain any beast belonging to the tenant on the land. Also it has been held that the lord may distrain any man's beasts which are upon the land, and retain them until an heriot is satisfied. Co. Litt. 185; Litt. Rep. 33; Cro. Car. 260. So it has been ruled, that for a heriot custom or service, the lord may seize as well in the manor as out; but if he distrain, it must be in the manor. 1 Salk. 356; 1 Show. 81; S. P. 3 Mod. 231. But it is now stated as positive law, that for heriot custom, which Coke says (Co. Cop. s. 25) lies only in prender and not in render, the lord may seize the identical thing itself, but cannot distrain any other chattel for it (Cro. Eliz. 590; Cro. Car. 260; 3 Comm. 15, c. 1); and this is confirmed by the following authorities. For heriot custom the lord is to seize, not distrain; and he may seize the best beast, &c., though out of the manor or in the king's highway, because he claims it as his proper goods by the death of the tenant, which he may seize in any place where he finds it. Kitch. 267; 2 Inst. 132; 2 Nels. Abr. 931; Plowd. 96; Keilw. 82, 4; 1 Salk. 356; Bro. Heriot, 2, 3. It seems that a custom for the homage to assess a compensation in lieu of a heriot, to be paid by a customary tenant, cannot be sustained. *Parkin v. Radcliffe*, 1 B. & P. 282. And evidence that a pecuniary assessment has always been made in the name of a heriot, will not support the claim of a heriot in kind. *Parkin v. Radcliffe*, id. 398; and *see* Copyhold, vol. iii. p. 248.

[1] The freehold of the highway is in the owner of the soil. *Lade v. Sheppard*, 2 Stra. 1004. It does not comprehend the minerals or earth under the surface (Roll. Abr. 392); nor the fences on either side (*R. v. Commissioners of Landillo*, 2 T. R. 232); but the public are *primâ facie* entitled to the entire

II. What is a Highway.[1]

III. Of the Dedication.[2]

space between the fences. 31 L. J. M. C. 166. And the law will presume that waste land adjoining a road, and the road itself *usque ad medium filum viæ*, belong to the owner of the soil of the adjoining enclosed land, whether he be freeholder, copyholder, or leaseholder, and not to the lord of the manor; but this presumption will be rebutted by acts of ownership, or other evidence of property. *Simpson v. Dendy*, 6 Jur. N. S. 1197. *Stell v. Prickett*, 2 Stark. 468. *Doe d. Pearsey*, 7 B. & C. 304. See *Doe v. Hampson*, 4 C. B. 267. *Doe v. Kemp*, 7 Bing. 332. And in case a strip by the side of the highway communicate with open commons, the presumption will not arise, or, at least, be much weakened. *Grose v. West*, 7 Taunt. 39. *See* also *White v. Hill*, 6 Q. B. 487.

The owner of the soil may maintain trespass for damage done to the soil of the highway. *Lade v. Sheppard*, 2 Stra. 1004; 1 Burr. 143.

There is nothing in the Highway Acts to alter the presumption of the ownership of the soil of the highway vesting in the owner of the adjacent land *ad medium filum viæ*, or to vest the soil of the road in the trustees. *Salisbury v. Great Northern Railway Co.* 5 C. B. (N. S.) 174; 28 L. J. C. P. 40.

[1] Highways are of three kinds — (1) a footway for man alone to pass along; (2) a foot and horseway, sometimes called a pack and prime way; (3) a road for carriages, horses, and men; and this last is twofold, either *regia via*, the king's highway for all men, &c., or *communis strata*, belonging to a city or town, or private persons. Co. Litt. 56 a. *R. v. Hammond*, 1 Stra. 44; 10 Mod. 382. But this distinction is no longer of any efficacy, for a common street is a public highway. *Woodyer v. Hadden*, 5 Taunt. 125.

A navigable river is a highway. *R. v. Hammond, supra.* A public railway, and the towing-path of a canal, are highways. *R. v. Severn & Wye Railway Co.* 2 B. & Adol. 646. *Badger v. South-York Railway Co.* 28 L. J. Q. B. 120. See *Monmouth Canal and Railway Co.* 4 H. & N. 427. *R. v. Trafford*, 1 B. & Adol. 874; and 8 Vic. c. 20, s. 92.

A turnpike-road, made under an act to be in force for 21 years, and open to the public only on payment of tolls, is still a highway. *Reg. v. Lordsmere*, 15 Q. B. 689. Though the road lead merely from a hamlet, it may be termed a highway. *R. v. Harrow*, 4 Burr. 2090. And even if there be no thoroughfare. *Gwynne v. Hardwicke*, 1 H. & N. 49. But, at the same time, the fact of a way being a *cul de sac* would be an argument against the inference of dedication. *Bateman v. Bluck*, 21 L. J. Q. B. 406. See *Trustees of Rugby Charity v. Merryweather*, 11 East, 376, n. *Woodyer v. Haddon*, 5 Taunt. 125. *Wood v. Veal*, 3 B. & A. 454. And a passage from one part of a public street to another, made originally for private convenience, may become a highway by uninterrupted user. *R. v. Lloyd*, 1 Camp. 260. A public way must lead between two public places. *Campbell v. Lang*, 1 Macq. H. of L. C. 451. *Young v. Cuthbertson*, id. 455.

A highway must originate either, 1st, from custom, usage, or possession; or 2d, from an act of parliament. First, the principal mode of acquiring a public right of way is by uncontested possession. The public as a body have no purchasing power; even a parish is unable to become a party to a contract, and can, therefore, enter into no agreement as to the sale of a right of way: hence the right becomes vested in the public by the dedication thereof to their use on the part of the landowner. As to what acts or omissions are sufficient to constitute this dedication, is a question upon which no certain rules can be laid down as applicable to every case. A dedication is supposed to take place through a mutual agreement between the owner of the land and the public; therefore, the consent of both these parties must be expressly or impliedly given. 2dly, highways may be created by turnpike acts, inclosure acts, or other acts of parliament, containing specific enactments for such purposes. The quality of these ways must, of course, depend upon the nature of the enactments in the respective acts by which they are brought into existence.

Highways are now regulated by the 5 & 6 Wm. 4, c. 50, which, however, does not apply to the streets of the metropolis, nor to any turnpike-roads, or any roads, bridges, &c. under any personal or local act; nor is it to affect the universities, or the city of London, or the powers of the Commissioners of Sewers.

Besides the local acts under which most turnpike-roads are managed, there are a few public and general turnpike-acts applicable to all; namely, 3 Geo. 4, c. 126; 4 Geo. 4, c. 95; 9 Geo. 4, c. 77, ss. 19, 20; 1 & 2 Wm. 4, c. 25, s. 4. *See* also 4 & 5 Vic. c. 59; 11 & 12 Vic. c. 96; 12 & 13 Vic. c. 87; 14 & 15 Vic. c. 37; 15 & 16 Vic. c. 58; 20 & 21 Vic. c. 81; 23 & 24 Vic. c. 67; and id. c. 73. The roads in South Wales are regulated under stats. 7 & 8 Vic. c. 91; 8 & 9 Vic. c. 61; 10 & 11 Vic. c. 72; and 14 & 15 Vic. c. 16.

A turnpike trust may be within the provisions of 4 & 5 Vic. c. 59, although the road was made after it was passed, and the tolls are taken under a public general statute. *Trustees of Sunk Island Turnpike-road v. Patrington*, 1 Best & Smith, 747.

[2] There must be a dedication of the highway to the public by the owner of the soil. In order to constitute such a dedication, there must be an intention to dedicate — an *animus dedicandi*, of which the user by the public is evidence, and no more — and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment. *Poole v. Huskinson*, 11 Mee. & W. 827. *Per*

IV. Surveyors of Highways.[1]

Parke, B.: Surrey Canal Co. v. Hall, 1 Man. & G. 392. Uninterrupted user by the public for a number of years is evidence from which a dedication may and ought to be presumed; and it is not necessary, in order to raise that presumption, to give evidence of title. *Reg. v. Petric*, 4 E. & B. 737. *Reg. v. East Mark*, 11 Q. B. 877. *Lade v. Sheppard*, 2 Stra. 1004. *R. v. Lloyd*, 1 Camp. 260. If the owner cause a bar, rail, or gate, however slight, to be erected across the way or street, the presumption will be rebutted, notwithstanding the public may in general be allowed to pass (*Woodyer v. Haddon*, 5 Taunt. 125. *Roberts v. Karr*, 1 Camp. 262, n.); for a mere permissive user is consistent with a right to resume the way. *Barraclough v. Johnson*, 8 Ad. & E. 99.

The doing of repairs upon the road by the parish in which it is situated is evidence of its being a highway. *R. v. Leake*, 5 B. & Adol. 469. And where an unfinished street, leading from an old public street to a new road across fields, one half of which was lighted, and the other neither lighted nor paved, and it had been used for five or six years by the inhabitants, who had paid the highway and paving-rates, it was held that there was evidence of a dedication to the public. *Jarvis v. Dean*, 3 Bing. 447. There cannot be a dedication to a limited part of the public, as a particular parish. *Poole v. Huskinson, supra.* And it has been doubted whether there can be a dedication for a limited object, as to carry all goods, except coals, over the way. *Marquis of Stafford v. Coyney*, 7 B. & C. 257.

There can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity. *Dawes v. Hawkins*, 8 C. B. (N. S.) 848; 7 Jur. N. S. 262. A highway may, however, it has been said, be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining lands, for the purpose of depositing goods thereon. *Morant v. Chamberlain*, 6 H. & N. 541; 30 L. J. Ex. 299.

The dedication must, in general, be by the owner of the fee; a leaseholder, however long his term, or a person having only a limited estate, cannot devote any portion of the land to a highway, so as to bind the reversioner. *Wood v. Veale*, 5 B. & Ald. 454. But user by the public is evidence of dedication by the owner of the fee, whoever he was, and it is not necessary to show who the particular owner was. *Reg. v. East Mark, supra. Reg. v. Petrie, supra.* If the existence of a term or other limited estate be shown, but there has been a continuance of the user after its determination, it is evidence that the owner of the fee assented to it, if it was with his knowledge. *Harper v. Charlesworth*, 4 B. & C. 574. And where there had been a user for a great many years, during which the land was in the occupation of tenants, and it appeared that complaints had been repeatedly made by one of the tenants to the landlord's steward, but no action was brought against any trespasser, a dedication by the landlord was presumed. *R. v. Barr*, 4 Camp. 16. No inference of dedication can arise where the land is vested by statute in trustees for a special purpose inconsistent with the enjoyment by the public of a right of way over the *locus in quo. R. v. Leake, supra.*

Where a road had been used by the public without interruption for about 30 years, but it appeared that in 1814, 22 years before the action commenced, an agreement was made by the owner of the soil on one side, and a company, and the surveyor of highways of the hamlet, and others, on the other side, by which the owner agreed to let them use the road, on the company paying 5*s.* a-year, and finding cinders, and the hamlet loading and spreading them:—*Held*, that, although the evidence of user *per se* would show a dedication by the owner of the soil, it was explained by the agreement of 1814, and that the agreement only amounted to a license to use during such time as the conditions in it should be observed. *Barraclough v. Johnson*, 3 Nev. & Per. 233; 8 Ad. & E. 99.

As to Turnpike-Roads.—They are so called from their having been either originally formed, or subsequently regulated by acts of parliament, which have provided the means of keeping them in repair by the tolls which are taken at the turnpike-gates for that purpose. Materials may be procured for such roads by their surveyors, in like manner as the Highway Acts have directed with regard to the highways more immediately under the care and management of parishes. 3 Geo. 4, c. 126, s. 97. And when the funds of a turnpike trust are insufficient for the repairs of the road, the justices, at a special session for the highways, have power to examine the state of the revenues and debts of the trust, and to inquire into the state and condition of the repairs, and if they think fit so to do, to order what portion, if any, of the rate levied, or to be levied, under 5 & 6 Wm. 4, c. 50, shall be paid to the trustees or their treasurer by the surveyor of the parish, township, or other district maintaining its own highways. See *Reg. v. Derbyshire*, 7 Q. B. 193. *Reg. v. Morrice*, 2 D. & L. 952. *Reg. v. Preston*, 12 Q. B. 816. *Reg. v. Berkshire*, 8 Dowl. 726. *Reg. v. South Shields Roads*, 3 E. & B. 599. *Reg. v. White*, 4 Q. B. 101.

[1] By 5 & 6 Wm. 4, c. 50, s. 6, the inhabitants of every parish maintaining its own highways are required, at their first meeting in vestry for the nomination of overseers of the poor in every year, to proceed to the election of one or more persons to serve the office of surveyor in the said parish for the year then next ensuing. If there be no meeting for the nomination of overseers, the inhabitants contributing to

the highway-rate are to meet at their usual place of public meeting upon the 25th day of March, or within fourteen days next after, for the purpose of such election of a surveyor or surveyors. See *Reg. v. Kershaw*, 6 El. & Bl. 999; 26 L. J. M. C. 19. An outgoing surveyor is to continue to act until his successor shall be appointed, and is eligible for re-election. The qualification for the office is occupancy in the parish, or in an adjoining parish, and possession of an estate in houses, &c. within the parish, of the annual value of 10*l.*, or personal estate of the annual value of 100*l.* The person elected may provide a sufficient deputy, subject to the approval of the justices. (Sect. 7.) Refusal to accept the office, or appoint a deputy, without sufficient excuse, subjects the person to a penalty not exceeding 20*l.* (Sect. 8.) If a township is bound to repair its own highways separately from the rest of the parish, it ought to appoint a separate surveyor. *R. v. King's Newton*, 1 B. & Adol. 826. If two persons be appointed for one parish, both are surveyors. *Morrell v. Martin*, 3 Man. & G. 581. A poll may be demanded upon the election by the vestry. *Reg. v. St. Pancras Vestrymen*, 11 Ad. & E. 15. *Ex-parte Grossmith*, 10 L. J. Q. B. 359. *Reg. v. D'Oyley*, 12 Ad. & E. 139. A party grieved by the appointment of a surveyor may appeal under sect. 105. *Reg. v. St. Alban's*, 3 B. & C. 698.

Instead of electing surveyors as above, the majority of the inhabitants so assembled may elect one person of skill and experience to serve the office of surveyor of such parish, and may fix such salary for the execution of the office as they think fit, which appointment is to be in writing on paper, without stamp, and signed by the chairman of the meeting. 5 & 6 Wm. 4, c. 50, s. 9. The salary is paid out of money raised under the authority of this act. (Id.)

The justices have power at a special sessions for the highways to appoint the surveyor in case of neglect of the inhabitants to do so, or the death or disqualification of the surveyor elected by them, &c. (Sects. 11, 12.) See *R. v. Denbighshire*, 4 East, 142. *Reg. v. Best*, 5 Dowl. & L. 48.

Upon the application of the inhabitants, parishes may be united into a district, and a surveyor appointed for the district, by order of justices. (Sects. 13, 14.) As to the duties of the district surveyor, *see* sects. 16, 17.

In districts for which a local board of health has been appointed, such local board are surveyors of the highways within the district, and have all the powers and duties of surveyors under the 5 & 6 Wm. 4, c. 50; 11 & 12 Vic. c. 63, s. 117.

The duties of the surveyor are specified in the act 5 & 6 Wm. 4, c. 50: he is to repair and keep in repair the several highways in the parish for which he is appointed (sect. 1), to erect direction-posts, to secure horse-causeways and foot-causeways by posts, blocks, or stones, or banks of earth, from being passed over and spoiled by waggons, &c. (Sect. 24.) *Ellis v. Woodbridge*, 8 C. B. (N. S.) 290.

The 24th section does not apply to the erection of posts at the extremity of a way for the purpose of protecting it from trespassers: it applies to posts erected to protect the footway from injury by waggons, &c. *Ellis v. Woodbridge, supra.*

The surveyor is also to remove obstructions caused by snow, falling down of banks, or any other cause (sect. 26), to make rates (sect. 27), to keep separate and distinct accounts of the monies levied for the highway-rate, specifying the different sums and the times when the persons to whom and by whom the same shall have been collected and paid. (Sect. 39.) He is also to keep a book, in which is to be entered a just, and true, and particular account of all money which has come to his hands as surveyor, and to whom, and on what occasions, and for what work, and in what place, and on what day he has paid or applied the same; and also an account of all tools, materials, implements, and other things provided by him for the repair of the highways, which is to be open to the inspection of rated inhabitants; and a penalty is incurred in case of neglect of this duty. (Sect. 40.) As to the delivering up of the books, tools, &c., *see* sects. 42, 43. The accounts of the surveyor, signed by him, are laid before the parishioners in vestry within fourteen days after the election or appointment of surveyor, and within a month after the same event before the justices, at a special sessions for the highways holden at the place nearest to the parish or district for which such surveyor shall have been appointed; and such justices are required to examine him as to the truth of the said accounts, or of any charge contained therein. And if any person chargeable to the rate authorised to be made by this act has any complaint against such accounts, or the application of the monies received by the said surveyor, he may complain to the justices at the time of the verification of the accounts, who are required to hear the complaint, and if they think fit, to examine the surveyor upon oath, and to make such order as to them seems meet. (Sect. 44.) See *Adams v. Lakeman*, El. Bl. & El. 615. No appeal lies to the general or quarter sessions against the allowance of the surveyor's accounts by the special sessions. *Reg. v. West Riding of Yorkshire*, 1 Q. B. 624.

The surveyor may charge in his account the expense of defending indictments which have been agreed to at a vestry, or allowed by two justices. (Sect. 111.) *Townsend v. Read*, 10 C. B. (N. S.) 317; 30 L. J. M. C. 245.

The decision of the sessions upon a complaint made by an inhabitant against the surveyor's accounts is the subject of an appeal to the superior courts under 20 & 21 Vic. c. 43. *Townsend v. Read*, 10 C. B. (N. S.) 398; 30 L. J. M. C. 223.

No appeal lies on the part of the surveyor against an order of justices in highway sessions allowing part of his accounts and dis-

V. Highway Board under 5 & 6 Wm. 4, c. 50.[1]

VI. Of Highway Districts under 25 & 26 Vic. c. 61.[2]

allowing the rest, and ordering him to pay over to his successor the amount disallowed. *Reg. v. Leicestershire*, 8 El. & Bl. 557.

The surveyor may be compelled by *mandamus*, if he neglect within the prescribed time, to produce his accounts. *R. v. Round*, 4 Ad. & E. 139. *R. v. Lewis*, 1 Dowl. 530.

The surveyor is prohibited, under a penalty, having any interest in any contract connected with the repair of the highways under his charge. (Sect. 46.)

As to surveyors in highway districts under 25 & 26 Vic. c. 61, *see infra.*

[1] By the 5 & 6 Wm. 4, c. 50, s. 18, power is given to form a board for the superintendence of the highways in any parish (*Reg. v. Bush*, 9 Ad. & E. 820), where the population, according to the last census, exceeds five thousand, if so determined by a majority of the vestry. The members of the board are elected by the vestry, "not exceeding twenty, nor less than five, being respectively householders, and residing in, and assessed to, the rate for the relief of the poor of the said parish, and also liable to be rated to the repairs of the highways in the said parish, under and by virtue of this act." The persons so elected, or any three of them, are to act as a board, and to carry into effect the powers, authorities, and directions in this act contained. The board may appoint a collector or collectors of rates to be made under this act, and employ a person to act as an assistant-surveyor, and also a clerk to attend the board: such assistant-surveyor and clerk to be paid such reasonable salaries out of the rates as the board may determine. They are also empowered to appoint a treasurer, and to take security from him. See *R. v. Patteson*, 4 B. & Adol. 9. They may rent, or, with the consent of the vestry, purchase, ground for the keeping of implements and materials necessary for the reparation of the highways, and may determine and direct how, and in what manner, the highways in the parish, or any and what parts, shall be kerbed or paved with stone, or otherwise. (Sect. 19.)

[2] *As to the Formation of Districts.*—By the 25 & 26 Vic. c. 61, which applies to England and Wales, provision is made for the formation of highway districts, and the appointment of boards to have the management and control of the highways within such districts. For this purpose any five or more justices of a county may, by writing under their hands, require of the clerk of the peace to add to or send with the notice required by law to be given of the holding of courts of general or quarter sessions, a notice that at the court therein mentioned a proposal will be made to the justices to divide the county, or some part thereof, into highway districts, or to constitute the whole or some part thereof a highway district, and also require the clerk of the peace to send by post notices in the aforesaid form to the churchwardens or overseers of every parish mentioned in the said notice; and upon such requisition being complied with, the justices assembled at the court of general or quarter sessions mentioned in the notice may entertain such proposal, and make a provisional order dividing their county, or some part thereof, into highway districts, or constituting the whole, or some part of their county, a highway district for the more convenient management of highways; but such order shall not be of any validity unless it is confirmed by a final order of the justices assembled at some subsequent court of general or quarter sessions: provided that, when it is proposed that only a part of a county shall be divided into a highway district, not less than two out of the five justices making such proposal shall be resident in the said district. (Sect. 5.) For the mode of proceeding on the order of justices, *see* sect. 6.

As to where Districts may be formed.—A highway district under the 25 & 26 Vic. c. 61, cannot be formed in any part of a county to which the 23 & 24 Vic. c. 68, for the management of highways in South Wales, applies; nor in the Isle of Wight; nor in any district constituted under the "Public Health Act, 1848," or the "Local Management Act, 1858;" nor where the highways are under a board established in pursuance of the principal act, 5 & 6 Wm. 4, c. 50, s. 18; nor within the limits of the metropolis, as defined by 18 & 19 Vic. c. 120; nor in any parish or place, or part of a parish or place, the highways whereof are maintained under the provisions of any local act of parliament. (Sect. 7.)

Within the limits of a borough, the consent of the counsel of the borough, and of the vestry of the parish, which, or part of which, is proposed to be included in the district, must be obtained. Parishes separately maintaining their own highways, and situate in more than one county, are deemed to be within that in which the parish church, or if no church, the greater part of the parish, is situate. Townships, tithings, hamlets, and places, each maintaining its own highways, forming a parish separately maintaining its own poor, may be combined for the purpose of maintaining the highways. (Sect. 7.)

When the board is appointed, all the property, before the creation of the board vested in the surveyor or surveyors become vested in them, subject to the debts and liabilities affecting the same, and the powers of the surveyors, except the power of making and levying highway-rates, become transferred to the board, who hold the property upon trust for the several parishes or places maintaining their own highways within their

district to which such property belongs, or for the benefit of which it was held previously to the formation of the district. (Sect. 11.)

As to the Highway Board.—The board consists of the waywardens elected in the several places within the district, and of the justices acting for the county, and residing within the district. It is a body corporate, having a perpetual succession and a common seal, with power to acquire and hold lands for the purposes of the Highway Acts. Their acts cannot be questioned on account of any vacancy in their body, nor by reason of any want of qualification of members, if the majority of members, parties to the proceedings, were entitled to act. Their minutes signed by the chairman are receivable in evidence without further proof; and the meeting itself is presumed to have been duly convened and held. The members are protected against individual liability for contracts entered into, or other acts done pursuant to the powers of the board; and they are entitled to indemnify themselves out of monies in their hands against losses, costs, or damages so incurred. (Sect. 9.) The waywardens are elected annually, one or more, as ordered by justices, in each parish, in the same manner and subject to the same qualification as surveyors. They are eligible for re-election, and remain in office till their successors are appointed. (Sect. 10.)

Any highway district formed under this act may from time to time be altered by the addition of any parishes, in the same or in any adjoining county, or the subtraction therefrom of any parishes; and new highway districts may be formed by the union of any highway district, in the same or any adjoining county, or any parishes forming part of any highway districts; or any highway district may be dissolved. The proceedings to effect this object are similar to those which must be taken for the original formation of a district. (Sect. 39.) Further, any parish, or part of a parish included in a highway district, may adopt the Local Government Act, in the same manner, and under the same circumstances, in and under which it might have adopted the same if it had not been included in such district; and upon such adoption being made, such parish, or part of a parish, shall cease to form part of such district, subject nevertheless to the payment of any contribution that may, at the time of such adoption, be due from such parish, or part of a parish to the highway board.

Any summons or notice, or any writ or proceedings at law or in equity, requiring to be served upon the board, may be served by the same being left at or transmitted through the post, in a prepaid letter, directed to the office of the board, or being given personally to the district surveyor or clerk of the board. 25 & 26 Vic. c. 61, s. 42.

As to the Officers within Highway Districts.—The board is required, at their first meeting or at an adjournment, to appoint by writing, under their seal, a treasurer, clerk, and district surveyor, and if they think fit, an assistant-surveyor. Salaries may be paid to the clerk and district and assistant-surveyor, and to the treasurer, if the board think necessary. The treasurer must give security. (Sect. 12.) No more than one of these offices can be held at the same time by the same person, or by persons in partnership, or standing in the relation of employer and clerk, agent, or servant. (Sect. 13.) The treasurer must account at least quarterly. (Sect. 14.) The clerk attends the meetings, makes minutes, and conducts the correspondence of the board. The district surveyor acts as the agent of the board in carrying into effect all the works, and performing all the duties, by this act required to be carried into effect or to be performed by the board. The assistant-surveyor performs such duties as the board may require, under the direction of the district surveyor. (Sect. 16.) The officers must account when required. (Sect. 31.)

As to the Duties of the Board.—The highway board maintains in good repair the highways within their district, and, subject to the provisions of the act 25 & 26 Vic. c. 61, as respects the highways in each parish within their district, perform the same duties, have the same powers, and are liable to the same legal proceedings, as the surveyor of such parish would have performed, had, and been liable to, if that act had not passed. It is the duty of the district surveyor to submit to the board, at the first meeting in every year, an estimate of the expenses likely to be incurred during the ensuing year, for maintaining and keeping in repair the highways in each parish within the district of the board, and to deliver a copy of such estimate, as approved or modified by the board, so far as the same relates to each parish, to the waywarden of such parish.

[1] By 5 & 6 Wm. 4, c. 50, s. 27, in order to raise money for carrying the act into execution, a rate is to be made, assessed, and levied by the surveyor upon all property now liable to be rated and assessed to the relief of the poor: provided that the same rate shall also extend to such woods, mines, and quarries of stone, or other hereditaments, as have heretofore been usually rated to the highways. See *Reg. v. Rose*, 6 Q. B. 153. *Reg. v. Randall*, 4 E. & B. 564. Every rate is to be signed by the surveyor, and allowed by two justices of the peace, and published the same way as poor-rates are now allowed and published. (Sect. 27.) *Ex-parte Skelton*, 23 L. J. M. C. 17. Concurrent rates for the same period are bad; but a second rate may be made before the whole of a former rate has been collected. *Reg. v. Best*, 5 D. & L. 40.

Where a Local Board of Health are surveyors of the highways of a district under 11 & 12 Vic. c. 63, highway-rates made by them need not be allowed or signed. (Sect.

117.) Where the district is conterminous with a single parish, the local board may make the rate under the 5 & 6 Wm. 4, c. 50. *Hanson v. Epsom Local Board*, 25 L. J. M. C. 27. See *Reg. v. Trustees of Worthing Roads*, 3 E. & B. 989. If the district includes several parishes, separately maintaining their own highways, the local board cannot make separate rates for each parish, but must raise the funds by a general district rule under the 11 & 12 Vic. c. 63. *Elmer v. Norwich Local Board*, 3 E. & B. 517.

The surveyor has a right, at all reasonable times, to inspect any of the poor-rates of the parish for which he is surveyor, or the books in which the assessments thereto are entered, in order to enable him to form a proper judgment of the highway-rate. 5 & 6 Wm. 4, c. 50, s. 28. The rate must contain the names of the occupiers, the description of the premises or property they occupy, and the full annual value of such premises or property, and must specify the sum in the pound at which it is made, which must not exceed tenpence in the pound at any one time, or two-and-sixpence in the pound in the whole in any one year, unless with the consent of four-fifths of the inhabitants, at a meeting specially called for the purpose. (Sect. 29.) Errors in the rate may be corrected with consent of the justices. (Sect. 31.) Composition may be made with landlords, as in the case of poor-rates. (Sect. 33.) And the vestry of any parish may order that the owners of tenements, the yearly value of which does not exceed 6*l.*, shall be rated to the highway-rate instead of the occupiers; and while such order is in force the owners are to be assessed at three-fourths of the amount at which such tenements would otherwise have been rated. 13 & 14 Vic. c. 99, ss. 1, 3, 4. The justices may exempt a person on the ground of poverty. 5 & 6 Wm. 4, c. 50, s. 32. And when property, or the owner or occupier in respect thereof, was previously to the passing of the act legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or highway-rate, they are exempt from the payment of the rates thereby imposed. Id. sect. 33. See *Reg. v. Browne*, 13 Q. B. 654. *Reg. v. Justices of Oxfordshire*, 6 D. & L. 288. Money payments in lieu of tithes are liable to be rated in the same manner as the tithes for which they were substituted. *R. v. Boldero*, 4 B. & C. 467; 6 D. & R. 557. See *Cortis v. Kent Waterworks Co.* 7 B. & C. 314. *R. v. Lacy*, 5 id. 702; 8 D. & R. 457.

The maintenance of the highways within the district of a local board must be provided for by a district rate, and not by a highway-rate, whether the district be or be not conterminous with an ancient parochial division. *Taff Railway Co. v. Cardiff Local Board*, 8 El. & Bl. 535.

Where by a local act commissioners were empowered to declare in writing streets when laid out and made to be public highways, and to make rates for their repair, it was held that a street made and dedicated by an owner was a highway within the 11 & 12 Vic. c. 63, and that a rate for its repair might be made under that statute, but could not be made under the local act, the commissioners not having declared it in writing to be a highway as required by the local act. *Wallington v. White*, 10 C. B. (N. S.) 128; 30 L. J. M. C. 209.

Highway-rates may be enforced in the same way as poor-rates. (Sect. 34.) *See* 12 Vic. c. 14. *Charrington v. Johnson*, 13 Mee. & W. 856. *Morrell v. Martin*, 3 Man. & G. 581. The provisions of 41 Geo. 3, c. 23, are applicable to appeals against highway-rates. (Sect. 106.)

The surveyor, with consent of the vestry, may appoint a collector of the rates, at such allowance as the vestry think reasonable (sect. 36), who must give security (sect. 37. See *R. v. Patteson*, 4 B. & Adol. 9), and account to the surveyor. (Sect. 38.)

In Highway Districts under 25 *&* 26 *Vic. c.* 61.—There is a district fund for common expenses, but the expenses of maintaining and keeping in repair the highways of each parish within the district, and all other expenses relating to such highways, except such as are authorised to be charged on the district fund, are a separate charge on each parish. (Sect. 20.) The contribution of each parish is paid by the overseers, on a precept of the board stating the sum, out of monies in their hand applicable to the relief of the poor, except in parishes where the surveyor has, according to custom, levied the highway-rate on premises not liable to be rated to the poor; in which instances the money is to be raised by the waywardens out of a highway rate. (Sect. 21. *See* sect. 22.) The contributions must not exceed 10*d.* in the pound at any one time, nor 2*s.* 6*d.* in the pound in any one year, except with the consent of four-fifths of the ratepayers (sect. 21), subject to the restrictions as to the amount of rates to be levied in pursuance of the act. All overseers or other persons to whom precepts of a highway board are issued, have the same powers, remedies, and privileges, for and in respect of levying the rates authorised to be levied for making payments to a highway board, as they would have in the case of levying ordinary rates for the relief of the poor. (Sect. 23.) Money which the overseers ought to pay to the board may be recovered in a summary way by proceedings before justices. (Sect. 24.) The highway board, at the end of each quarter, delivers or sends, in a prepared letter, to the overseers of every parish, an account of the expenses of maintaining and keeping in repair the highways within their respective parishes during the preceding quarter. (Sect. 30.)

In highway districts under 25 & 26 Vic. c. 61, accounts of the board are made up annually, and transmitted to the churchwardens of each parish in the district; and if a wayward or ratepayer be of opinion that the amount charged to his parish is too much, he may appeal to the general or quarter sessions. (Sects. 25, 26.)

VIII. Repair of Highways.

(A) *Liability of Parish.*[1]

[1] A parish, by the common law, is bound to repair all public highways within it (see *Reg. v. Claxby*, 24 L. J. Q. B. 223); but not to make new roads, or widen old ones (*R. v. Devon*, 4 B. & C. 670), although this obligation is frequently imposed by acts of parliament. *See* the Highway Act and Turnpike Acts. If a road has ceased to exist, as where the soil over which it passed has been washed away by the sea, the parish is not compellable to reinstate it. *Reg. v. Bamber*, 5 Q. B. 279. *R. v. Paul*, 2 M. & Rob. 307. *Reg. v. Hornsea*, 23 L. J. M. C. 59; 1 Dears. C. C. R. 291. See *R. v. Landulph*, 1 M. & Rob. 393. To constitute a want of repair, the road must be foundrous. *Reg. v. Stretford*, 2 Ld. Raym. 1169.

Where a township, liable to repair a way by custom, was relieved of its liability by an act of parliament, it was held that the liability necessarily fell upon the parish at large. *R. v. Sheffield*, 2 T. R. 106. In order to get rid of the duty, the parish must show an obligation on some other person or body, equally durable with that binding the parish, and founded upon a consideration equally durable as the burthen. *R. v. St. Giles*, 5 M. & S. 265. *R. v. Eastington*, 5 Ad. & E. 765. *R. v. Mayor of Liverpool*, 3 East, 86. *R. v. Scarisbrick*, 6 Ad. & E. 509. *Reg. v. Brightside Berlow*, 13 Q. B. 933.

And even if other persons or public bodies made chargeable by statute become insolvent (*Anon.* 1 Ld. Raym. 725), or neglect to repair when necessary (*R. v. St. George, Hanover Square*, 3 Camp. 222), the duty of the parish revives unless it is expressly exempted by the statute (*R. v. Nethesthong*, 2 B. & Ald. 179. *R. v. Lordsmere*, 15 Q. B. 689); and the parish has a remedy over against the trustees or other body who ought to have repaired. *Reg. v. the Trustees of Oxford Roads*, 12 Ad. & E. 427.

An adoption by the parish was not necessary of a highway dedicated to the public, in order to entail the duty of keeping in repair. *R. v. Leake*, 5 B. & Adol. 469. *Contra, R. v. St. Benedict*, 4 B. & Ald. 447. But now, by the 5 & 6 Wm. 4, c. 50, s. 23, the person dedicating must give three calendar months' notice to the surveyor of the parish of his intention to dedicate the highway, after which the question of its utility and acceptance is determined at a vestry meeting. *Reg. v. Westmark*, 2 M. & Rob. 305. *Roberts v. Hunt*, 15 Q. B. 17.

This section does not apply to a road made by the trustees under a turnpike act. *Reg. v. Thomas*, 7 E. & B. 399; 3 Jur. N. S. 713. An appeal lies by the person who made the road to the quarter sessions, against an order of justices, made on the resolution of the majority of the vestry, that a new road is not of sufficient utility to justify its being kept in repair at the expense of the parish. *Reg. v. Derbyshire*, El. Bl. & El. 69; 27 L. J. M. C. 189.

Until the whole of a turnpike-road, as described by the act of parliament, is completed, the burden of repairing it is not thrown upon the parish. *R. v. Camberworth*, 3 B. & Adol. 108. *R. v. Edge Lane*, 4 Ad. & E. 723. *R. v. Camberworth*, id. 731. And where, under an act, the performance of statute duty was to remain in force for a limited period only, it was held not to bind the parish to repair the road after the act had expired. *R. v. Mellor*, 1 B. & Adol. 32. The duty to repair rests *primâ facie* on the whole parish. *Austin's case*, 1 Vent. 189; *R. v. Penderryn*, 2 T. R. 513. *R. v. Clifton*, 2 id. 498. But a hamlet, or other district less than a parish, may be liable, by custom or prescription, to repair the highways within it. *R. v. Great Broughton*, 5 Burr. 2700. *R. v. King's Newton*, 1 B. & Adol. 826. See *R. v. Kingsmoor*, 2 B. & C. 190.

A corporation aggregate may be bound by prescription to repair a road (1 Hawk. P. C. 6; 1 Ch. 76, s. 8); but not an individual. 13 Rep. 33; 2 W. Saund. 158, h. *R. v. Kerrison*, 1 M. & S. 435.

A custom for a district to repair its own highways is good, although no particular reason can be shown for it. *R. v. Ecclesfield*, 1 B. & Ald. 348. But a charge on a parish or district to repair a highway not being within it, must be shown to be by prescription, and cannot be by custom. 2 Wms. Saund. 159, i. n. o. *R. v. St. Giles, Cambridge*, 5 M. & S. 260. *R. v. Machynlleth*, 2 B. & C. 166. *R. v. Bishop Auckland*, 1 Ad. & E. 744. And where the origin of a way can be shown, the prescription to repair it is necessarily destroyed, since it must rest upon immemorial usage. *R. v. Hudson*, 2 Stra. 909. *See* also *R. v. Scarisbrook*, 6 Ad. & E. 509. *Reg. v. Westmark*, 6 M. & Rob. 305.

Powers are conferred, and directions given, with respect to the obtaining and keeping, &c. materials for the repair of highways by the 5 & 7 Wm. 4, c. 50, ss. 35, 46, 47, 49, 51–57; 8 & 9 Vic. c. 118, s. 72.

A surveyor cannot justify a trespass, under a prescriptive right or custom to take stones from the waste, whether adjoining the sea-shore or otherwise, for the repair of highways. *Padwick v. Knight*, 7 Ex. 854.

By the 5 & 6 Wm. 4, c. 50, s. 58, provision is made for settling the liability to repair where the boundaries of parishes pass across or through the middle of a common highway, and one side of such highway is situate in one parish and the other side in another parish, by adjudication of justices. *See* also ss. 59–61. *Reg. v. Perkins*, 14 Q. B. 229. *Reg. v. Hickling*, 7 id. 880.

The trustees of a turnpike-road may agree with other trustees that a road which is common to both should be repaired by one, the other contributing a certain annual sum

(B) *Liability* Ratione Tenuræ.[1]

towards that object. *Swinburne v. Robinson*, 1 El. & El. 80.

With respect to boroughs in which the roads and highways are repaired by the inhabitants of the parishes and townships within which they are situated, and the inhabitants of which also contribute to the repair of the public streets and highways kept in repair by the council, it is by the 25 & 26 Vic. c. 61, s. 45, enacted, that the council of every such borough may, upon the petition of the majority of the ratepayers of such parishes or townships, present at a public meeting duly convened, adopt all or any of such parish roads and highways as the council shall in its discretion consider advisable, and apply the rates levied and collected by the council for the repair of the public streets, roads, and highways within such borough, in maintaining and repairing such parish roads and highways: Provided that it shall be competent for such council, previous to adopting such parish roads and highways, to require the provisions contained in any local act applying to the public streets, roads, and highways of such borough to be complied with.

[1] An individual may be liable to repair a highway by reason of his tenure of certain land, if it appear that those who have held the land have been immemorially accustomed to repair it; for in such a case it is presumed that the land was originally granted in consideration of such repairs being done. *R. v. Middlesex*, 3 B. & Adol. 210. *R. v. Hayman*, M. & M. 401. The occupier, and not the owner, is the person to be indicted. *Reg. v. Watts*, 1 Salk. 357. See *Baker v. Greenhill*, 3 Q. B. 148. *R. v. Sutton*, 3 Ad. & E. 597. Proprietorship of a navigation may impose such a liability. *R. v. Kerrison*, 1 M. & S. 435. *Henley v. Mayor of Lyme Regis*, 5 Bing. 51. *Reg. v. Sheffield Canal Co.* 13 Q. B. 913. Each of several grantees of land bound to repair is liable to the whole charge, and must seek contribution from the rest. 2 Wms. Saund. 159, n. g. *Reg. v. Duchess of Buccleuch*, 1 Salk. 358. By the 5 & 6 Wm. 4, c. 50, s. 62, provision is made for transferring the burden of repair of a road *ratione tenuræ* to the parish, with consent of the inhabitants, and by order of the justices. *See* also sect. 58. Lands given for maintenance of highways may be let on lease. (Sect. 50.)

Where a highway has been turned or diverted under 5 & 6 Wm. 4, c. 50, the parish or other party liable to repair the old highway is liable to repair the new highway, without reference to its parochial locality. 5 & 6 Wm. 4, c. 50, s. 92.

With respect to roads within highway districts under 25 & 26 Vic. c. 61, it is by sect. 34 of that act enacted, that "where any highway which any body politic or corporate, or person, is liable to repair by reason of tenure of any land, or otherwise howsoever, shall be adjudged in the manner provided by 5 & 6 Wm. 4, c. 50, to be out of repair, the highway board of the district in which such highway is situate may, if they see fit, direct their surveyor to repair the same, and the expenses to be incurred in such repair shall be paid by the party liable to repair as aforesaid; and it shall be lawful for any justice, upon the application of any person authorised in their behalf by the highway board, to summon the party liable to pay such expenses to appear before two justices, at a time and place to be named in such summons, and upon the appearance of the parties, or in the absence of either of them, it shall be lawful for such justices to hear and determine the matter, and make such order, as well as to costs or otherwise, as to them may seem just." (Sect. 34.)

And by sect. 35 of 25 & 26 Vic. c. 61, it is enacted, that "where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid, to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway; and in default of payment of such sum the board may proceed for the recovery thereof, in the same manner as for the recovery of penalties or forfeitures recoverable under this act: Provided always, that when the sum so fixed to be paid in full discharge of all claims thereafter in respect of the repair and maintenance of such highway exceeds 50*l.*, the same, when received, shall be invested in the name of the highway board of the district in some public government securities, and the interest and dividends arising therefrom shall be applied by such board towards the repair and maintenance of the highways within the parish in which such highway is situate; but where such sum does not exceed 50*l.*, the same, or any part thereof, at the discretion of such highway board, shall from time to time be applied by such board towards the repair and maintenance of the highways within such parish: Provided that any person aggrieved by any order of justices made

(C) *Liability* Ratione Clausuræ.[1]

in pursuance of this section, may appeal to a court of general or quarter sessions holden within four months from the date of such order; but no appeal shall be entertained unless the appellant has given to the other party to the case a notice in writing of such appeal, and of the matter thereof, within fourteen days after such order, and seven clear days, at the least, before such sessions, and has entered into a recognisance, with two sufficient sureties, before a justice of the peace, conditioned to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as may be by the court awarded; and upon such notice being given, and such recognisance being entered into, the court at such sessions shall hear and determine the matter of the appeal, and shall make such order thereon, with or without costs to either party, as to the court may seem meet. From and after the making of such order by the justices, or by the court on appeal, as the case may require, such highway shall be repaired in like manner, and at the like expense, as highways which a parish is liable to repair." And by sect. 36, "where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway, or any private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in a vestry duly convened for the purpose, and with the consent in writing of the owner and the occupier thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway, to be repaired at the expense of the parish; and upon such application being made, it shall be lawful for the justices to declare the same to be a public carriage road, to be repaired at the expense of the parish."

[1] Another mode by which an occupier of land may become liable to repair a highway adjoining it is by inclosure. *Duncombe's case*, Cro. Ca. 366. *Hern's case*, W. Jones, 296. *R. v. Flecknow*, 1 Burr. 465.

As inclosing lands adjoining a highway takes away the liberty and convenience which the public have of going upon such lands, whether cultivated or not (*Taylor v. Whitehead*, Doug. 749), when the highway is out of repair, it has been holden, that if the owner of lands not inclosed next adjoining to a highway incloses his lands on both sides, he is bound to make a perfect good way as long as the inclosure lasts, and is not excused by showing that he has made the way as good as it was at the time of the inclosure, because, if it was then defective, the public might have gone upon the adjoining land. *R. v. Staughton*, 2 Saund. 160; 1 Hawk. P. C. 76, s. 7. So, if a man incloses land on one side, which has been anciently inclosed on the other side, he ought to repair all the way; but if there is no such ancient inclosure on the other side, he ought to repair but half the way. *Steel v. Pricket*, 2 Stark. 469. Thus, if there be an old hedge, time out of mind, belonging to A. on the one side of the way, and B. having land lying on the other side make a new hedge, then B. shall be charged with the whole repair; but if A. make a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties: but a person having made himself liable to repair a highway by reason of inclosure, may relieve himself from the burden of any further reparations by throwing it open again. 1 Hawk. P. C. 76, s. 7. Thus it was ruled, that if a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione courctationis* ceases. But it was held in the same case, that if a person charged *ratione tenuræ* pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant for twenty-five years since the removal of the alleged encroachment, this is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show the time when the encroachment was made. Where a road has been so inclosed, and it is insufficient, any passenger may break down the inclosure and go over the adjoining land. *Anon.* 3 Salk. 182. Where a new road is made in pursuance of a writ of *ad quod damnum*, the owner of the land is not obliged to repair the new road, unless the jury impose such a condition upon him; but the parishioners ought to keep it in repair for the future; because, being discharged from repairing the old road, no new burden is laid upon them, but their labour is only transposed from one place to another. But if the new road lie in another parish, then the person who sued out the writ, and his heirs, ought not only to make it but to keep it in repair, otherwise the parishioners of such other parish would have a new charge upon them, and no recompense by the former road being taken away. See *ex-parte Venner*, 3 Atk. 771.

The liability to repair a highway *ratione clausuræ* is in the occupier of the lands inclosed, not in the owner as owner. *Reg. v. Ramsden*, El. Bl. & El. 949; 5 Jur. N. S. 169.

By the 25 & 26 Vic. c. 61, s. 46, "no person through whose land a highway passes, which is to be repaired by the parish, shall become liable for the repair of such highway by erecting fences between such highway and the adjoining land, if such fences are erected with the consent in writing of the highway board of the district within which such highway is situate, in the case of a place within the jurisdiction of a highway board; and in the case of any other place, with the consent of the surveyor, or other authority having jurisdiction over the highway."

(D) *Compelling Repair.*

(*a*) *By Order of Justices.*[1]

(*b*) „ *Indictment or Mandamus.*[2]

[1] By the 5 & 6 Wm. 4, c. 50, s. 94, upon information on oath of one credible witness of a highway being out of repair, before a justice of the peace, a summons may issue requiring the surveyor, or other person chargeable with the repairs, to appear before the justices, at some special sessions for the highways, who have power to impose a penalty, and order the repairs to be done within a limited time. The order must show that it was as required by the act made at a special sessions for the highways, held within the division where the particular highway is situate. *Reg. v. Morice*, 2 D. & L. 952. *Reg. v. Hickley*, 7 Q. B. 890. *Reg. v. Martin*, 2 id. 1037. *Reg. v. Watford*, 4 D. & L. 593. As to justices' summary jurisdiction where title to land in question, see *Williams v. Adams*, 31 L. J. M. C. 109.

When a turnpike-road is out of repair, the proper person to be summoned and proceeded against, in the first instance, before justices at special sessions, is the treasurer or surveyor, or other officer, of the turnpike-road. *Reg. v. Trafford*, 5 El. & Bl. 967; 25 L. J. M. C. 70.

A single justice has no power to summon the surveyor, or other officer, of a turnpike-road. *George v. Chambers*, 11 Mee. & W. 149. And the justices, before making the order, are bound to ascertain that the trust funds are sufficient to furnish the money. *Reg. v. Justices of St. Albans*, 22 L. J. M. C. 142. The justices have a discretion in convicting. *R. v. Wilts*, 8 Dowl. 717. As to the costs, *see* sect. 97.

In Highway Districts.— In highway districts, under the 25 & 26 Vic. c. 61, "where complaint is made to any justice of the peace that any highway within the jurisdiction of the highway board is out of repair, the justice is required to issue two summonses, the one addressed to the highway board, and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty session, in the summons mentioned, to be held in the division where such highway is situate, and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions, to be then named, and shall either appoint some competent person to view the highway and report to them on its state at such other petty sessions, or fix a day at which two or more of such justices will themselves attend to view the highway. Acting on the report, or their own view, the board may be ordered by the justices to repair the highway within a limited time, and required to pay the costs of the proceedings (sect. 18); but if, at the hearing, the liability to repair is denied, the justices must direct an indictment. 25 & 26 Vic. c. 61, s. 19.

[2] By 5 & 6 Wm. 4, c. 50, s. 95, the justices are required to direct an indictment if the liability to repair the highway is denied. See *Reg. v. Justices of Surrey*, 21 L. J. M. C. 195. *Ex-parte Bartlett*, 31 id. 65.

And with respect to highways within highway districts, under 25 & 26 Vic. c. 61, where similar recourse is had to the justices for an order requiring the board to repair a highway, and "the liability to repair is denied on behalf of his parish, or by any party charged therewith, the justice shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place whereon such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct; and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly." 25 & 26 Vic. c. 61, s. 19.

It is, unless there are exceptional circumstances, obligatory to direct the indictment upon denial of the liability, and this duty may be enforced by *mandamus*. *Reg. v. Arnold*, 8 E. & B. 550; 27 L. J. M. C. 92. But the court refused to order the justices to direct an indictment where an indictment had been shortly before tried against the same parish, in which there was an acquittal. *Ex-parte Bartlett*, 30 L. J. M. C. 65; 6 Jur. N. S. 1196. The power with which justices are invested of directing an indictment does not prevent an individual indicting a parish for non-repair. An information will also lie (*R. v. Essex*, T. Raym. 384); but the Court of Queen's Bench will not give leave to file such an information, except in cases of great importance, or gross misconduct of the grand jury in refusing to find the bill. *Reg. v. Upton St. Leonards*, 10 Q. B. 827. And if the circumstances of the case require it, the Court of Queen's Bench will interpose with their authority, and issue a *mandamus* to compel a party to reinstate in good order a way, for the nuisance to which he might also have been proceeded against by indictment. As in *Rex v. the Severn and Wye Railway Co.* 2 B. & A. 646, the court issued their *mandamus* to compel the company to reinstate and lay down again a portion of the tram-road which they had illegally removed, as the remedy by indictment was not so effectual as that by *mandamus;* more especially as the defendants were a corporate body. But in the case

of *Rex v. the Justices of Dorset*, 15 East, 200, where the relators moved the court to issue a writ of prohibition to stay a nuisance which they complained of in the demolition of a public county bridge, the motion was refused, as the application of a writ of prohibition to such a case would confessedly be new in modern practice, and there is a clear known remedy by indictment in the ordinary course, if the parties were pulling down the old bridge illegally, and the court said they did not feel themselves called upon to apply any new remedy.

As to the Indictment.—In every indictment against a parish for not repairing a highway, there are three essential averments: the first, that the road is a highway; the second, that it is out of repair; and the third, that it is situated in the parish. *See* 2 Stark. C. P. 667, n. f.

It is sufficient to state that the road is a highway, without showing how it became so (*Aspindall v. Brown*, 3 T. R. 265. *Reg. v. Turweston*, 16 Q. B. 109), except where the indictment charges a prescriptive liability, in which case it should aver it has been a highway from time immemorial. *Reg. v. Westmark*, 2 M. & Rob. 305. See *R. v. Marchioness of Downshire*, 4 Ad. & E. 232. *See* further as to the description of the road, *Thrower's case*, 1 Vent. 208; Say. 168. *Sutcliffe v. Greenwood*, 8 Price, 535. *Allen v. Ormond*, 8 East, 4. *R. v. Hatfield*, Ca. tem. Hardw. 315. *R. v. St. Weonards*, 5 C. & P. 579. *R. v. Lyon*, R. & M. 157. *R. v. Marquis of Buckingham*, 4 Camp. 189. *R. v. Hammersmith*, 1 Stark. R. 357. *Reg. v. Steventon*, 1 C. & Kir. 55. *R. v. Marchioness of Downshire, supra.* It is not strictly necessary, although usual, to state the *termini*. *R. v. St. Weonards*, 6 C. & P. 582; 2 Wms. Saund. 158, c. n. 6. It must be proved as stated. *R. v. Great Canfield*, 6 Esp. 136. *Reg. v. Waverton*, 17 Q. B. 562. But a variance either in the description of the highway or its *termini* may be amended at the trial. 14 & 15 Vic. c. 100. See *R. v. Sturge*, 3 E. & B. 734.

The highway must be alleged to be in the parish indicted. *R. v. Hartford*, Cowp. 111. *R. v. Gamlingay*, 3 T. R. 513. *R. v. Upton-on-Severn*, 6 C. & P. 133. *R. v. Botfield*, C. & M. 151. *R. v. Knight*, 7 B. & C. 413. *R. v. Harrow*, 4 Burr. 2090. *R. v. Clifton*, 5 T. R. 498.

The indictment must also allege that the highway is out of repair. It is insufficient merely to allege that it is muddy or narrow. *R. v. Stretford*, 2 Ld. Raym. 1169.

If it be sought to charge the inhabitants of part of a parish, as a township, or other division, or a number of persons in any other capacity, or a private individual, with the burden of repair, this being against common right, it must be shown on the face of the indictment, or other pleading, how the liability rises, whether by custom, prescription, or *ratione tenuræ*. *R. v. Penderryn*, 2 T. R. 513. *R. v. Kingsmoor*, 2 B. & C. 190. *R. v. Broughton*, 5 Burr. 2700. *Case of St. Andrew, Holborn*, Freem. 522; 3 Keb. 301. *R. v. Sheffield*, 2 T. R. 106. *Reg. v. Heage*, 2 Q. B. 128. *R. v. Ecclesfield*, 1 Stark. R. 393. Three townships may be charged conjointly in one indictment. *R. v. Bishop Auckland*, 1 Ad. & E. 744.

In an indictment against an individual it must be stated how the liability arises, whether *ratione tenuræ*, or the taking of toll or other profit. 2 Wms. Saund. 158, h. *R. v. Corrock*, 1 Stra. 187; Co. Ent. 358; Keilw. 52, pl. 4. See *R. v. Kingsmoor, supra.*

As to the Pleas.—And where a person is charged with the repairs of a highway, or bridge, against common right, he may discharge himself upon not guilty to the indictment; and therefore, where a particular division of a parish is charged with the repairs by prescription, or a particular person by reason of tenure, or the like, which are obligations against the common law, they may throw the burthen either on the parish, or even on an individual, under the general issue; and the reason seems to be, because, upon this issue, the prosecutor is bound to prove that the defendants are chargeable by tenure or prescription, and, therefore, the defendants may disprove it by opposite evidence; but if they will, though unnecessarily, plead the special matter, it is held not to be enough to say they ought not to repair, but they must go further, and show who ought. 1 Sid. 140; Carth. 213; 1 Stra. 180, *et seq.*; 3 Salk. 183, pl. 3; 2 Saund. 159, a. n. 10.

If one parish seeks to charge another with the repair of a road within the former, a consideration must appear on the face of the plea; but if the parish charges a district within its own boundaries, and which is part of the parish, it is not necessary to aver any consideration in pleading. Steere's P. L. 244. *R. v. St. Giles, Cambridge*, 5 M. & S. 260. *R. v. Ecclesfield*, 1 Stark. R. 393; 1 B. & Ald. 348. *R. v. West Riding of Yorkshire*, 4 B. & Ald. 623.

Where any sub-division of a parish is liable to the repair of a highway, and the indictment is, notwithstanding, preferred against the whole parish, care should be taken to plead the liability of such division; for if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the whole parish to repair, unless fraud can be shown. Peake, 219; 1 East, 355. Fraud, however, is only put for example; for if the other districts can show that they had no notice of the indictment, and that the defence was made and conducted entirely by the district in which the highway indicted lay, without their knowledge or privity, the court will consider it as being substantially an indictment against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish. 2 Saund. 159, c. n. 10.

Upon an issue of liability to repair *ratione tenuræ* of an ancient mill, which was shown not to exist before the time of Hen. 8:—*Held*, that it could not be supported; it is

essential to prove the liability from time out of memory. *Rex v. Hayman*, 1 M. & M. 401.

On an indictment against the parish for non-repair of a highway within it, alleging the liability of the parish at large; plea, alleging that a township had always been accustomed, and of right ought to repair, traversing the liability of the parish at large to repair; and issue on the custom found for the defendants:—*Held*, first, that the custom being in favour of the defendant, judgment for the Crown could not be entered *non obstante veredicto;* and secondly, that the plea was bad for not averring in direct terms that the parish would have been liable but for the custom—and judgment arrested. *Rex v. Hatfield*, 4 Ad. & E. 156.

As to the Evidence.—If a liability to repair *ratione tenuræ* be alleged, and it turn out that the tenement in respect of which the liability exists, or the way itself, first originated within legal memory, the defendant must be acquitted. *Reg. v. Westmark*, 2 M. & Rob. 305. *R. v. Hayman*, M. & M. 401. See *R. v. Middlesex*, 3 B. & Adol. 210.

The manner in which the road has been used is material in raising the inference of dedication: *e. g.* user for a public and notorious purpose will raise a stronger inference than mere instances of individuals using the road. *R. v. Wandsworth*, 1 B. & Ald. 63. *R. v. Bliss*, 7 Ad. & E. 550. *See* Stark. Ev. 47. Evidence of reputation is admissible to prove that the way is public (*Austin's case*, 1 Vent. 189); or to show that an individual is liable to repair *ratione tenuræ*. *Reg. v. Bedfordshire*, 4 E. & B. 535. See *Reg. v. Sutton*, 8 Ad. & E. 516. A verdict on an issue taken on a public right of way, finding it to be such, is afterwards evidence. *Reed v. Jackson*, 1 East, 355. An award made under submission by a former tenant is not evidence against the landlord. *R. v. Cotton*, 3 Camp. 444. Proof of repairs done by the parish, or by a parishioner, under an agreement with the parish that he shall therefore be excused his statute duty, is strong evidence to fix the parish. *R. v. Wandsworth, supra.* A conviction on an indictment against the same parish, &c. for non-repair of the same highway, is conclusive, unless fraud or want of notice can be shown (*R. v. St. Pancras*, Peak. N. P. C. 219. *Reg. v. Haughton*, 1 E. & B. 501. *Reg. v. Blakemore*, 2 Den. C. C. 401); but an acquittal is not conclusive, if it be evidence at all, to discharge the defendant; for it only shows that the defendant was not liable at the particular time then laid. 1 Stark. Ev. 361. *R. v. Wandsworth, supra.*

If a parish be indicted for the non-repair of a pack and prime way, and if it be proved that the way is a carriage-way, this is a misdescription of the way, and the defendants are entitled to be acquitted. In an indictment for non-repair of a highway, it is not necessary to state the *termini;* but if they are stated, they must be proved. *Rex v. Inhabitants of St. Weonards*, 6 C. & P. 582. *See* 14 & 15 Vic. c. 100, as to amending indictment.

The court will not set aside a verdict of guilty, and grant a new trial, on the ground that such verdict was against evidence. *Reg. v. Johnson*, 29 L. J. M. C. 133; 6 Jur. N. S. 553.

As to the Judgment.—The judgment is that the nuisance be abated, and a fine imposed. *Rex v. Pappineau*, 1 Stra. 686; Hawk. P. C. In Vin. Abr. Chemin, Common, E. 27, it is stated, the course of B. R., upon an indictment for stopping a way, is, that the offender is admitted to a fine on his submission before verdict, if there be a certificate that the way is repaired; but if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *constat* to issue out to the sheriff, who ought to return that the way is repaired, because the verdict, which is a record, ought to be answered with matter of record.

The fine is to be applied towards the repair of the road. 5 & 6 Wm. 4, c. 50, s. 96. *R. v. Barnard Castle*, 1 Q. B. 246. If a parish is indicted for not repairing a highway, being a turnpike-road, and a fine for its repair is imposed, it is to be apportioned between the parish and the trustees of the turnpike-road, as the court think fit. 3 Geo. 4, c. 126, s. 110.

In general, the inhabitants of a parish will not be discharged from an indictment for not repairing a highway, until it is ascertained that the repairs done will stand the winter. *R. v. Witney*, 5 Dowl. 728.

Upon a certificate of a justice of the peace that the road is in good condition at the time judgment is about to be pronounced, the court will merely assess a nominal fine. *R. v. Incledon*, 13 East, 164. See *R. v. Wingfield*, 1 W. Black. 602.

As to the Costs.—The costs of a prosecution ordered by justices are to be directed by the judge of assize before whom the indictment is tried, or by the justices at quarter sessions, to be paid out of the rate made and levied in pursuance of the act, in the parish in which the highway is situate. 5 & 6 Wm. 4, c. 50, s. 95. The judge, if the defendants are found guilty, is bound to make an order for costs. *Reg. v. Paul*, 2 M. & Rob. 307. *Reg. v. Heanor*, id. 445, n. *Reg. v. Yarkhill*, 9 C. & P. 218. *Reg. v. Down Holland*, 15 L. J. M. C. 25); although not until after withdrawal of a plea of not guilty. *Reg. v. Langley*, 8 Cox, 366; 2 F. & F. 150. The judge has no jurisdiction to order costs if either the defendants plead guilty (*Reg. v. Vowchurch*, 2 C. & Kir. 393), or are acquitted on the ground that the road is not a highway. *Reg. v. Heanor*, 6 Q. B. 745. The order for costs must specify their amount (*Reg. v. Clark*, 5 id. 887. See *Reg. v. Lency*, 1 id. 740. *Ex-parte Holloway*, 1 Dowl. 26), unless the indictment has been removed by *certiorari* (*Reg. v. Pembridge*, 3 Q. B. 901. *Reg. v. Watford*, 4 D. & L. 493), in which case they may be taxed on a side-bar rule by the officer of the Court of Queen's Bench. *Reg. v. Eardisland*, 3 E. & B. 760. The order ought to specify out of what fund the costs are to be paid. *Reg. v. Watford, supra.* The surveyor is bound to pay them out of funds in his hands, or to make a rate for the pur-

IX. Repair of Bridges.[1]

pose; but they are not recoverable against him by distress. *Reg. v. Eyton*, 3 E. & B. 390.

The court before whom the indictment is preferred may, if the defence appear to be frivolous or vexatious, award costs to the prosecutor, to be paid by the person indicted. 5 & 6 Wm. 4, c. 50, s. 98. The court will not review the exercise of the judge's discretion in making this order (*R. v. Chadderton*, 5 T. R. 272), and which may be certified on the back of the record. *R. v. Clifton*, 6 id. 344. The order may be enforced by attachment (*Reg. v. Pembridge, supra*); and is operative, notwithstanding the judgment be arrested. *R. v. St. John's Margate*, 6 M. & S. 130.

The power to give costs under 5 & 6 Wm. 4, c. 50, s. 95, for a frivolous defence to an indictment for not repairing a highway, is confined to the court in which the indictment is preferred, and not where tried: where, therefore, it had been removed by *certiorari*:—*Held*, that the judge had no power to give costs. *Reg. v. Preston*, 2 M. & R. 137. *See* 9 C. & P. 285; 2 M. & Rob. 307.

A complaint was made to magistrates, under the 94th section of the Highway Act (5 & 6 Wm. 4, c. 50), that a way, alleged to be a highway, was out of repair. The magistrates ordered an indictment against the inhabitants of the parish, which was found and removed by *certiorari*, and on the trial of it the defendants were acquitted, on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate, under the 95th section of the act. It was objected, that this provision as to costs only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by *certiorari*. The judge refused the order. *Reg. v. Inhabitants of Chedworth*, 9 C. & P. 285.

As to who are parties aggrieved so as to be entitled to costs under the 5 & 6 Wm. & M. c. 11, s. 3, in case of removal of the indictment by *certiorari*, see *R. v. Taunton St. Mary*, 3 M. & S. 465. *R. v. Kettleworth*, 5 T. R. 33; and 9 C. & P. 285.

[1] The duty of repairing public bridges rests by law upon the counties, unless they can throw it upon others by prescription or act of parliament. 2 Inst. 700. *R. v. Kerrison*, 3 M. & S. 526. The remedy in case the bridge is out of repair is by indictment or presentment for the public nuisance, and this remedy is not taken away by the 5 & 6 Wm. 4, c. 50. *Reg. v. Brecknockshire*, 15 Q. B. 813. *Reg. v. Merionethshire*, 6 id. 343. No action lies against the inhabitants at large or the surveyor at the suit of an individual injured by such bridge being out of repair. *M'Kinnon v. Renson*, 8 Ex. 319; 9 id. 609; 31 L. J. Ex. 250. *Russell v. Men of Devon*, 8 Ex. 319.

By Prescription or Ratione Tenuræ, a parish, township, corporation, or private individual, may be liable to repair a public bridge (Hale, P. C. 143. See *R. v. Lindsey*, 14 East, 317. *R. v. Kent*, 13 id. 220); but not to widen it. *R. v. Devon*, 4 B. & C. 670, overruling *R. v. Cumberland*, 6 T. R. 194; 3 B. & P. 354. See *R. v. Surrey*, 2 Camp. 455. However, if they do enlarge it, the obligation still continues. *R. v. W. R. Yorkshire*, 2 East, 342.

If a private person for his own advantage cut a drain through a highway, and carry a bridge over the drain, the public user of the bridge is referable to the original act, which was legal only on condition of the person doing it providing a proper crossing, and such a bridge is not repairable by the county. *Reg. v. Ely*, 15 Q. B. 827; 19 L. J. M. C. 223. *R. v. Lindsey*, 14 East, 317. *R. v. Kerrison*, 3 M. & S. 526.

By 43 Geo. 3, c. 59, s. 5, no bridge to be erected or built after the 24th June, 1803, by or at the expense of any individual or private person, body politic or corporate, shall be deemed to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction and to the satisfaction of the county surveyor or person appointed by the quarter sessions. See *R. v. W. R. Yorkshire*, 5 Burr. 2594. *R. v. Kent*, 2 M. & S. 513. *R. v. Bucks*, 12 East, 192. *Surrey Canal Co. v. Hall*, 1 Scott, N. R. 264. This does not apply to old bridges widened or rebuilt, but only to new bridges on a different site. *R. v. Devonshire*, 5 B. & Adol. 383. *R. v. Lancashire*, 2 id. 813. It applies to bridges built by trustees of a turnpike-road. *R. v. Derbyshire*, 3 B. & Adol. 147.

As to the Approaches.—The county, where liable to repair the bridge, is also under an obligation to repair the highway to the extent of three hundred feet at each end. *R. v. W. R. Yorkshire*, 5 Taunt. 584; 7 East, 588; see *R. v. Derbyshire*, 2 Q. B. 745. *R. v. Oxfordshire*, 1 B. & Adol. 289. But by the 5 & 6 Wm. 4, c. 50, s. 21, if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike-road, who were by law before the erection of the said bridge bound to repair the said highway. But this is not to exonerate or discharge any county, or part of a county, from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof. The justices in quarter sessions have authority, under certain circumstances, to borrow money on mortgage of the county-rate for maintaining, improving, or rebuilding any county bridge. 4 & 5 Vic. c. 49.

X. Nuisances on Highways.[1]

[1] All injuries or obstructions (*R. v. Electric Telegraph*, 31 L. J. M. C. 166; and 30 id. 165), to any highway are public nuisances at common law, and in general indictable as such (Hawk. c. 76, s. 48); such as the ploughing up of a public footpath across an arable field (3 Camp. 226), suffering adjacent ditches to be foul, or trees to grow over (Hawk. c. 76, s. 48); and it seems clear that any one might justify lopping such trees so far as to avoid the nuisance. (Id.) But these and other nuisances are by the Highway and Turnpike Acts removeable, or punishable by summary proceedings; and in general, notice is required to the occupier himself to remove the nuisance before another person can interfere. Chit. Gen. Pr. 200. And it has been held, that a person incommoded by railway gates across a highway, although they are not erected in conformity with the statutory powers, and are a nuisance, has no right to knock them down, but must proceed by *mandamus* or other legal procedure. *Ellis v. South-Western Railway Co.* 2 H. & N. 424; 26 L. J. Ex. 349.

Mere temporary obstructions are not indictable if absolutely necessary, but otherwise they are so. 3 Camp. 231. Thus, the erecting of a scaffold to repair a house to a reasonable extent, or the unloading a cart or waggon, and the delivery of any large articles, as casks of liquor, if done with as little delay as possible, are lawful; though if an unreasonable time were employed in the operation they would become nuisances. (Id.) And on repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable. 1 B. & P. 407. And a timber-merchant, although only occasionally cutting logs of wood in the street, and which he could not otherwise convey into his premises, would not be excused by the necessity which, in choosing the situation, he himself created (3 Camp. 230; 2 Roll. Abr. 137); but the removing them promptly, and the not suffering them to remain on the highway an unreasonable time, would excuse him. Id. Bac. Abr. Highway (E). So, if stage-coaches, carts, or other carriages, ply or be kept an unreasonable time in a public street, or for placing a tramway (*R. v. Train*, 31 L. J. M. C. 169), the owner may be indicted. 6 East, 427; 3 Camp. 224. And public exhibitions in a street, occasioning a large concourse of people there, would be indictable. 1 Vent. 169; 1 Mod. 76; Bac. Abr. Nuisance. But a mere transitory obstruction, as distributing handbills in a public highway, is not illegal. 1 Burr. 516. Nor is it indictable to build a house higher than before, whereby the street becomes darker. 1 Ld. Raym. 737.

It is not a nuisance to the highway for the owner of land adjoining to dig a quarry in his land, notwithstanding persons might wander from the highway in the dark and be in danger of falling into it, if it be not so near the highway as to endanger persons while using the highway. *Ellis v. Woodbridge*, 29 L. J. M. C. 183; 6 Jur. N. S. 1017. *Hardcastle v. South-Yorkshire Railway Co.* 4 H. & N. 67; 28 L. J. Ex. 139.

By 5 & 6 Wm. 4, c. 50, s. 64, no tree, bush, or shrub shall be planted on any carriageway, or cartway, or within the distance of fifteen feet from the centre thereof, but the same shall be cut down, grubbed up, and carried away by the owner or occupier of the land or soil within twenty-one days after notice to him or his agent by the surveyor, on pain of forfeiting for every neglect the sum of ten shillings. By sects. 65, 66, provision is made for the lopping of trees, &c. adjoining the highway. See *Jenney v. Brook*, 2 Q. B. 274; 6 id. 324, And by sects. 67, 68, for the scouring of ditches, &c., see *Peters v. Clarson*, 7 Man. & G. 548; 11 & 12 Vic. c. 123, s. 6. By sect. 69, if any person encroaches by making a building, hedge, ditch, or other fence, on any carriageway or cartway within the distance of fifteen feet from the centre thereof, he is subject to a penalty not exceeding 40*s.*; and the surveyor may abate the nuisance at the expense of the person to whom it belongs. See *Evans v. Oakley*, 1 C. & Kir. 125. *Keane v. Reynolds*, 2 E. & B. 748. This section does not, it seems, apply to encroachments or inclosures made before the passing of the act. *Chapman v. Robinson*, 5 Jur. N. S. 434. And in order to justify a conviction for an encroachment under sect. 69, the encroachment must be upon a highway, as defined in sect. 63; that is, on a highway repaired by the surveyors within six months. *Chapman v. Robinson*, 1 El. & El. 25.

By sect. 70, the erecting of steam-engines, &c. within twenty-five yards of a highway, unless within a building, is prohibited. And by sect. 71, railways crossing highways are required to erect and maintain gates, and to employ proper persons to attend to the opening and shutting of the gates. *See* also 2 & 3 Vic. c. 45; 5 & 6 Vic. c. 55, s. 9.

By 5 & 6 Wm. 4, c. 50, s. 72, if any person wilfully rides upon a footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers; or wilfully leads or drives any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck or sledge, upon any such footpath or causeway, or tethers any horse, ass, mule, swine, or cattle, on any highway, so as to suffer or permit the tethered animal to be thereon; or causes any injury or damage to be done to the highway, or the hedges, walls, posts, rails, or fences thereof; or wilfully obstructs the passage of any footway; or wilfully destroys or injures the surface of any highway; or wilfully or wantonly pulls up, cuts down, removes, or damages the posts, blocks, or stones fixed by the surveyor as

XI. Widening, Stopping, and Diverting Highways.[1]

herein directed; or digs or cuts down the banks which are the securities and defence of the highways; or breaks, damages, or throws down the stones, bricks, or wood, fixed upon the parapets or battlements of bridges, or otherwise injures or defaces the same; or pulls down, destroys, obliterates, or defaces any mile-stone or post, graduated or direction-post or stone erected upon any highway; or plays at football or any other game on any part of the said highways, to the annoyance of any passenger or passengers; or if any hawker, higgler, gipsy, or other person travelling, pitches any tent, booth, stall, or stand, or encamps upon any part of any highway; or if any person makes or assists in making any fire, or wantonly fires off any gun or pistol, or sets fire to, or wantonly lets off, or throws any squib, rocket, serpent, or other firework whatsoever, within fifty feet of the centre of such carriageway or cartway; or baits, or runs for the purpose of baiting, any bull, upon or near any highway; or lays any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever, upon such highway, to the injury, interruption, or personal danger of any person travelling thereon; or suffers any filth, dirt, lime, or other offensive matter or thing whatsoever to run or flow into or upon any highway, from any house, building, erection, lands, or premises adjacent thereto; or in any way wilfully obstructs the free passage of any such highway; every person so offending in any of the cases aforesaid shall, for each and every such offence, forfeit and pay any sum not exceeding 40*s.* over and above the damages occasioned thereby. By the 73d sect., if the matter causing the obstruction be not removed on notice given by the surveyor, the surveyor may obtain an order of a justice, and himself remove it. See *Morgan v. Leach*, 10 Mee. & W. 558. *Mould v. Williams*, 5 Q. B. 469. Cattle straying on the highway may be impounded. (Ss. 74, 75.)

As to destroying gates and toll-houses, *see* 24 & 25 Vic. c. 97, s. 34; *post*, Malicious Injury.

It is no answer that the obstruction has been of long continuance. *R. v. Cross*, 3 Camp. 224. *R. v. Russell*, 6 East, 427. But the obstruction of a highway by a fair or market is not indictable, if there has been an uninterrupted custom for twenty years. *R. v. Smith*, 4 Esp. 109.

An act which would otherwise be a nuisance, will cease to be indictable if done under the powers or by the direction of an act of parliament, as a railway adjoining a highway, the passing of locomotives upon which frightens horses on the highway. *R. v. Pease*, 4 B. & Adol. 30. See *R. v. Morris*, 1 id. 441. So a gas company, if empowered by statute to do so, may break the surface of the highway; but if not so empowered, they will be indictable should they do so, notwithstanding the surveyor may have given them leave. *Reg. v. Sheffield Gas Consumers' Co.* 18 Jur. 46, n. See *Reg. v. Scott*, 3 Q. B. 543. *See* 31 L. J. M. C. 166.

An individual suffering a particular and special damage or injury by the nuisance or obstruction, may maintain an action against the person by whom it is occasioned. *Wilks v. Hungerford Market Co.* 2 Bing. N. C. 281. *Rose v. Groves*, 6 Scott, N. R. 645. *Dobson v. Blackmore*, 9 Q. B. 991. The being compelled to drive cattle to the plaintiff's field by a longer route, has been held to be such a peculiar damage. *Blagrave v. Bristol Waterworks Co.* 1 H. & N. 369; 26 L. J. Ex. 57. See *Fisher v. Prowse*, 31 id. Q. B. 212.

[1] The surveyor is required to make and maintain every public cartway leading to any market-town, twenty feet wide at the least, and every public horseway eight feet wide at the least, and to support and maintain every public footway by the side of any carriageway or cartway three feet at the least, if the ground between the fences, including the same, will admit thereof. But the surveyor is not required to make or form any public footway without the consent of the vestry. 5 & 6 Wm. 4, c. 50, s. 80. Gates across public cartways must not be less than ten feet wide, or if across a public horseway, five feet wide, clear between the posts. (Sect. 81.) And any highway may be widened by order of justices upon the view, so that it shall not when widened exceed thirty feet in breadth. Sect. 82. *R. v. Jones*, 12 Ad. & E. 684. *R. v. Marquis of Downshire*, 4 id. 498. *R. v. Bagshaw*, 7 T. R. 363. *R. v. Norwich*, 5 Ad. & E. 563; 1 Nev. & P. 32.

Further, when the inhabitants in vestry assembled deem it expedient that any highway should be stopped up, diverted, or turned, either entirely, or reserving a bridleway or footway along the whole or any part or parts thereof, this may be effected by an order of justices, made upon view, which is had upon the application of the surveyor empowered by the chairman of the meeting. Sects. 84, 85, 91. See *R. v. Horner*, 2 B. & Adol. 150. *R. v. Milverton*, 5 Ad. & E. 841. Inspection by the justices is necessary, and should be stated in their certificate. *R. v. Downshire*, 4 Ad. & E. 721. *Reg. v. Jones*, 12 id. 684. *R. v. Cambridge*, 4 id. 111. *R. v. Kent*, 10 B. & C. 477. *Reg. v. Worcestershire*, 3 E. & B. 447. It must also appear that the owner of the land consented. *R. v. Kirk*, 1 B. & C. 21. *R. v. Kent*, id. 622. The plan must be strictly adhered to. *Reg. v. Newmarket Railway Co.* 15 Q. B. 702.

Statutory powers for setting out new ways, and extinguishing old ones, must be strictly followed, otherwise the old ways will not be extinguished. *Logan v. Burton*, 5 B. & C. 513. *Harber v. Rand*, 9 Price, 58. But see *Manning v. Eastern Counties Railway Co.* 12 Mee. & W. 237. See *De Beauvoir v. Welch*, 7 B. & C. 266. *Reg. v. Cricklade*, 14 Q. B. 735. But after the lapse of twenty-

XII. Protection in Suits for Things Done under Highway Act.[1]

XIII. Proceedings and Recovery of Penalties.[2]

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eight years, during which the use of a road had been abandoned, it was presumed that there had been an order of justices, which was necessary for stopping it up, upon a new road being opened, although no such order could be found. *Williams v. Eyton*, 4 H. & N. 357; 28 L. L. J. Ex. 146.

If highways are so connected that they cannot be separately stopped or diverted, one order or certificate may include several (sect. 86); otherwise there must be separate orders for each. *R. v. Milverton*, 5 Ad. & E. 841. *R. v. Middlesex*, id. 626. A recital that the new road is completed in the certificate is sufficient. *De Ponthieu v. Pennyfather*, 5 Taunt. 634.

By sects. 88 and 89 an appeal is given to any person, who thinks he would be injured or aggrieved, to the quarter sessions (*R. v. Suffolk*, 5 D. & L. 558), upon such party giving fourteen clear days' (12 & 13 Vic. c. 45, s. 1. *R. v. Yorkshire*, 4 B. & Adol. 685. *R. v. Goodenough*, 2 Ad. & E. 463. *Reg. v. Lancashire*, 8 E. & B. 563; 27 L. J. M. C. 161) notice in writing to the surveyor, together with a statement of the grounds of appeal. The notice should show that he is aggrieved by reason of some peculiar inconvenience sustained by him beyond what affects the public at large. *R. v. Yorkshire*, 7 B. & C. 678. *R. v. Adey*, 4 Nev. & M. 365. *R. v. Essex*, 5 B. & C. 431. On the hearing of the appeal, it is to be decided by a jury whether the new road is nearer or more commodious, whether the road to be stopped is unnecessary, and whether the appellant is aggrieved. See *R. v. Shiles*, 1 Q. B. 919. *Reg. v. Worcestershire*, 3 E. & B. 447.

The quarter sessions are required by sect. 90 to award to the party giving or receiving notice of appeal, such costs and expenses as are incurred in prosecuting or resisting such appeal, whether the same be tried or not, &c. See *Sellwood v. Mount*, 1 Q. B. 726. *Reg. v. Long*, id. 740. *Ex-parte Holloway*, 1 Dowl. 26.

With regard to Highway Districts, it is by the 25 & 26 Vic. c. 61, s. 44, enacted, that "all the provisions of the principal act (5 & 6 Wm. 4, c. 50) for widening, diverting, and stopping up highways, shall be applicable to all highways which now are, or hereafter may be, paved, repaired, or cleansed, under or by virtue of any local or personal act or acts of parliament, or which may be situate within the limits of any such act or acts, except highways which any railway company, or the owners, conservators, commissioners, trustees, or undertakers of any canal, river, or inland navigation, are liable, by virtue of any act of parliament relating to such railway, canal, river, or inland navigation, to make, maintain, repair, or cleanse."

It has already been shown that a river which is common to all the king's subjects is a highway, and one consequence from that doctrine is clearly established; viz. that the right to passage cannot be extinguished, except by writ of *ad quod damnum*, by act of parliament, or by natural causes. In *Vooght v. Winch*, 2 B. & A. 662, a new trial was granted, because at the trial the judge had told the jury that twenty years' possession was binding upon the rights of the public. In that case, *Holroyd, J.*, remarked, that an act of parliament is the only means by which such a public right can be determined. But that learned judge, in the late case of *The King v. Montague*, 4 B. & C. 603; 6 D. & R. 616, qualified his former opinion, by saying that it may be done by a writ of *ad quod damnum*, and an inquisition found thereupon by a jury as well as by an act of parliament. So also it may be extinguished by natural causes; and he cited Com. Dig. Chemin. a. 1, where it is said, "A navigable river is in the nature of a highway, and if the water alters its course the way alters." It may be remarked, that the case cited by Comyn, and also another case put by Fitzherbert, are both instances of a thoroughfare.

[1] By 5 & 6 Wm. 4, c. 50, s. 109, actions for anything done in pursuance of, or under the authority of the act, are not to be brought until [one calendar month, 5 & 6 Vic. c. 97, s. 4] notice has been given, nor after sufficient tender made to the party grieved; nor more than three calendar months after the fact committed, and are to be tried in the county where the cause of action arose. The defendant may plead the general issue, and give the act and special matter in evidence. In the event of a verdict for the defendant, nonsuit, discontinuance, or judgment for the defendant, on demurrer he is to have costs as between attorney and client. *See* 11 & 12 Vic. c. 44, s. 9. *Rex v. Borton*, 12 Ad. & E. 470. *Huggins v. Waydey*, 15 Mee. & W. 357. *Davis v. Curling*, 8 Q. B. 287.

The proviso in the 143d sect. of the 5 & 6 Vic. c. 50, with regard to the giving of notice and limiting the time for commencing proceedings, must be strictly complied with. *Cobbett v. Warner*, 1 H. & N. 388; 26 L. J. Ex. 11.

[2] *In Highway Districts* all penalties under the 25 & 26 Vic. c. 61, and all monies recoverable as penalties, may be recovered summarily before two or more justices, in the manner directed by the act 11 & 12 Vic. c. 43, and any act amending the same; but where any sum adjudged to be paid under this act, in respect of such penalties or monies, exceeds 5*l.*, an appeal may be had by any person aggrieved to a court of general or quarter sessions, in manner provided by the 110th sect. of the 24 & 25 Vic. c. 96, entitled "An Act to Consolidate and Amend the Statute Law of England and Ireland relating to Larceny and other similar Offences."

HOLIDAYS.[1]

HOMICIDE. *See post*, Murder.

HOMINE Replegianao.[2]

HORSES. *See* Gaming, vol. iv. p. 596; *post*, Innkeeper; Lien; Livery Stable; Post-horse Act; Wager; Warranty.

I. Hire of, p. 50.

(A) *Liability of Owner*, p. 50.

(B) „ *Hirer*, p. 51.

(C) „ *Owner and Hirer for Injuries to Third Persons*, p. 51.

II. Sale of. *See post*, Warranty.

III. Horse-Racing, p. 52.

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V. „ Stealing. *See* Cattle, Larceny of, vol. iii. p. 52.

VI. Horse-Maiming or Killing. *See* Cattle-Killing, vol. iii. p. 52; *post*, Malicious Injuries to Cattle.

I. Hire of.

(A) *Liability of Owner.*[3]

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[1] By 3 & 4 Wm. 4, c. 42, s. 43, "none of the several days mentioned in the 5 & 6 Edw. 3, c. 3 (which comprised all the fasts and festivals of the church), shall be observed or kept in the superior courts, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week." And by R. H. 6 Wm. 4, it is ordered that "thenceforth in addition to the said days, the following, and none other, shall be observed or kept as holidays in the several offices belonging to the said courts, viz. Good Friday and Easter Eve, and such of the five days following as may not fall in the time of Term, but not otherwise, viz. the birthday of our Lord the King, the birthday of our Lady the Queen, the day of the accession of our Lord the King, Whit-Monday, and Whit-Tuesday." These are not *dies non*, but periods of vacation for the courts and officers. The proceedings are not suspended.

The offices may be opened at any time when regularly they are shut. They are closed on a holiday for the benefit of the officers, and if they think fit to attend they may; and if open, judgment may be signed. *Bennett v. Potter*, 2 C. & J. 622. *See post*, Time, Computation of.

[2] This writ was to bail a man out of prison in the same manner that chattels taken in distress may be replevied. *See* F. N. B. 6. But being entirely superseded by the writ of *habeas corpus* (*see* Habeas Corpus, vol. iv. p. 619), it will suffice to refer to the cases connected with the writ *homine replegianao*. See *Banbury v. Wood*, 2 Ld. Raym. 987. *Banbury v. Knolls*, 2 id. 903. *Calthrop v. Axtel*, 3 Mod. 169. *Anon.* 7 Mod. 9. *Grey's case*, Skin. 61. *Bastide v. Reynell*, 4 Mod. 183. *Moor v. Watts*, 1 Ld. Raym. 613. *Wise v. Lawrence*, Ca. Prac. 83. *Designey's case*, T. Raym. 474. *Ilatt v. Lissett*, Ca. Prac. 39.

[3] If a horse or carriage be let for hire for the purpose of performing a particular journey, the owner warrants it to be proper and convenient for such journey, and this even though the hirer select from the owner's stables a particular horse. *Chew v. Jones*, 10 L. T. Ex. 231. And if the horse falls lame on the journey, the hirer may abandon him at any place where he turns out unfit, and give notice of that fact to the owner, whose duty it is to send for him. (Id.)

If a hired horse is taken sick on the journey agreed on without the fault of the hirer, its cure is at the expense of the owner (Pothier, Louage, p. 129. Story on Bailments, 258); and the hirer, if he calls in a farrier, is not liable for his ill-treatment of the horse; though he would be so had he improperly prescribed himself. *Dean v. Keate*, 3 Camp. 4. And, in general, the owner of a horse is liable for any accident

(B) *Liability of Hirer.*[1]

(C) ,, *Owner and Hirer for Injuries to Third Persons.*[2]

which may befal when fairly used by the hirer. *Sutton v. Temple*, 12 Mee. & W. 60. Where a horse is let on hire to be kept for a certain period, the hirer is liable for the shoeing; but if the owner let his carriage and horses to be driven by his own servant, the owner is liable. Pothier, Louage, p. 167. Story on Bailments, 258.

[1] If a person borrow a horse for a time, the law implies that it was part of the agreement that he should feed it while in his possession. *Handford v. Palmer*, 2 B. & B. 359. But if he so treats and manages him as any prudent man would act towards his own horse, he is not responsible for any damage the horse may receive. *Jennings v. Randall*, 8 D. & R. 335. So he is not liable when the horse is returned with broken knees, unless negligence appears. *Cooper v. Barton*, 3 Camp. 4. But a hirer is liable, at all events, if he keep the thing hired after the stipulated time, or use it differently from his agreement (Jones on Bailments, 121. *Davis v. Garrett*, 6 Bing. 716); and he ought not to continue to use the horse after he is exhausted and has refused his feed. *Bray v. Mayne*, Gow. N. P. 1. *Chew v. Jones*, 10 L. T. Ex. 231. So he will be liable if he take upon himself to prescribe for the horse if he fall ill, and do so improperly. *Deane v. Keate*, 3 Camp. 4. If through the hirer's negligence, as by leaving the door of his stable open at night, the horse be stolen, he must answer for it; but not if he be robbed of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as by travelling at unusual hours, or by taking an unusual road. The hirer is liable in the same way for the negligence of his servant when acting under his directions, either express or implied. Jones on Bailments, 88. A person jobbing a carriage by the year under a written agreement, by which the owner binds himself "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident. *Reading v. Menham*, 1 M. & Rob. 234.

[2] If a man hire a carriage and horses, and the owner send with him his postilion or coachman, the hirer is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage while he sits in it, and he is not answerable for any damage done by the negligence of the owner's servants. Jones on Bailments, 88. *Samuel v. Wright*, 5 Esp. 263. *Smith v. Lawrence*, 2 M. & R. 1. And where horses are hired to draw a private carriage to a certain place, and they are driven by the owner's servants, the owner is liable for any damage done through the servant's negligence. *Dean v. Branthwaite*, 5 Esp. 35. *Sir H. Hoghton's case*, cited 5 B. & C. 556. In *Laugher v. Pointer*, 5 id. 545, where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, it was held, by *Abbott, C. J.*, and *Littledale, C. J.*, that the owner of the carriage was not liable to be sued for such injury; *Bailey and Holroyd, JJ., dissentients.* But since that case, where the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day, or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party, it was held that the owners of the carriage were not liable to be sued for such injury. *Quarman v. Burnett*, 6 Mee. & W. 499; 4 Jur. 969. It was also held to make no difference that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses, or that they had always paid him a fixed sum for such drive, or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury was occasioned by his leaving the horses while so depositing the livery in their house. (Id.) If, however, the hirer take the actual management of the horses, or order the servant of the owner to drive in a particular manner, whereby the accident is occasioned, he will become liable by his own conduct. Thus, where a party, consisting of the defendant and others, hired for a day's excursion a carriage and post-horses, driven by postilions who were the servants of the owner of the horses; the defendant rode upon the box; the postilions, in endeavouring to force their way into a line of carriages, overturned a gig, and seriously injured the plaintiff, who was in the gig; the defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened:—*Held*, that he was liable in trespass. *M'Laughlin v. Pryor*, 4 Man. & G. 48; 4 Scott, N. R. 655; Car. & M. 354. *See* also *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500. *Chandler v. Broughton*, 1 C. & M. 29.

Whether the driver is acting as servant for the hirer or owner is a question for the jury; and in *Brady v. Giles*, 1 M. & Rob. 496, *Lord Abinger* said, "that no satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of a driver, ceased to be responsible, and the temporary hirer to become so, each case of this class must depend upon its own circumstances."

A hirer may, of course, by agreement, make himself answerable for accidents.

III. Horse-Racing.

(A) *Legality of.*[1] *See* Gaming, vol. iv. p. 596.

(B) *Decision of Stewards.*[2]

Thus, where the owner told the hirer that he had no horse at home but a black one, which shied, and that if he took it on hire he must be answerable for all accidents. The horse was engaged for six weeks at a certain price, and it appeared that, whilst it was in the hirer's possession, it came down upon the road in consequence of shying, and suffered a material injury in having its fetlock cut by a glass bottle. The owner of the horse brought an action against the hirer on his agreement, and the latter was held answerable for the damage done. *Jeffery v. Walton*, 1 Stark. N. P. C. 267.

[1] Since the repeal of the 18 Geo. 2, c. 19, it has been held that a horse-race for money given by third persons by way of prize is not illegal. *Applegarth v. Colley*, 10 Mee. & W. 723. *See* also *Batty v. Marriott*, 5 C. B. 818. And a steeple-chase for 50*l.* or upwards is a lawful race. *Evans v. Pratt*, 3 Man. & G. 759; 4 Scott, N. R. 378.

If two persons, intending to run a horse-race or foot-race against each other, or to engage in any lawful game, severally deposit sums of money or stakes in the hands of a stakeholder, to be awarded by him, or an umpire, to the winner of the race or game, an action may be maintained by the winner against such stakeholder for the recovery of the stakes (*Reg. v. Ashton*, 22 L. J. M. C. 1); but if the amount of a bet is deposited in the hands of a stakeholder, to be awarded to the winner of the bet, the money cannot be recovered (*Varney v. Hickman*, 5 C. B. 271; 17 L. J. C. P. 102. *Moore v. Durden*, 12 Jur. Ex. 138); for all bets, though made upon a lawful game, are invalidated by the statute. *Parsons v. Alexander*, 24 L. J. Q. B. 277. *See* Gaming, vol. iv. p. 596. A. and B. deposited with C. 50*l.* each to abide the event of a horse-race. After the race had been run, A. claimed to be the winner, and as such, demanded the entire amount of the stakes from C., and upon his refusal, sued for the same as such winner, and also for money had and received. A verdict was found against A. upon the special count, on the ground of the race being illegal within the 8 & 9 Vic. c. 109, s. 18, but he sought to recover back his deposit under the money count:—*Held*, that inasmuch as he had not, previously to the action, demanded back the specific sum, and thereby disconnected himself from the illegal transaction, but, on the contrary, had sought to receive the entire amount deposited on both sides, he could not recover the amount of his own stake. *M'Elwaine v. Mercer*, 9 Ir. Com. Law Rep. 13, C. P. See *Fox v. Hale*, 4 H. & N. 359; 5 Jur. N. S. 964, Ex. Ch.

[2] The stewards are generally the proper parties to decide all disputes in a race, and all matters which, according to the conditions of a race, are to be referred to them. If they are unable, or incompetent to determine it, the case must go to a jury, and the stakes, in the meantime, must remain in the hands of the clerk of the course where he is the stakeholder. *Marriott v. Broderick*, 2 Mee. & W. 369. The decision of the stewards will be upheld by the courts. *Benbow v. Jones*, 14 id. 193; 14 L. J. Ex. 257. *Parr v. Winteringham*, 5 Jur. N. S. 787; 28 L. J. Q. B. 123. The stewards of a race are the proper parties to appoint a judge, who may decide which is the winning horse; and if they are paid for their trouble, or enter upon their duties, they are liable to an action for not doing so. *Balfe v. West*, 22 L. J. C. P. 175. But a person gratuitously undertaking the duties of steward of a horse-race is not liable for negligent non-feasance in not appointing a judge, unless it appear that he commenced to perform the duties of the office. Id. 175; 1 C. L. R. 225, P. C.

Where, by the conditions of a race, the decision of the umpire or committee is to be final, the parties are bound by it in the same way as in the case of stewards. *Evans v. Pratt*, 4 Scott, N. R. 378.

Although the judge of a horse-race has power to decide finally who is entitled to the stakes as winner, such power does not accrue to him until the race has been run. *Carr v. Martinson*, 5 Jur. N. S. 788; 28 L. J. Q. B. 126; 7 W. R. 293; 32 L. T. 273.

One of the conditions of a race was that "all disputes should be settled by the stewards, whose decisions should be final." There were four stewards, and a dispute having arisen as to whether the plaintiff's horse or the defendant's mare was the winner, three of the stewards voted in favour of the plaintiff's horse. One of the three had betted against the defendant's mare:—*Held*, that the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; and even assuming that he was, that did not annul the decision of the other stewards. *Ellis v. Hopper*, 3 H. & N. 766; 4 Jur. N. S. 1025; 28 L. J. Ex. 1; 7 W. R. 15; 32 L. T. 77.

In 1843, Lord Eglinton being steward of the Doncaster Races, tickets were sold in Doncaster at a guinea each, which were understood to entitle the holders to admission into the grand stand and its enclosure, and to remain there during the races. They were issued with Lord Eglinton's privity, but they were not sealed or signed by him:—*Held*, that it was lawful for Lord Eglinton, without returning the guinea, or assigning any reason for what he did, to order any holder of a ticket to quit the stand and inclosure, and, after reasonable time, to force him to leave, though such holder had not misconducted himself, and, but for the order

to quit, would have been justified, by the purchase of the ticket, in remaining there. *Wood v. Ledbitter*, 13 Mee. & W. 838; 9 Jur. 187; 14 L. J. Ex. 161.

[1] The plaintiff and defendant made an agreement in writing to run a match with greyhounds "on the Wednesday during the Newmarket February meeting, 1841." It appeared that the Newmarket meetings were meetings of a coursing club; that the power of appointing and adjourning meetings was vested in the stewards, who were governed by printed rules; and that the practice of the club was to hold the February meeting on the first Tuesday in that month, weather permitting, but if weather prevented its being then held, to adjourn it to a future day, weather permitting. At the time when the contract was made, the day appointed for the February meeting was Tuesday, the 2nd February, 1841. On Wednesday, the 3rd, the plaintiff and the defendant were there, but frost prevented the meeting from being then held, and it was adjourned to Tuesday, the 9th, and again, from the same cause, to Tuesday, the 16th, when it was held. On Wednesday, the 17th, the plaintiff was ready with his dog to run the match, but the defendant made default:—*Held*, first, that the true construction of the contract was that the match should be run on the Wednesday during the February meeting, whenever it should be actually held, and, therefore, that the plaintiff performed his part of the contract by being ready to run on Wednesday, the 17th. *Daintree v. Hutchinson*, 10 Mee. & W. 85; 6 Jur. 39. *Held*, secondly, that the plaintiff was not bound to produce the printed rules, but it was enough for him to show that the February meeting was then actually held. (Id.) *Held*, also, that evidence was admissible to show the meaning of the words "P. P." subjoined to the agreement. (Id.)

In an action on the following memorandum, signed by the parties: "Evans and Pratt; T. H. umpire. F. Pratt bets T. Evans 100*l.* to 25*l.* p.p. Mr. Riley's brown mare (late his property) beats T. Evans' mare, Matilda, four miles across a country. 13 s. each. To come off the 1st of March, 1841. The umpire's decision to be final:"—*Held*, that evidence was admissible to show that, in sporting phraseology, "across a country" means over all obstructions, and prohibited the rider from availing himself of an open gate. *Evans v. Pratt*, 4 Scott, N. R. 378; 1 Dowl. N. S. 505; 3 Man. & G. 759; 6 Jur. 152. *Held*, also, that it was not competent to either party to dispute the decision of the umpire, whom they had constituted judge of the law and the fact. (Id.)

Where in an action to recover a stake of 100*l.* due upon a horse-race, a document was put in evidence, bearing one stamp but two agreements, one of which had been fulfilled, the other being that upon which the action was brought:—*Held*, that the stamp must be taken to apply to the latter. (Id.) A race was run subject to conditions, one of which was, that the riders should be "gentlemen, farmers, or tradesmen, being persons never having ridden as regular jockies or paid riders;" another, that the decision of the committee on any dispute that might arise should be final. At the trial, it appeared that the rider of the plaintiff's horse, which came first to the winning-post, had been in the habit of riding at the races, sometimes receiving his expenses, but never having been paid for his services, and that the plaintiff's right to the stakes was disputed on the ground of an alleged cross, on the subject of which the committee had heard evidence, and intimated an opinion adverse to the plaintiff, but had come to no final decision:—*Held*, that the rider of the plaintiff's horse was not disqualified, nor the plaintiff, under the circumstances, disentitled to maintain the action. *Walmsley v. Matthews*, 3 Scott, N. R. 584; 3 Man. & G. 133; 5 Jur. 508.

Plaintiff entered his horse for a steeple-chase, one of the conditions being that no groom or professional jockey would be allowed to ride; and another, that all disputes should be decided by the steward, whose decision should be final. Plaintiff intended his horse to be ridden by W., but, before the day of the race, was informed by the steward that he considered W. a professional jockey, and that the horse, if ridden by him, would be no horse in the race. Plaintiff insisted that W. was qualified, and on the race-day, notwithstanding a similar intimation from the steward to plaintiff, W. rode the horse, which came in first. On the following day the steward pronounced the second horse to be the winner, and by his directions the stakes were paid to the owner of that horse:—*Held*, that the steward had decided the question within the meaning of the condition; that his decision was final, although it was not made after hearing both parties; and that plaintiff could not recover the stakes from the shareholder. *Benbow v. Jones*, 14 Mee. & W. 193; 14 L. J. Ex. 257.

The plaintiff and defendant agreed that the plaintiff should take the defendant's mare in exchange for that of the plaintiff; that the defendant should give the plaintiff the half of the winnings of her two first races; or, in case she should be sold before, the defendant should pay the plaintiff one-third of what she should be sold for:—*Held*, that the agreement, being one simply to give an increased price for the mare, upon the occurrence of a state of facts which might add to her value, was a legal contract, and not in the nature of a wager. *Crofton v. Colgate*, 10 Ir. Com. Law Rep. 133, C. P.

The defendant's mare having won a prize of 50*l.* at a horse-race, the conditions of which were, that a subscription should be made up of three sovereigns each, subscribed by the owners of the horses, and thirty sovereigns added thereto, out of which the expenses and 1*l.* 10*s.* were to be deducted and paid to the treasurer, and 3*l.* 3*s.* to the owner of the second horse:—*Held*, that the

IV. Horse-Slaughtering.[1]

HOSPITAL. *See* Charitable Uses, vol. iii. p. 75; Charities, Commissioners of, id. p. 78.

I. Founding, p. 54.

II. Rating to the Poor. *See post*, Poor; Rate.

III. Liability of Members of Committee, p. 54.

I. Founding.[2]

III. Liability of Members of Committee.

Burls v. Smith, 7 Bing. 705; S. C. 5 M. & P. 735.

Members of a committee of an hospital who manage its concerns are personally liable.

In *assumpsit* it appeared that the affairs of an hospital were managed by a committee appointed by the subscribers at large, of whom the defendant was one of the committee; he had issued directions for the management, and signed cheques for the payment of the tradesmen's accounts.

The Court held that the subscribers, who attend a committee for managing the concerns of an hospital, are liable to the creditors of the hospital; and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce the plaintiff to believe that he was to look to the defendant and the other members of the committee for payment.

See also Clubs, vol. iii. p. 126.

HOTEL. *See post*, Innkeeper.

HOUSE.[3]

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races referred to in the agreement were to be such as were legal within the 8 & 9 Vic. c. 109, s. 18, and that the race in question satisfied the requirements of the statute. (Id.)

[1] Regulations as to the slaughtering of horses, &c. are contained in 26 Geo. 3, c. 71; 5 & 6 Wm. 4, c. 59, ss. 7, 8; and 7 & 8 Vic. c. 87; and are to be found in Burns' *Justice*, vol. iii. p. 1087, under the head "Slaughtering of Horses" and "Horses and Slaughterhouses." *See* also Public Health Act, 11 & 12 Vic. c. 63, ss. 2, 61–64.

[2] Before the 39 Eliz. c. 5, hospitals could only be founded by royal license or letters patent. By that act they might be incorporated. In 1597, but before the sessions of parliament, B. founded a hospital for bedesmen, and made "ordinances" for their regulation, in which the "feoffees" of the hospital were spoken of. (The bedesmen are, in effect, appointed during good behaviour):—*Held*, that a legal foundation of the hospital might be presumed either by license or letters patent, not necessarily investing the bedesmen with a corporate character; and they were entitled to a separate equitable estate of freehold in their respective rooms. *Simpson, App., Wilkinson, Resp.* 1 Lutw. Reg. Cas. 168; *see* 1 B. & A. 308; 1 Pig. & Rod. 128; 14 L. J. C. P. 49.

The 39 Eliz. c. 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them. A municipal corporation is included in the words "every person and persons," and may exercise the powers given by the act. *Newcastle Corporation) v. Attorney-General*, 12 Clark & Fin. 402.

Where an hospital for the relief of the poor, needy, and impotent people, is duly incorporated, and consists of a master and twelve poor brethren, and the advowson of a living is conveyed to them, to hold to the use of the master and brethren and their successors for ever, the right to nominate to the living belongs to the majority of the entire body of master and brethren, and the master's concurrence in the act of the majority is not necessary. *Reg. v. Kendall*, 1 Q. B. 366; 4 Per. & D. 603. Where the majority has nominated the party at a meeting, and the master refuses to put the common seal to a presentation, the court will compel him to do so by *mandamus;* and if the master, in his return to the writ, merely insists on his right to withhold his consent, and to refuse to seal it, he cannot object that there was no corporate resolution under seal; or that the writ insufficiently states his custody of the seal; or that no presentation has been actually tendered to him for signature; or that the majority, having only voted for the prosecution of the writ, may retract their resolution. And it is no answer to the writ that there are visitors appointed by the founder, to whom disputes between the master and brethren are to be referred. (Id.) *See* Grant on Corporations, index, Hospitals.

[3] A building intended for human habitation. 14 Mee. & W. 181. The term "house" *primâ facie* means a dwelling-house. Id. 185; and *see* 4 Man. G. and Scott, 105; but in 7 Man. & G. 122, it was said that a house does not necessarily mean a dwelling-house: *Creswell, J.* (Id. 136.) A building

HOUSEBREAKING. *See* also Arson, vol. i. p. 543; Burglary, vol. iii. p. 2; *post*, Hundred, p. 57; Riot.

I. Breaking and Entering Building within the Curtilage and Committing a Felony, p. 55.
II. Stealing in a Dwelling-House with Menaces, p. 55.
III. „ „ to the Value of £5, p. 55.
IV. Breaking and Entering a House, Warehouse, &c., and Committing a Felony, p. 55.
V. Breaking and Entering a House, Place of Divine Worship, &c. with Intent to commit Felony, p. 56.

I. Breaking and Entering Building within the Curtilage and Committing a Felony.

Breaking and entering building within the curtilage of a dwelling-house and committing a felony.[1]

By 24 & 25 Vic. c. 96, s. 55, "whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or, being in any such building, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

II. Stealing in a Dwelling-House with Menaces.

Stealing in a dwelling-house with menaces.

Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable to precisely the same punishment as in the last section.[2]

III. Stealing in a Dwelling-House to the Value of £5.

Stealing in a dwelling-house to the value of 5*l.*[3]

By 24 & 25 Vic. c. 96, s. 60, "whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

IV. Breaking and Entering a House, Warehouse, &c. and Committing a Felony.

Breaking and entering a house, warehouse,

By 24 & 25 Vic. c. 96, s. 56, "whosoever shall break and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling-house, school-house, shop, warehouse,

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calculated to be used as a dwelling-house, though not used as such, is properly described as "a house." (Id. 122.) A building divided into floors and apartments, with four walls, a roof, a door, and chimneys, would be considered, in ordinary parlance between man and man, as a house: *Tindal, C. J.* (Id. 125.) By the grant of a messuage or house, the orchard, garden, and curtilage occupied therewith will pass, but *contra* as to the garden; and so an acre or more may pass by the name of a house. So by a devise of a messuage or house land will pass. 1 Crabb's *Real Prop.* 68, 87.

[1] As to what is within the curtilage, *see* Burglary, vol. iii. p. 3.

[2] Besides the larceny, prove that the person mentioned in the indictment was put in fear by menace or threat. *R. v. Etherington*, 2 Leach, 671; 2 East, P. C. 685. As to what is a dwelling-house, *see* Burglary, vol. iii. p. 5.

[3] For this statute to apply, the goods stolen must be under the protection of the house, and not of the person; and this is a question for the court and not for the jury. *R. v. Thomas*, Car. Sup. 295. If one go to bed, and place his clothes and money by the bedside, these are in the protection of the house, and not of the person. Id. *R. v. Hamilton*, 8 C. & P. 49. *R. v. Campbell*, 2 Leach, 264. *R. v. Owen*, id. 572. Stealing in a dwelling-house to the value of 5*l.* by the owner of the house is within the statute.

&c. and committing a felony.[1]

or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

V. Breaking and Entering a House, Place of Divine Worship, &c., with Intent to commit Felony.

Breaking and entering a house, place of divine worship, &c., with intent to commit a felony.

By 24 & 25 Vic. c. 96, s. 57, "whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage of such school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

HOUSE: Malicious Injury to by Tenant.

Tenants of houses, &c. maliciously injuring them.

By 24 & 25 Vic. c. 97, s. 13, "whosoever being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish the same, or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture, being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of misdemeanor."

Provisions of 24 & 25 Vic. c. 97, to apply to persons in possession of property injured.

By sect. 59, "every provision of this act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property in respect of which such act shall be done."

HOUSE: Malicious Injury to by Explosive Substances.

Destroying or damaging house with gunpowder.

By 24 & 25 Vic. c. 97, s. 9, "whosoever shall unlawfully and maliciously, by the explosion of gunpowder or any other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any time not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping." Sect. 10 applies to attempts to destroy buildings with gunpowder.

HOUSE Agent.[2]

of Lords and House of Commons. *See post*, Parliament.

Correction. *See post*, Prison.

HUE and Cry.[3] *See post*, Hundred, p. 57.

[1] As to what is a dwelling-house, *see* Burglary, vol. iii. p. 5. For breaking, &c. *see* id. p. 7.

[2] By 24 & 25 Vic. c. 21, s. 10, a person selling or letting furnished houses must be licensed where the annual value or rent of the house exceeds 25*l*. It is a question for the jury whether he undertakes for his commission to ascertain the solvency of the party to whom he lets. *Keys v. Tindall*, 1 B. & J. 296; 30 L. J. Q. B. 362. *See* Principal and Agent.

[3] This is derived from two French verbs, *huer* and *crier*, both signifying to shout or cry. Manwood, in his *Forest Law*, c. 19, n. 11, says that *hue* in Latin is *vox dolentis*, and *cry* is the pursuit of the felon upon the highway. It is defined to be the pursuit of a felon from town to town till he be taken, and is enjoined by the common law. 3 Inst. 116, 117; 2 id. 172; 3 New. Ab. 61; Fitz. Coron. 395.

HUNDRED. *See post*, Riot.

I. What it is, p. 57.

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(A) *Hundred to make Compensation for Damage done by Rioters*, p. 57.

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(F) *Mode of Proceeding where the Damage does not exceed 30l.*, p. 59.

I. What it is.[1]

II. Liability of, in what Cases.[2]

III. 7 & 8 Geo. 4, c. 31, Provisions of.[3]

(A) *Hundred to make Compensation for Damage done by Rioters.*

By sect. 2, "if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house,[4] stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof,[5] or any steam-engine or other engine for sinking, draining, or working any mine,[6] or any staith, building, or erection, used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, shall be feloniously[7] demolished,

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[1] A part or division of a shire, so called, either because, anciently, each hundred found 100 fide jussors of the king's peace, or 100 able men for his wars; or more probably it is so called because it was composed of a hundred families. A hundred is to have a jurisdiction, or power, to administer justice in 100-vills, or 100 men, or 100 parishes. Br. Court Baron, pl. 8, cites 8 Hen. 7; 1 Steph. Com. 117.

Every ward in London is a hundred in a county, and every parish in London is a vill in a hundred. 9 Rep. 66, b.

[2] The liability of the hundred is now confined to damage occasioned by persons riotously and tumultuously assembled; and it is no longer liable in cases of robbery, or where houses are burnt or destroyed without riotous assembly. *See* 7 & 8 Geo. 4, c. 31, s. 1.

[3] The whole law relating to the liability of the hundred is consolidated and amended by this statute.

[4] A house of the plaintiff occupied by lodgers is within the statute 1 Geo. 1, s. 2, c. 5. *Rex v. Wood*, 2 Stark. 269. But an unfinished building never yet inhabited, though intended for a dwelling-house, is not within the 9 Geo. 1, c. 22, s. 7. *Elsmere v. St. Briavells*, 8 B. & C. 461.

[5] *Hiles v. Shrewsbury*, 3 East, 457. *Orgill v. Smith*, 6 M. & S. 182. It is conceived that a hustings for an election is not within the statute. *Allen v. Ayre*, 3 D. & R. 96.

[6] A wooden trough, by which water was brought from a distance of half a mile for the purpose of washing the ore, is within these words. *Barwell v. Winterstoke*, 14 Q. B. 704; 19 L. J. Q. B. 206.

[7] Unless the riot is of a kind to amount to felony, the hundred are not liable. *Reid v. Clarke*, 7 T. R. 496. It has, however, been held sufficient to give evidence that the fire was wilful and malicious. *R. v. Gainsbury*, 4 D. & R. 250. *Burrows v. Wright*, 1 East, 615. In a declaration the word "feloniously" is sufficient, without "unlawfully and maliciously." *Allen v. Kerton*, 3 Wils. 318; S. C. 2 Black. 842. *See* also *Beaton v. Rushforth*, 7 Taunt. 45. The hundred are only liable for the damage done to the house and such other property as was destroyed in doing that damage (*Greachy v. Higginbottom*, 1 East, 636); as where a mob threatened to demolish, with intent to rescue, and actually commenced,

pulled down or destroyed, wholly or in part, by any persons riotously or tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed,[1] shall be liable to yield full compensation[2] to the persons damnified[3] by the offence, not only for the damage which may at the same time be done by any such offender to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid."[4]

(B) *Party Damaged to Comply with certain Conditions.*[5]

(C) *Process, how Served.*[6]

(D) *Inhabitants of Hundred competent Witnesses.*[7]

(E) *How Verdict for Plaintiff to be Enforced.*[8]

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it was held sufficient (though they afterwards desisted) to render the hundred liable for goods used and destroyed in the purpose of demolition, but not for such as were stolen, that being a distinct felony. *Beckwith v. Wood*, 1 B. & A. 487; 2 Stark. 263. But see *King v. Chambers*, 1 Stark. 195; 4 Camp. 377. The term "demolish," in an action on the Riot Act, to include "burning." *Nesham v. Armstrong*, 1 B. & A. 146. *R. v. Howell*, 9 C. & P. 437. *R. v. Harris*, C. & Mar. 661.

[1] Orders made by the justices for the county in which premises are described as being in a certain hundred are evidence of the fact. *Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Adol. 273. Where a district by statute is taken out of a county, and annexed to a county of a city, the county of a city is liable. *Humphries v. Inhabitants of Bristol*, 2 Nev. & M. 74. *Rolfe v. Inhabitants of Elthorne*, 1 M. & M. 185.

[2] The jury appearing to have assessed the damages done by a mob demolishing the plaintiff's factory at the sum which would replace it in the state it was before the outrage, as nearly as was practicable, the court refused to disturb the verdict. *Rex v. Hundred of Broxtowe*, 3 B. & Adol. 550.

[3] Under 9 Geo. 1, c. 22, a reversioner as well as the termor was held entitled to sue the hundred. *Pellew v. Inhabitants of Wonford*, 9 B. & C. 134. And a trustee might sue on the Riot Act now repealed. *Pritchett v. Waldron*, 5 T. R. 14. *Held*, under the 1 Geo. 1, s. 2, c. 5, that the house must be in the possession of the party suing (*Marnot v. Cooke*, 1 Price, 349), though using a shop and parlour by day was a sufficient occupation. *Rea v. Wood*, 2 Stark. 269. The circumstance of the proprietor having previously recovered from an insurance office, is no bar to an action against the hundred (*Clarke v. Blything*, 2 B. & C. 254); for the insurers may sue the hundred in his name (*Mason v. Sainsbury*, 3 Dougl. 61), but not in their own. *London Assurance Co. v. Sainsbury*, id. 245.

[4] The hundred are liable for damage done to the furniture as well as to the house. *Ratcliffe v. Eden*, Cowp. 485. *Hyde v. Cozens*, Dougl. 699. But *see* n. 7, *supra*, p. 57. *Smith v. Bolton*, Holt, 201.

[5] By sect. 3, "no action is to be maintained by virtue of this act for damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognisance before him to prosecute the offenders when apprehended: Provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence."

The plaintiff must prove that he entered into the required recognisance. Noy. 150. The seven days are to be reckoned exclusively of the day on which the damage was committed. *Pellew v. East Wonford*, 9 B. & C. 134.

[6] By sect. 4, the process is to be served on the high-constable, who may let judgment go by default, or defend the action, as he may be advised; or now, by 2 Wm. 4, c. 39, s. 13, "on any one of the high-constables of the hundred; and if against the inhabitants of any county of a city or town, or the inhabitants of any franchise, liberty, city, town or place, not being part of a hundred or other like district, on some peace-officer thereof." Such process must be against the inhabitants at large, and not against two or more of them by name. *Jackson v. Pearson*, 1 B. & C. 304.

[7] By sect. 5, the inhabitants of the hundred are made competent witnesses.

[8] By sect. 6 it is enacted, that if the plaintiff shall recover, the writ of execution shall not be executed, but that the sheriff, on receipt of it, shall make out his warrant to

(F) *Mode of Proceeding where the Damage does not exceed 30l.*[1]

HUSBAND and WIFE.[2] *See post*, Marriage; Parent and Child.

I. Of the Persons between whom the Relative Situation of Husband and Wife may or may not be Created.

(A) *With reference to Canonical Impediments.*

(*a*) *From Consanguinity and Affinity.* *See post*, Marriage.

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the county treasurer, who is to pay the amount. And by sect 13 the sheriff may direct his warrant into liberties.

By sect. 7, the expenses of the high-constable's defence are to be allowed by two justices, and paid by the county treasurer; and the whole of these sums are to be levied on the hundred over and above their share of the county rate.

By sects. 12, 14, and 15, the mode of payment in liberties, &c. is provided for, and the mode of suing for damages done to churches and chapels, or to property belonging to corporations, is pointed out by the 11th sect. of the act.

In an action brought against the hundred of Salford, for damage done by a riotous mob to premises in the borough of Manchester, which formed part of the hundred, it was held that the borough was liable as part of the hundred, notwithstanding the 5 & 6 Wm. 4, c. 76, s. 112. *Birley v. Salford*, 11 Mee. & W. 391. *See* also *Humphries v. Bristol*, 2 Nev. & M. 74.

[1] By 7 & 8 Geo. 4, c. 31, s. 8, it is enacted, "that it shall not be lawful for any person to commence any action against the inhabitants of any hundred, or other like district, where the damage alleged to have been sustained by reason of any of the offences in this act mentioned shall not exceed the sum of 30*l.*, but the party damnified shall, within seven days after the commission of the offence, give a notice in writing of his claim for compensation, according to the form in the schedule hereunto annexed, to the high-constable, or some one of the high-constables (if there be more than one) of the hundred, or other like district, in which the offence shall have been committed; and such high-constable shall, within seven days after the receipt of the notice, exhibit to some two justices of the peace of the county, riding or division, in which such hundred or district shall be situate, residing in or acting for such hundred or district, and they shall thereupon appoint a special petty session of all the justices of the peace of the county, riding or division, acting for such hundred or district, to be holden within not less than twenty, or more than thirty days next after the exhibition of such notice, for the purpose of hearing and determining any claim which may be then and there brought before them on account of any such damage; and such high-constable shall, within three days after such appointment, give notice in writing to the claimant of the day and hour and place appointed for holding such petty sessions, and shall, within ten days, give the like notice to all the justices acting for such hundred or district; and the claimant is hereby required to cause a notice in writing, in the form in the schedule hereunto annexed, to be placed on the church or chapel door, or other conspicuous part of the parish, township, or place in which such damage shall have been sustained, on two Sundays preceding the day of holding such petty session.

In cases under 30*l.* the parties must undergo the examination, and enter into a recognisance under the 3d sect. of this act, stated *supra*. And by sect. 9 it is enacted, "that it shall be lawful for the justices, not being less than two, at such petty session, or any adjournment thereof, to hear and examine, upon oath or affirmation, the claimant and any of the inhabitants of the hundred, or other like district, and their several witnesses, concerning any such offence, and the damage sustained thereby; and thereupon the said justices, or the major part of them, if they shall find that the claimant has sustained any damage by means of any such offence, shall make an order for payment of the amount of such damage to him, together with his reasonable costs and charges, and also an order for payment of the costs and charges (if any) of the high-constable or inhabitants, and shall direct such order or orders to the treasurer of the county, riding or division, in which such hundred or district shall be situate, who shall pay the same to the party or parties therein named, and shall be reimbursed for the same in the manner hereinbefore directed."

The court will not grant a *mandamus* to summon the petty sessions for the purpose of such proceeding, where it does not appear by affidavit that the party or his servant, &c. had gone before a justice within seven days, and submitted to examination under the 3d sect. *R. v. Folkestone Justices*, 4 B. & Adol. 552. *R. v. Bateman*, 1 Nev. & M. 718.

The parties going before the justices must be the owners or the persons having the management of the property. *R. v. Broxtowe*, 3 B. & Adol. 550. The examination should include all the servants of the landlord in possession of and using part of the premises. *Duke of Somerset v. Hundred of Mere*, 4 B. & C. 167.

[2] The old law term for "husband and wife" was "baron and feme."

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IV. Of the Effect of the relative Situation of Husband and Wife being Created.

(A) *Of the Interest and Power acquired by the Husband by Marriage* [1]

(*a*) *In the Person of his Wife.*[2]

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[1] The husband is in general entitled to the absolute control over his wife's person. *Manby v. Scott*, Bridg. 233. He can impose such corporal restraints as he may deem necessary for securing to himself the fulfilment of the obligations imposed on her by virtue of the marriage contract. He may, in the plenitude of his power, adopt every act of physical coercion which does not endanger the life or health of the wife, or render cohabitation unsafe. *See post*, Marriage. And he may seize her, or obtain a *habeas corpus* to recover possession of her person, unless he has expressly abandoned his marital rights by executing a deed of separation (*Rex v. Mead*, 2 Kenyon, 279; S. C. 1 Burr. 542. S. P. *Anne Gregory's case*, 4 id. 1991), or the parties be judicially separated. He then loses all control over her person. *Lister's case*, 8 Mod. 22; 1 Stra. 478. *Rex v. Mead*, 1 Burr. 542. *Lord Vane's case*, 13 East, 171, n.; 2 Stra. 1202. *Lewis v. Ponsford*, 8 C. & P. 687); and if it be shown that he has ill-treated her, and she has sworn the peace against him, the court, on her being brought up by *habeas corpus*, will not compel her to return into his custody. *Ann Gregory's case, supra.* And a husband engaged in treasonable schemes cannot oblige his wife to live with him. *Manby v. Scott*, Bridg. Rep. 243.

Where a wife absents herself from her husband, on account of no misconduct on his part, and he afterwards by stratagem obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her of her liberty until she is willing to return to the performance of her conjugal duties (*In re Cochrane*, 8 Dowl. P. C. 630); but where a wife is voluntarily, and without any restraint, absent from her husband, a court of common law has no jurisdiction upon his application to issue a writ of *habeas corpus* to bring up her body. *Ex-parte Sunderland*, 21 L. J. Q. B. 342; 17 Jur. 317.

The affidavit in support of a motion for a *habeas corpus* to bring up the wife of the applicant, must state that the former is detained against her will. *The King v. Wiseman*, 2 Smith, 617.

An action on the case lies by the husband for enticing away his wife (*Winsmore v. Greenbank*, Willes, 577); even against the parent of the wife (*Anon.* 1 Vent. 37); or he may institute a suit in the matrimonial court for the restoration of conjugal rights, or to enforce cohabitation.

In an action for enticing away it is sufficient to state in the declaration that the defendant unlawfully and unjustly persuaded, *procured*, and enticed the wife to continue absent, &c., by means of which persuasion, &c. she did continue absent, &c., whereby the plaintiff lost the comfort and society of his wife, without setting forth the means, &c. used by the defendant. *Winsmore v. Greenbank*, Willes, 577; S. C. Bull. N. P. 78. But when a woman is compelled by ill-treatment to leave her husband, any person may receive and protect her. *Berthon v. Cartwright*, 2 Esp. 480. And it is sufficient for this purpose if the wife *represent herself* to be ill-treated. *Philp v. Squire*, Peake, 82. And a private person may justify breaking and entering the house of another, and imprisoning his person, in order to prevent him committing murder on his wife. *Hancock v. Baker*, 2 B. & P. 260.

We have seen, where a wife withdrew from her husband for no misconduct on his part, and she declared her resolution of leaving him whenever she could: — *Held*, that having by stratagem obtained possession of her person to prevent her eloping from him, he was justified in restraining her of her liberty. *In re Cochrane, supra.*

[2] Upon the principle that the husband possesses an absolute control over the person of the wife, it has been received as clear law, that a man cannot be guilty of a rape on his own wife, for the matrimonial consent cannot be retracted (1 Hale, 629); but he may be criminal in aiding and abetting others in such a design. *Lord Audley's case*, 1 Harg. *St. Tr.* 388); and where a marriage is coercive and consummated by force, though the husband cannot be appealed of rape till it is dissolved, as till then it is a marriage *de facto*, he will be liable afterwards to be indicted as if no ceremony had passed. *See* Abduction, vol. i. p. 46, n. [1].

(1) *To have the Custody of her Person.*
(2) „ *secure her from Abduction.* *See* vol. i. p. 44.
(3) „ *Adultery.*[1]
(4) „ *Assaults or other Injuries.*[2]

(*b*) *In the Property of his Wife.*[3]

(3) *Power of Husband over his Wife's Real Estate.*[4]

(*a* 1) *To Convey.*[5]

[1] Where a man finds another in the act of adultery with his wife, and kills him in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree. *Madely's case*, T. Raym. 212; 1 Vent. 158; 2 Keb. 829. *Key v. Kelly*, 2 C. & Kir. 814. But if the husband kill the adulterer deliberately and upon revenge, it would be murder. *See post*, Murder.

[2] The husband may justify an assault in defence of his wife, or even killing the assailant. 2 Roll. Abr. 546 (D) pl. 1; 1 Bro. Trespass, pl. 128; 1 Hale, 484; 4 Bl. Com. 186.

[3] By marriage, the husband and wife are as one person in law. Upon this union depend almost all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage. By that act the husband acquires a freehold interest during the *joint* lives of himself and wife in all such freehold property of inheritance as she was seised of at the time, or may become so during the coverture. *See* Curtesy, vol. iii. p. 531. *Robertson v. Norris*, 11 Q. B. 917; 17 L. J. Q. B. 201.

[4] When there is no settlement or interposed equity they cannot, either jointly or separately, appoint an attorney to alienate the wife's lands (*Graham v. Jackson*, 6 Q. B. 811; *see* 13 Sim. 327); but the husband by marriage obtains, in his wife's real estate only, a title to the rents and profits during the coverture, and the property remains entire to the wife after the death of the husband, or to her heirs if she dies before him, unless by the birth of a child he becomes tenant for life by the curtesy.

Of the freehold lands of which the husband and wife are seised in right of the wife, whether held in fee-simple, fee-tail, or for life, his alienation would be good as against himself; and as to her power to transfer the whole estate of his wife, subject only to the right of entry of the wife, or her heirs, *see post*. And it seems that an estate conveyed by the husband alone will be voidable only, and not void, and that it will continue till defeated by the entry of the wife, or of her heirs. 1 Prest. Ab. 336; Bac. Abr. Leases.

[5] As under a devise to husband and wife they take by entireties, and not in moieties, the husband *alone* cannot by his own conveyance divest the wife's estate or interest, and if she survive him she will be entitled to the whole. *Doe d. Freestone v. Parratt*, 5 T. R. 652. And the law is the same whether the property be in possession, remainder, or reversion. *Purefoy v. Rogers*, 2 Lev. 39.

The husband, immediately upon the marriage, becomes entitled to his wife's freehold for their joint lives; that is to say, as long as they are *both* alive he is the sole tenant, but upon the death of his wife he ceases to have any interest in the property, unless a child is born of the marriage, in which case the husband becomes tenant of his wife's freeholds *for his own life* by the curtesy. *See ante*, vol. iii. p. 531. So that, though the child die, the husband is still tenant for his own life; and if the child lives he has to wait for the death of his father before coming into the property.

The husband may, therefore, without his wife's concurrence, lease, sell, or mortgage his wife's freeholds to the extent of his interest therein; that is, before the birth of issue he may grant a lease of the lands, to last as long as he and his wife both live, or he may mortgage or sell them to the same extent; and after the birth of issue he may lease, sell, or mortgage for his own life. But the *ultimate inheritance* is not the property of the husband, whose right is bounded by the marriage. It is the property of the wife, subject to the husband's rights, and cannot be parted with but by their joint act. And in order to protect her against an undue exercise of her husband's authority, the law will not suffer her to part with her estate till her knowledge of the effect of the deed of conveyance, and her consent to execute it, have been ascertained by an examination apart from her husband. This examination is called "taking the acknowledgment of a married woman," and is conducted by one of the judges of the land, or of the Court of Chancery, or of the county courts, or by two commissioners, of whom several are appointed in different parts of the country for the purpose. Without it no deed will be effectual to pass her estate. The person or persons who take the acknowledgment sign a certificate, which, with an affidavit verifying it, is filed in the Court of Common Pleas.

If the wife is abroad, the Court of Common Pleas may commission any persons, residing where she is, or going thither, to take her acknowledgment.

The deed takes effect from the time of the acknowledgment.

Being unable to sell, the husband and wife are of course unable to mortgage, or otherwise charge her freeholds, without an acknowledgment by her.

At the wife's death her freeholds descend to her heir, who will be her eldest son, if she has one, whether by her present or a former marriage, but subject to her husband's life estate by the curtesy, if she has had issue by him. See Curtesy, vol. iii. p. 531.

The husband may dispose of a part of his wife's chattels real; for instance, in case of a lease he may underlet (1 Platt, 540) a part of the lands, reserving rent to himself, or he may underlet the whole for a portion of the term. He may sell his wife's reversionary interest, whether contingent or not, in chattels real; and it matters not that he dies before the contingency takes place, or the reversion falls in. *Downe v. Hart*, 2 R. & M. 360; 16 Beav. 333. He may, of course, mortgage his wife's chattels real, but after his death the equity of redemption survives to his wife. 1 Bright, H. & W. 42, 78.

If the husband has agreed to mortgage such property of his wife to secure a debt which he owes, the wife will, after his death, be bound to execute the mortgage or pay the money. Her leaseholds are liable to execution for the husband's debts, and if he is outlawed or attainted, such property will be forfeited to the Crown. 1 Bright, H. & W. 106.

Marriage does not affect the right of the husband to his own freeholds, whether for life or in fee, except that if he were married after 1833 his wife would be entitled after his death to dower out of all his estates of inheritance (that is, one-third for her life), unless the right were barred by the deed under which he takes the estate, or unless he excluded the wife's right by his will.

Where the husband is tenant under a lease, his right to it is not affected by his marriage, and of course he may leave it by will to whomsoever he pleases. If he leaves no will the lease will be vested in his widow, upon her becoming his administratrix; the children, if any, being entitled to the same share of it as of the other personal estate. When the wife is tenant under a lease, the husband has, during his life, all the benefit of the property, either by way of occupation or of increased rental upon underletting.

The husband may assign the lease in his lifetime, and take the money for it, without the reduction into possession which is required to enable him to dispose of her choses in action. *See post.* But the husband cannot bequeath the lease away from his wife by will. When he dies it will survive to the wife, not as his administratrix, but in her own right, and then she can deal with it, or leave it by will, as she pleases.

The wife cannot assign the lease during her husband's lifetime, unless it is settled to her separate use.

Upon the wife's death her lease will belong to her husband if he survives her, in his own right, and without administration being granted to him, and of course the children are not entitled to any share. Thus the wife's lease survives to whichever of the two lives longest, but the husband's lease does not survive, but may be bequeathed away, or in case of intestacy will form a part of his personal estate, of which the wife will only be entitled to her share. 1 Platt, 140.

Though the husband cannot bequeath his wife's lease away from her by will, yet he may *make* a will leaving the lease to whomsoever he pleases, and then, if she happens to die before him, the will will take effect as if she had been dead when it was made, for all wills are treated as having been made immediately before the testator's death, unless the language used indicates a contrary intention. 1 Platt on Leases, 139.

With regard to the wife's next presentation to a living, the husband may present when a vacancy occurs, or may dispose of the next presentation during the lifetime of the present incumbent, and receive the purchase-money. At the death of either husband or wife the same rules apply to this kind of property as to a lease.

If the husband during his life agree to dispose of his wife's chattels real for valuable consideration, the wife, after his death, will be bound by the agreement.

By a marriage settlement real estates were conveyed to trustees, in trust to permit the wife to receive the rents to her sole use, independently of her husband. After the marriage the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life:—*Held*, that it was a question of fact in what character the husband let the premises, whether as agent for the trustees, or as dealing with his wife's property, and that after the death of the wife the tenants were not estopped from denying that the husband had any interest, unless it was found that he let in his own name. *Howe v. Scarrott, Sharp v. Scarrott*, 4 H. & N. 723; 28 L. J. Ex. 325.

If lands should be settled in trust for the separate use of the wife, with a clause restraining alienation, neither husband nor wife can make any disposition. But in all other cases the husband and wife may together make any such disposition of the wife's interest in real estate as she could do if unmarried. The mode in which such dispositions were formerly effected was by a fine duly levied in the Court of Common Pleas. They were fictitious suits commenced and then compromised by leave of the court, whereby the lands in question were acknowledged to be the right of one of the parties.

Whenever a married woman was party to a fine, it was necessary that she should be examined apart from her husband, to ascertain whether she joined in the fine of her own free will, or was compelled to it by the threats and menaces of her husband. Cruise on Fines, 108, 109. Having this protection, a fine by husband and wife was an effectual conveyance, as well of the wife's as of the husband's interests of every kind in the land compromised in the fine. But without a fine no conveyance could be made of the wife's lands: thus she could not leave them by her will even to her husband, although by means of the Statute of Uses a testa-

(*a* 2) *To Discontinue.*[1]
(*a* 3) „ *Forfeit.*[2]
(*a* 4) „ *grant Leases.*[3]

mentary appointment of lands in the nature of a will might be made by the wife in favour of her husband, in a manner to be hereafter explained. *See post*, Wills; 1 Platt on Leases, 139. And in this respect the law still remains unaltered, although a change has been made in the machinery for effecting conveyances of the lands of married women. The cumbrous and expensive nature of fines having occasioned their abolition, provision has now been made by the act for the abolition of fines and recoveries (3 & 4 Wm. 4, c. 74), and for the conveyance by deed merely of the interests of married women in real estate. Every kind of conveyance of freehold estates which a woman could execute if unmarried, may now be made by her by a deed executed with her husband's concurrence. (Sect. 77.) But the separate examination which was before necessary in the case of a fine is still retained, and every deed executed under the provisions of the act must be produced and acknowledged by the wife as her own act and deed, before a judge of one of the superior courts at Westminster, or a master in Chancery, or two commissioners (sect. 79), who must, before they receive the acknowledgment, examine her apart from her husband touching her knowledge of the deed, and must ascertain whether she freely and voluntarily consents thereto. (Sect. 80.)

[1] This is now obsolete, for by 3 & 4 Wm. 4, c. 27, it is enacted, that no discontinuance which shall be made after 31st December, 1833, shall defeat any right of entry for the recovery of land.

[2] The treason of the husband will not occasion a forfeiture of the wife's real estate, but the wife will take the whole (Co. Litt. 187, a); but the queen will be entitled to the receipt of the profits during the coverture. (Id. 299.)

[3] Where husband is seised of lands in right of his wife, we have seen, *ante*, p. 64, he becomes absolutely entitled to the rents and profits, though not to the freehold. 1 Bright, H. & W. 112. By the common law, no lease of such lands could be made by the husband and wife to bind the issue. For a *feme covert*, as we shall hereafter see, can make no lease, and the husband could impart to the lessee no more than an interest determinable upon his death (Bac. Abr. Leases; and *see* this point minutely discussed in 2 Wms. Saund. 180, n.), nor could the joinder of the wife secure the estate to the lessee after the husband's death, because the widow might then confirm or avoid the lease at her pleasure (1 Roll. Abr. 349; C. P. 22. *Doe d. Collins v. Weller*, 7 T. R. 478); though, until she avoided it by her entry, the lease would remain good. Cro. Jac. 332; id. 417; id. 563; 1 Platt on Leases, 138.

But now the 32 Hen. 8, c. 28 (commonly called "the enabling statute") empowers a husband seised of lands in fee or in tail, in right of his wife, or jointly with his wife, to make leases for 21 years, or for three lives, which will bind his wife and issue. In order, however, to render such leases valid, several things must be observed: the wife must be made party to any lease by a husband of the inheritance of his wife; such lease must be made by indenture in the name of the husband and wife, and sealed by the wife, the rent reserved to the husband and wife, and the heirs of the wife, according to her estate in the same, and must be the most accustomable rent paid for the same lands within 21 years next before the lease; the lease not to exceed 21 years, or three lives, from the day of making; nor to commence till the expiration, or within one year thereof, of any former lease of the same land. Nor is the lease to be granted without impeachment of waste. 1 Bright, H. & W. 201; 1 Platt, 152. The statute does not extend to a grant of any reversion, nor to leases of land not most commonly letten for 20 years next before such lease. This act is repealed by 19 & 20 Vic. c. 120, s. 35, except as to ecclesiastical leases, which give power to the Court of Chancery (in the case of married women, infants, &c. sects. 36–38) to authorise leases, and preliminary contracts, to grant leases of settled estates, that is, of estates limited by any instrument or instruments (whether before or after the passing of the act, sect. 44), to or in trust for any persons by way of succession, or of any rights and privileges over or affecting any settled estates, subject to certain conditions (sects. 1–3, 6), unless an application for that purpose has been rejected by parliament (sect. 21); or unless it would be contrary to the intention of the settlor (sect. 26), or beyond his power (sect. 27); or unless, in the case of leases of copyholds, without the consent of the lord. (Sect. 43.) But no lease shall be granted for more than 21 years of any settled estate, whereof the tenants in tail are debarred from defeating their estate's tail, or where the reversion is in the Crown. (Sect. 42.)

By sects. 32–3, 36–8, of the same statute (even in the case of infants, lunatics, bankrupts, insolvents, and married women), tenants for life, or for years determinable on lives, or for any greater estate of property settled since the passing of the act, and tenants by the curtesy, or in dower, or in right of their wives of unsettled property, may, without application to the court, make binding leases (except of the principal mansion, and the land usually occupied therewith) for 21 years in possession, subject to certain conditions, except in the case of copyholds, without the consent of the lord.

By sects. 7, 10, of the same statute, the

(*a* 5) *To Encumber.*[1]

Court of Chancery may vest powers of leasing estates in the trustees of the settlement, or in any other persons.

The act is amended and extended by the stat. 21 & 22 Vic. c. 77.

It was always held necessary, as well before as since the 32 Hen. 8, c. 28, that a lease by husband and wife should be by *deed* (*sed qu.* 1 Platt on Leases, 141; and 8 & 9 Vic. c. 106); for if it be not, the lease is void, and cannot be affirmed by acceptance of rent by the wife after the husband's decease; and the reason is, because her assent is necessary at the commencement of the lease, and that can only be given by deed. Dy. 91, b. Still, however, if the lessee or any other *plead* a demise by husband and wife, it is not necessary to plead it to be by deed. 2 Rep. 61, b. And a lease by husband and wife of the wife's lands, not pursuant to the statute, is a good lease during the coverture, and may be pleaded as *their* lease, though it be without any reservation of rent, for the lease is not void, because the wife, after her husband's death, may affirm it by accepting fealty (Hutt. 102) or rent (*Doe d. Collins v. Weller*, 7 T. R. 478); and where rent is reserved by acceptance of rent; or disagree, and avoid it by an ejectment or action of trespass. 3 Rep. 27, b; 28, n. If she accepts rent after the husband's death, she is liable to the covenants in the lease; and if a lease is made *to* a husband and wife by indenture, and she agrees after the husband's death, she is liable to all the covenants contained in the lease, except such collateral covenants (as the payment of a sum in gross, &c.), which charge the person and not the land. Bro. Covenant, 6. If the husband alone makes a lease for *life* of his wife's lands, it seems to be only voidable, and that the wife must *enter* after his death to avoid it; but if he alone makes an estate for *years*, it is absolutely void and determined by his death, and therefore cannot be affirmed by acceptance of rent after. 2 Saund. 181, a; 1 Platt, 158.

Husband and wife made a lease not pursuant to the statute, the lessee enters, and the husband, before any day of payment, dies; the wife takes a second husband, who at the day accepts rent and dies. It was holden that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoidance to her husband, and his acceptance of the rent binds her. Dy. 159. But *see* Co. Litt. 246.

[1] From the interest which the husband acquires by the marriage in the *real estates* of his wife, it follows that he singly cannot charge them at law with his debts during their joint lives; but if he were the survivor, and entitled to be tenant by the curtesy, than the incumbrances would continue during his life, at the conclusion of which they must necessarily terminate with his interest in the estate. But if she join with her husband in a valid conveyance, in conformity with 3 & 4 Wm. 4, c. 74, of her estate to raise money to pay his debts, or otherwise to answer his engagements, the security will be good and obligatory upon her and her husband, and all persons claiming under them.

By immemorial customs prevailing in particular places, a bargain and sale, &c. by the husband and wife, when she is examined according to such custom, will bind her, and those claiming under her (2 Inst. 673); and such conveyances are also protected by 34 Hen. 8, c. 22. As to copyholds, *see* 3 & 4 Wm. 4, c. 74, s. 77.

Where a wife's estate is mortgaged for the benefit of her husband, she has, if she survives him, a right, after all his debts are paid, to stand as a creditor against his assets (*Tate v. Austin*, 1 P. Wms. 264; 2 Vern. 689; 1 Bro. P. C. 1), unless, at the time of the mortgage, a settlement is made upon her (*Lewis v. Nangle*, Ambl. 150); but evidence is admissible to show that the wife intended otherwise. The title of the wife to be exonerated is considered as precisely the same with that of the heir. *Clinton v. Hooper*, 3 Bro. C. C. 201; S. C. 1 Ves. jun. 173; 1 Bright, 367. If the mortgage of the wife's estate is not for the husband's debts, or for debts due from the wife *dum sola* (*Lewis v. Nangle*, *supra*), his assets, though he join in the mortgage, are not primarily liable. *Bagot v. Oughton*, 1 P. Wms. 347; S. C. Fortescue, 332; Mod. Cas. 249, 381; and see *Clinton v. Hooper*, 3 Bro. C. C. 211; S. C. 1 Ves. jun. 188. And where the wife has the absolute disposal of the money, though she appropriates it to the use of the husband, his assets are not liable. *Clinton v. Hooper*, 3 Bro. C. C. Where husband and wife mortgage the lands of the latter, and she dies, the equity of redemption survives to the husband, and not to her administrator; and if he dies, the wife shall have the benefit of the equity of redemption, and not the husband's executors. *Anon.* 3 Salk. 64; 1 Bright, 277; Smith, Eq. 150, 267.

If the wife join with her husband in charging her estate, even by *mere* deed, she will be bound by her confirmation of the charge after his death. *Goodright v. Straphon*, Cowp. 291. But see *Drybutter v. Bartholomew*, 2 P. Wms. 127; 1 Bright, 194.

As to Land of Wife being Primarily Liable for her Debts.—Action upon a covenant by the defendant and wife to pay money. Equitable plea, that the defendant and wife, by the deed in question, mortgaged lands of which they were seised in fee in right of the wife, to the plaintiffs in fee, as a security for money (of which the sum pleaded to was parcel) lent by the plaintiff to the defendant and wife, at the request of the latter, for the purpose of repaying with the sum a sum borrowed of another person by the defendant and wife; also, at her request, for the purpose of discharging a debt of the wife, contracted before marriage; that the wife died, leaving the plaintiff her heir-at-law, who thereupon became entitled to the equity of redemption in fee, in addition to the legal estate in fee-simple in the lands; that

(4) *Rights of Husband in, and Power over, his Wife's Chattels Real.*[1]
(5) „ „ *his Wife's Choses in Action.*
(*a* 1) *Possessed by her in her own Right.*[2]

the lands were of more value than the monies, as to which the plea was pleaded, and all costs, &c., and became, upon the death of the wife, the primary fund for paying the monies to which the plea was pleaded; which sums, as the plaintiff was entitled to the said lands and the said monies, and the equity of redemption, were in equity satisfied before action by the value of the lands: — *Held*, on demurrer, that the plea disclosed facts which would entitle the defendant to an absolute and perpetual injunction, and was, therefore, good as an equitable defence. *Gee v. Smart*, 8 El. & Bl. 313; 3 Jur. N. S. 1056; 26 L. J. Q. B. 305.

[1] As to leases for years, or other chattel interests (*see* 1 Bright, H. & W. 94) of which the husband and wife are possessed in right of the latter (except as to estates or interests settled by the husband, or by the husband and wife on their marriage, by way of provision for her, and whether such interest be legal, or, as it should seem, equitable) the husband alone may bind the interest of his wife by lease, assignment, or surrender; by reference to arbitration, and an award thereon; by forfeiture, by bankruptcy, or by judgment and execution against him. 1 Prest. Abst. 342–3. And such assignment, &c. will bind the wife, though it be made without consideration. 3 P. Wms. 200. *Re Trinity House*, 2 You. & C. 526. But the husband cannot dispose of his wife's chattels real by will, nor bind his wife's interest by a mere charge, as an annuity, &c., or by a judgment without execution (3 P. Wms. 204); but his contract to sell will be an equitable alienation. *Stead v. Cragh*, 9 Mod. 42; 1 Bright, H. & W. 107. And if the wife should survive the husband, the term, so far as it shall not have been aliened or forfeited by the husband, will remain with the wife; but if the husband should survive, it will, whether legal or equitable, remain with him *jure mariti*, and consequently without letters of administration to be obtained of her effects. Alleyn. 15; 1 Roll. Abr. 345, l. 40. If, however, the wife have a possibility of a term (Wing. *Max.* 213, pl. 13; 10 Co. 51, a; 9 Mod. 104), which cannot by any means vest in the husband during coverture, the husband's release, or other disposition, will not affect her. Nor can he alone alien a term settled for the separate use of the wife, or a term which is settled on their marriage, as a provision for her, as distinguished from a settlement by a former husband. *Sir Edward Turner's case*, 1 Vern. 7.

In regard to the right of the husband's executors or his surviving wife to rents reserved upon underleases of her chattels real, and to the arrears of rent due at the husband's death, it appears, if the husband *alone* grant an underlease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife so long as the sub-demise continued; the husband's executors, therefore, would be entitled not only to the subsequent accruing rents, but to the arrears due at his death. 1 Roll. Abr. 344–5; Co. Litt. 46, b; 2 Lev. 100; 3 Keb. 300; 1 Bright, H. & W. 43–45.

But if the rent be reserved by husband to himself and wife, then, as their interests in the term granted, and the rent reserved, were joint and entire, the wife, upon surviving the husband, would be entitled to the future rents, and that she would be equally entitled to the arrears of rent at her husband's death: because, they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would with their principal, the term, survive to the wife. 4 Vin. Abr. D. a. 117.

With respect to the husband's liability to charges affecting his wife's terms for years, when he succeeds to them upon surviving her, the law may be considered to be thus settled; that when the husband survives his wife, and, upon that event, becomes entitled to her term for years, he succeeds to them subject to all the charges and equities with which they were affected in her possession.

The power which the law gives the husband to alien the whole *interest* of his wife in her chattels real, necessarily authorises him to dispose of it in part. *Sym's case*, Cro. Eliz. 33; 1 Roll. Abr. 344, pl. 10; Moore, 395; 6 Ves. 389.

As the husband is empowered by express alienation of his wife's chattels real in possession to divest her property, and defeat her right by survivorship, as it before appears, so he may by other acts produce the same effect.

[2] Property falling under this description are debts owing to the wife, arrears of rent, legacies, residuary personal estate, money in the funds, &c. Such choses in action do not vest in the husband by the mere operation of marriage; to entitle himself to them, he must first reduce them into possession, and if either party die before they are reduced into possession, they will not belong to the husband or his representatives, whether he should happen to survive his wife, or his wife should outlive him; but in the former case, her personal representatives will be entitled to them at her death, and the husband must proceed for them, if at all, as her administrator (Rep. Talb. 173. *Gaters v. Madeley*, 6 Mee. & W. 423); and in case of the husband dying before his wife, she will be absolutely entitled to them at his death. Co. Litt. 351, b; Com. Dig. Baron and Feme, E. 23, F. 2; 3 Mod. 186; F. N. B. 121; 3 P. Wms. 411, 2. The husband, however, is in all cases permitted, if he think proper, to reduce the choses in action of the wife into possession during the coverture, and to proceed at law on any contract made with the wife *dum sola*. 1 Bright, 36.

Choses in action may be released by the husband alone, and a payment to him will be a good discharge. *Rogers v. Acarles*, 14

Beav. 445. *See* 8 C. B. 592; 19 L. J. C. P. 126; 12 Jur. 464. Nor is it incumbent on the husband, when he has a legal remedy for the debt, to make any settlement or provision on the wife; but unless the money shall be released by the husband, or paid to him, or unless the right shall be changed, as in the case of an award, ordering the money to be paid to the husband, or judgment recovered by him alone, the interest of the husband as husband will determine on his death, or on the death of his wife, if she die in his lifetime. *Philliskirk v. Pluckwell*, 2 M. & S. 395. *Day v. Pargrave*, id. 396. *Wildman v. Wildman*, 9 Ves. 174. *Nash v. Nash*, 2 Mad. Rep. 133 *See* 6 Mee. & W. 426. But with respect to the equitable right, this may be varied by contract, and, therefore, if the husband make a settlement on his wife in consideration of her fortune, the wife's fortune, though consisting of choses in action, and though there be no particular agreement for that purpose, is considered as purchased by him, and will go to his personal representatives. *Cleland v. Cleland*, Prec. Ch. 63. *Blois v. Martin*, 2 Vern. 501. *Packer v. Wyndham*, Prec. Ch. 412; 3 P. Wms. 199. *Adams v. Cole*, Cas. Temp. Talb. 168; 1 Bright, H. & W. 36.

Money due upon mortgage is considered as a chose in action, and subject to the disposal of the husband alone, whether the mortgage be in fee or for a term (*Bosvil v. Brondes*, 1 P. Wms. 458. *Bates v. Doudy*, 2 Atk. 208); for though, in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property in the debt. As to bills and notes, *see* vol. ii. p. 400.

If the husband (1 Roll. Abr. 342; Moore, 452), or husband and wife (Moore, 452; 1 Roll. Abr. 342; Gold. 160), make a power of attorney to a person to receive a debt (1 Roll. Abr. 342), or legacy (id. 344), due to the wife, and he receives it, but does not pay it over to the husband, yet it vests in him. And where an executor paid a legacy to a *feme covert*, who lived separate from her husband, yet on a bill brought by the husband against the executor, he was decreed to pay it over again with interest. Salk. 115, p. 14; 1 Vern. 261. So where a legacy was given to a *feme covert* to be paid twelve months after testator's death, and the wife died within the twelvemonth, the interest was holden to be vested in the husband, for he might release within the twelve months. 2 Roll. Abr. 134; Com. Dig. Bar. and Fem. 837. But where the husband dies without having made any disposition of a legacy left to the wife, it survives to her. *Brothero v. Hood*, 2 Com. Rep. 725. *Garford v. Bradley*, 2 Ves. 676. The wife's distributive share of personal estate vests in her husband on the death of intestate. *Robinson v. Taylor*, 2 Bro. Ch. Ca. 589. *Sawyer v. White*, 1 Anstr. 36. But possession by the husband as executor and trustee is not such a reduction into possession of his wife's share in the residue as will entitle him against her right by survivorship. *Baker v. Hall*, 12 Ves. 497. *Hallen v. Tomlinson*, 16 id. 413. If the husband survive he has the legacy, though he die before it was paid. *Humfrey v. Bullen*, 1 Atk. 458. If husband and wife be evicted of a term which he enjoyed in her right, and he commence an action of ejectment in his own name, and obtain judgment, the recovery will change the wife's property in the term, and vest it in the husband, because it is a reduction of the term into his own possession; but if he had joined his wife in the action, then the judgment being joint, their interests would have been the same as before the eviction: so that, if the wife survived, she would be entitled to the residue of the term by survivorship.

Equivalent to the husband's power of alienation of his wife term, or trust term, is the disposition which the law makes of it in instances of his misconduct. 1 Roll. Abr. 851, pl. 50. Thus if he commit waste, the term will be forfeited (Co. Litt. 351), or outlawed or attainted for felony. Jenk. Rep. 65.

The husband might have released a legacy left his wife, although they were divorced *à mensâ et thoro*. 1 Roll. Abr. 343; Cro. Eliz. 908; Noy, 45; Moore, 665; 3 Bulst. 264. *See post*, Marriage. But a husband divorced *à mensâ et thoro* was restrained by injunction from selling a term of his wife's. 9 Mod. 43. But if a special *assumpsit* had been brought by both, on an express promise to the wife, it had been good. Cro. Eliz. 69, 96; Cro. Car. 439.

Whatever the wife earns during the coverture, belongs solely to the husband, unless protected under the clause in the recent statute. *Buckley v. Collier*, 4 Mod. 156; 1 Salk. 114; Carth. 251. *See post*, Marriage.

Where the husband assigns a chose in action of his wife for valuable consideration, and dies before either he or the assignee has actually obtained possession of it, leaving the wife surviving, it matters not whether the chose in action was reversionary, so that it could not have been reduced into possession, or whether the wife, having become absolutely entitled, it was still left outstanding, and not reduced into possession; through neglect in either case, the wife surviving will be entitled as against the assignee for valuable consideration. *Elwyn v. Williams*, 7 Jur. 337; 12 L. J. Ch. 440.

A gift may be made by a husband to his wife, which, though bad in law, will be supported in equity. Though the property does not pass at law, yet in equity a husband, being the legal owner, may become a trustee for his wife, and if by clear and irrevocable acts he has made himself a trustee, the gift to his wife will be conclusive. *Mews v. Mews*, 15 Beav. 529; 1 Bright, H. & W. 29–33.

To constitute a gift between husband and wife there must either be a clear irrevocable gift, a trustee for the wife, or some clear and distinct act of the husband by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. If a man were to deposit

(*a* 1) *Possessed by Wife in her own Right (continued).*
(*a* 2) „ in autre Droit.[1]
(6) *Right of Husband to, and Power over, Wife's Chattels Personal.*
(*a* 1) *Possessed by her in her own Right.*[2]

money with bankers, directing them to hold it for his wife, that would probably be sufficient. (Id.)

Savings of Wife.—Husband and wife had for many years lived, and were still living, separate. The husband remitted money for her maintenance and support. She saved a considerable portion:—*Held*, that the husband could not recover back these savings. *Brooke v. Brooke*, 25 Beav. 342. But a wife, living separately from her husband by agreement, received from him a weekly allowance for her support, out of which she saved 100*l.*, which she placed in the funds, and two days before her death sold it out, and gave it to the defendant:—*Held*, at law, that the husband was entitled to recover it back. *Messenger v. Clark*, 19 L. J. Ex. (N. S.) 306; 5 Ex. 306; Ex. Rep. 388.

And the husband of a woman living separate from him, supporting his children, and earning a salary for her services, is entitled to such wages, and may sue her employers for the amount, if they pay her after notice not to do so (*Glover v. the Proprietors of Drury Lane*, 2 Chit. Rep. 117), unless protected under 20 & 21 Vic. c. 85.

And if a woman marries a second husband whilst her first husband is alive, she is deemed the servant of the former, and he will be entitled to the profits of her industry. *Strutville v.* ——, 1 Stra. 80. He is entitled to all monies accumulated by the wife during separation and living in adultery, although vested by her in trustees for herself and her illegitimate issue. *Agar v. Blethyn*, 2 C., M. & R. 699.

[1] The choses in action possessed by the wife *in autre droit* will belong to the wife if the survive, and if she die in the lifetime of her husband, to the personal representatives of the person to whom she is executrix or administratrix; but during the coverture the husband alone may assign or surrender the term which the wife has as executrix, &c., or he may release or receive money due on choses in action of the person whom she represents. 1 Prest. Abr. 350. This power is allowed, lest she should misapply the funds for which he would be liable. Jenk. Rep. 79; 1 Bright, H. & W. 40.

If he be entitled to a term for years in her right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged, because a man may have a freehold in his own right, and a term for years *in autre droit;* and it seems essential to merger that the term and the freehold should vest in a person, in one and the same right. Co. Litt. 338, b; and *see* 3 T. R. 401; 2 Roll. Rep. 472; 1 Roll. Abr. 934, pl. 10, 11; Cro. Jac. 275.

A man possessed of a term of years in right of his wife as executrix, has power to grant and convey the same. *Thrustout v. Coppin*, 3 Wils, 277; 2 Bl. Rep. 801.

And as the husband is answerable for the wife's acts, she is not permitted to administer without his concurrence, nor will payments made to her as executrix or administratrix, without his consent, be valid. *Anon.* 1 Salk. 282.

[2] Marriage is an absolute gift to the husband of all the goods and personal chattels, which the wife was actually and beneficially possessed of at that time in her own right, and of such other goods and personal chattels as may come to her during the coverture. Co. Litt. 300; 1 Bright, H. & W. 34. He may, therefore, dispose of them by his will, which will be effectual whether he survive her or not. He may also empower her to make a will to dispose of her personal estate. But the husband's consent to the will must be given, either after his wife's death, or by prior contract, and it entitles her executor to claim such articles of her personal estate, which would have been her husband's as her administrator. It appears, then, that this consent is personal to the husband. It is no more than a waiver of his rights as his wife's administrator. It therefore can only give validity to the instrument in the event of his being survivor. 15 Ves. 156.

And so fixed and positive is the right of the husband to the personal effects of his wife, that if she was possessed of any anterior to the marriage, she cannot dispose of it in contemplation of the intended union, without her husband's privity. Thus *Lord Thurlow*, in the case of the *Countess of Strathmore v. Bowes*, 1 Ves. jun. 28, said, "A conveyance by a wife, whatsoever may be the circumstances, and even a moment before the marriage, is *primâ facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty* of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *primâ facie*, because affected with *that fraud*. *See* also *Howard v. Hooker*, 2 Ch. Rep. 81; Eq. Ca. Ab. 59. *Carleton v. the Earl of Dorset*, 2 Vern. 17; 2 Cox, 33; 2 P. Wms. 359. But as the husband in strictness can have no right to any of his wife's property previously to the solemnization of the marriage, the wife is in general before marriage at liberty to settle or dispose of her fortune as she pleases, provided it be done with no improper motive, nor to deceive the person who is then addressing her with a view to their union. *Hunt v. Matthews*, 1 Vern. 408; 2 Ch. Rep. 81; 2 P. Wms. 359; 1 Bright, H. & W. 222; Smith, Eq. 78.

A woman a few days before her marriage, and without the knowledge of her intended husband, transferred a sum of stock to

(*a* 2) *Possessed by Wife* in autre Droit.[1]

(B) *Of the Liabilities to which the Husband is rendered subject by the Marriage.*

(*a*) *For Acts of the Wife before Marriage.*

(1) *For her Contracts.*[2]

(2) „ *Torts.*[3]

(3) *When Liability for such Acts terminates.*[4]

(*b*) *For Acts of the Wife during the Marriage.*

(1) *For Necessaries obtained by her during Cohabitation.*[5]

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trustees upon a parol trust, as alleged by the trustees, for her separate use for life, and after her death for the benefit of her children. The fact of this transfer became known to the husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death the husband filed a bill, praying a transfer of the stock, and containing a statement that the dividends were duly paid to the wife during the coverture: — *Held*, under the circumstances, that the husband was precluded from asserting his claim to the stock as having been transferred in fraud of his marital right. *Loader v. Clarke*, 2 Mac. & G. 882. *See* 18 L. J. Ch. 396.

[1] In the immediately preceding division it was shown, that marriage was an absolute unqualified gift to the husband of all the goods and *personal* chattels, of which his wife was absolutely possessed at that time, or became so afterwards in her own right, whether he survived her or not. Marriage, however, makes no such gift to him of the goods and chattels which belong to his wife *in autre droit*, as executor or administrator, because such a gift might prove disadvantageous to the creditors (*see* 1 Bright, H. & W. 39; 11 Mod. 178), whether he had any portion with her or not; and this the law presumes reasonable, for as the husband, by the marriage, acquires an absolute interest in the personal property of the wife, and has the receipt of the rents and profits of her real estate during coverture; and is entitled to whatever accrues to her by her industry, or otherwise, during the same period; the law in favour of creditors, and that no person's act should prejudice another, makes the husband liable to those debts to which he took her subject. F. N. B. 265; 20 H. 6, 22, b; Moore, 468; Roll. Abr. 352; Co. Litt. 351, a. b. n. 1; 20 H. 6, 22; Bull. N. P. 136.

But where a *feme sole* bought goods, but did not pay for them, and the goods came to her husband's hands, and the creditors, after her death, brought a bill in equity against the husband, to which he demurred, the *Lord Chancellor*, with earnestness, overruled the demurrer, saying he would change the law in that point. 1 Ch. Ca. 295. See *Heard v. Stamford*, 3 P. Wms. 409; S. C. Temp. Talb. 173; 2 Bright, 2.

[2] The husband is liable for the debts of his wife contracted before her marriage, provided he be sued in her *lifetime*. *O'Brian v. Ram*, 3 Mod. 170, 186. *Mason v. Burdon*, C. P. Prac. Reg. 91.

If a warrant of attorney is given by a *feme sole*, who afterwards, and before judgment, marries, judgment cannot be signed against her alone, but it may be entered up, by leave of the court, against the husband and wife. *Staples v. Purser*, 2 Dowl. 764. *Hartford v. Mattingly*, 2 Chit. 117. *Higginbottom v. Higginbottom*, 8 Dowl. 126. The rule for that purpose is absolute in the first instance, unless there are special circumstances in the case. *Pocock v. Fry*, 8 Dowl. 126. So, if given to a *feme sole*, judgment by leave may be entered up at suit of both. 1 Salk. 117; 6 D. & R. 46.

After the husband's decease, his representatives are not liable for debts contracted by the wife before marriage. *Woodman v. Chapman*, 1 Camp. 189. Nor is the husband alone responsible for *use and occupation* by his wife partly before and partly after marriage. *Richardson v. Hall*, 3 Moore, 307; S. C. 1 B. & B. 50.

[3] The husband is liable jointly with his wife for *torts* committed by her before marriage. 1 Bac. Ab. Baron and Feme, L.

[4] Where an action is brought against husband and wife upon her contracts or for her *torts* before coverture, if she die before judgment, the suit will abate; but if the husband die, or become bankrupt, her liability will continue. 7 T. R. 350; Com. Dig. Baron and Feme, 26; *sed qu. see ante*, vol. i. p. 11.

[5] The wife cannot bind her husband by any contract without his assent, either express or implied. *Manby v. Scott*, Ex. Cham. 1 Sid. 109; S. C. Brid. Rep. 229; S. C. 1 Bac. Abr. 296. *See* elaborate note, 2 Smith, L. C. 418, 5th ed.

And in *Montague v. Benedict*, 3 B. & C. 631; S. C. 1 Carr. 356; *Seaton v. Benedict*, 5 Bing. 28, the general rule was stated to be, that a husband is not liable in respect of a contract made by his wife without his assent to it; and a party suing to charge him in respect of such contract is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied. *See* Skin. 348; Com. Dig. Baron and Feme, 2; 1 Camp. 120; 3 id. 22; 5 Taunt. 356.

Cohabitation being evidence only of the husband's assent in a special verdict, that assent ought to be found, and as it is merely presumptive evidence, it may be rebutted by contrary evidence. *Manby v. Scott*, *supra*. Hence, proof that the articles were consumed in the family of the husband

(2) *For Necessaries obtained by her after she has committed Adultery.*[1]
(3) „ „ *whilst the Husband is Abroad, or Transported.*[2]

was considered only presumptive evidence of his assent.

In respect of the wife's contracts binding the husband, they are analogous to the relation of master and servant. In fact, in contemplation of law, the wife is the servant of the husband. In F. N. B. 120, it is stated, that a man shall be charged in debt for contract of his bailiff or servant to buy and sell for him, and so for the contract of the wife if he give such authority to his wife, otherwise not; therefore, a surgeon who is sent for by the wife or servant of A. B. to visit his sick child, can recover the bill only upon an express contract by A. B., or upon a presumption that A. B. gave his wife or servant authority to send for the surgeon. *Manby v. Scott: per Bridgman, C. J.*, Bridg. Rep. 256. *See* 3 B. & P. 247; 2 Smith's Cases, 418, 5th ed.

The liability depends upon whether she is his agent for the purpose of binding him by contracts for goods supplied to her, which is a question for the jury to determine upon the facts of the case; and in determining that question, the extravagant nature of her orders is a matter to be taken into consideration, as showing she had no such authority. *Lane v. Ironmonger*, 13 Mee. & W. 368; 14 L. J. Ex. 35. In an action for goods supplied by the plaintiff to the defendant's wife while living with him, the question for the jury to decide, in order to find the defendant liable, is, whether the wife was authorised by him to purchase the goods, and not merely whether they were necessaries for the wife in her station in life. *Reid v. Teakle*, 13 C. B. 627; 17 Jur.; 22 L. J. C. P. 161; 2 Smith, L. C. 420, 5th ed.

But it has been since holden, that during cohabitation the husband shall be answerable for all contracts of the wife for *necessaries*, unless the husband give notice to the trader not to trust her, and notice to the servant of the latter suffices. *Etherington v. Parrot*, 2 Ld. Raym. 1006; 1 Salk. 118; Holt, 102.

What are or are not necessaries must depend on the rank and situation of the husband. *Ozard v. Darnford*, cited 1 Selw. N. P. 273. For if the articles supplied be unsuitable to her husband's degree, and be delivered to her without his knowledge, and she gives her own note in payment (*Metcalfe v. Shaw*, 3 Camp. 22); or the tradesman gives credit to her, the husband is not liable, though he may have seen his wife wear some of the articles furnished to her. *Bentley v. Griffin*, 5 Taunt. 356.

So if a tradesman, having notice of a difference between a man and his wife, sells the wife goods only to enable her to ruin her husband, there the husband shall not be chargeable; but if part of the goods be suitable to the husband's degree he shall be chargeable for that part. *Morton v. Withens*, Skin. 348.

And the same rules obtain where a man cohabits with a woman, and allows her to assume his name (*Watson v. Threlkeld*, 2 Esp. 637. *Car v. King*, 12 Mod. 372. *Ryan v. Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271); or marries a woman during the existence of a former wife. *Robinson v. Nahon*, 1 Camp. 245. But they only hold with regard to an unmarried female during cohabitation. *Munro v. De Chemant*, 4 id. 215. The mere fact that a man has allowed a woman to call herself by his name, he not cohabiting with her, nor otherwise holding her out as his wife, will not suffice to make a *primâ facie* case against him of liability for her debts. *Gomme v. Franklin*, 1 F. & F. 465: *Martin, J.* And do not apply even then to a common prostitute. *Watson v. Threlkeld, supra. See* 2 Smith, L. C. 420, 5th ed.

[1] A husband is not chargeable for necessaries provided (*Morris v. Martin*, 1 Stra. 647) or goods sold to an adulteress (*Manwairing v. Sands*, 1 Stra. 706. *Hardie v. Grant*, 8 C. & P. 512), even although he may have turned her out of doors, if it be on account of her having committed adultery under his roof. *Ham v. Toovey*, M. S. cited 1 Selw. N. P. 272. Although the husband has been the aggressor by living in adultery with another woman. *Govier v. Hancock*, 6 T. R. 603. And he is not liable, notwithstanding she merely elope without going away in an adulterous manner, if the husband subsequently offer to take her back. *Child v. Hardyman*, 2 Stra. 875. S. P. *Manby v. Scott*, Ex. Ch. S. C. Bridg. Rep. 253. *Hall v. Gates*, 11 Mod. 241; 2 Smith, L. C. 422.

In an action for board and lodging supplied to the defendant's wife, if the defence be the adultery of the wife, a statement made by her, confessing her adultery, which was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband; and so are letters from different men found by him at that time in her writing-desk. 1 Carr. 621. But if a *feme* has been guilty of adultery, and the husband receive her again into his house, and afterwards turn her out (*Harris v. Morris*, 4 Esp. 41. *See post*, Marriage. *Dunn v. Dunn*, 2 Phil. Rep. 403; 3 id. 6); or if he leave her in his house with his children, after the commission of adultery, he is liable for necessaries furnished to her. *Norton v. Fazan*, 1 B. & P. 226. And it seems formerly, that a *feme covert* living in adultery was bound by her contracts for necessaries, though she had not a separate maintenance; and the creditor might have sued her or the husband, at his election. *Cox v. Kitchin*, 1 id. 338. But a different doctrine now obtains. *Marshall v. Rutton*, 8 T. R. 545; *see* 2 Smith, L. C. 429.

[2] A. went abroad in 1852, leaving his wife and three children here with a sufficient

provision for their proper maintenance in his absence. On his return in 1856, he found that his wife had formed an adulterous connexion with another man, who lived with her and passed by her husband's name, and he immediately removed his children: — *Held*, that under these circumstances, A. was not liable for medicine and attendance provided for his children at the wife's request, although the plaintiff was not aware of the state in which she was living at the time. *Atkyns v. Pearce*, 2 C. B. (N. S.) 763; 3 Jur. N. S. 1180; 26 L. J. C. P. 252. *Cooper v. Lloyd*, 6 C. B. 519; 2 Smith, L. C. 425. The wife herself is an admissible witness to prove the adultery. (Id.)

The general rule is, that a wife cannot bind her husband by her contract, except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorised, that will alone be sufficient to repel the inference of agency. If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own banker's, from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife, and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury, in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband (*Freestone v. Butcher*, 9 C. & P. 643); but where the defendant, having become bankrupt in 1824, did not surrender, and the business was carried on by his wife in 1833, during which period goods in the way of trade were supplied to her, and it was shown that the husband had been seen a few times at the place, and was arrested in the shop: — *Held*, to be insufficient evidence to show that she acted as his agent in carrying on the trade, to charge him. *Smallpiece v. Dawes*, 7 id. 40.

Slight evidence of the wife's agency will suffice to fix the husband (*M'George v. Egan*, 5 Bing. N. S. 196): as being seen in the counting-house, conducting her husband's business. *Plimmer v. Sells*, 3 Nev. & M. 422. The foundation of the husband's liability for necessaries supplied to his wife is the assumption that she acts as his agent. *Seaton v. Benedict*, 5 Bing. 28; 2 M. & P. 66. Whether the wife had authority to order goods is a question for the jury (*Filmer v. Lynn*, 4 Nev. & M. 559); but to render the husband liable for jewels, there must be some evidence of his assent, if she had sufficient on her marriage. *Montaque v. Benedict*, 3 B. & C. 631; 5 D. & R. 532.

A promise by the husband to pay debt contracted by wife, though not otherwise liable, is binding on him. *Harrison v. Hall*, 1 M. & Rob. 185.

Where a man, who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad: — *Held*, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties. *Smout v. Ilbery*, 10 Mee. & W. 1. A party who advances money to a married woman whose husband, resident abroad, makes no provision for her maintenance, for the express purpose of providing necessaries, and which is actually expended by the wife for that purpose, does not thereby obtain an equitable right against the husband for the repayment of the money so advanced. *May v. Skey*, 16 Sim. 588; 13 Jur. 594; 13 L. J. Ch. 306.

Where a husband turns away his wife, and she is unable to maintain herself, she has an authority, of necessity, to pledge his credit for goods supplied to her. *Johnston v. Sumner*, 3 H. & N. 261; 4 Jur. N. S. 462; 27 L. J. Ex. 341. It is questionable, however, whether this holds in a case where a labouring man turns away his wife, she being capable of earning, and earning as much as he; or where a man turns away his wife, she having a settlement double his income in amount. (Id.) Where husband and wife live apart by mutual consent, and has nothing, and she has no means and cannot maintain herself, a jury may infer that the husband meant his credit should be pledged by her, unless at parting he had said otherwise. (Id.)

In action brought against a husband for goods supplied to his wife, who lives apart from him, the *onus* lies on the plaintiff to show either an express or implied authority from the husband to the wife to pledge his credit. (Id.) Such an authority cannot be implied when they part upon terms negativing any such authority, and making a provision for her not shown to be insufficient for her maintenance. (Id.) 2 Smith, L. C. 422.

Husband and wife separated by mutual consent, and without imputation of misconduct on either side, and never met afterwards. On parting he left her with 70*l.*, and a verbal agreement was entered into between them that 200*l.* a-year, secured to

(4) *For Necessaries supplied to Children of the Wife by a former Marriage.*[1]

(5) *For Necessaries obtained by her after a Separation.*[2]

her separate use by their marriage settlement, should continue to be paid to her. After the separation a tradesman, not knowing that she was a *feme covert*, supplied her with goods at reasonable charges, and afterwards sued the husband for them:—*Held*, that on this evidence the husband was not liable, and that the judge had rightly refused to leave it to the jury whether the allowance made to her on the separation was sufficient. (Id.)

[1] Before the Poor-Law Amendment Act, 4 & 5 Wm. 4, a husband was not bound to maintain his wife's children by a previous marriage. If a man marry a widow, he is not bound to support her children, though they were maintained by the widow before her second marriage; and if he maintain them, a good consideration is raised for a promise by such children when they come of age to repay to repay the expense of their maintenance (*Tubb v. Harrison*, 4 T. R. 118. S. P. *Cooper v. Martin*, 4 East, 76); but if he holds them out to the world as part of his family, he then stands *in loco parentis*, and is liable for a contract entered into by his wife for their education during his absence abroad. *Stone v. Carr*, 3 Esp. 1.

[2] A deed of separation between husband and wife, even although executed by the wife under restraint, and securing an allowance duly paid, is an answer to an action against the husband for necessaries supplied to the wife. *Mallalieu v. Lyon*, 1 F. & F. 431: *Lord Campbell.* But after a decree for restitution of conjugal rights, the wife not having been really restored to cohabitation, but placed under improper restraint, is, on her escape from such restraint, authorised to bind her husband for necessaries. (Id.)

And where goods are supplied to a wife living separate, it is incumbent on the party supplying them to show that the separation was for a justifiable cause, to enable him to recover (*Mainwaring v. Leslie*, 2 C. & P. 507; 1 M. & M. 18); but in an action for coals supplied to the wife living separate:—*Held*, that the husband was liable, unless the wife be shown to have a competent provision; and it lies on him to show that, and a mere notice that he will not pay is not sufficient to relieve him from the liability. Where the tradesman served both, and agreed with the husband not to charge him with the goods supplied to the wife, he could not recover from the husband. *Dixon v. Hurrell*, 8 C. & P. 717. Where, in an action against the husband for supplies to the wife, living separate, and only a payment of a sum into court pleaded:—*Held*, that the defendant thereby admitting the authority to contract, it was a question only of amount; but that she could not pledge his credit beyond what would be reasonable and necessary for her subsistence. The bill (140*l.*) being for horses and carriage let on hire for ten months, and 73*l.* paid into court, the jury found for the defendant. *Emmett v. Norton*, 3 id. 506. A person is only liable to pay for goods supplied to his wife upon the ground of an implied contract; and it is not for the defendant to prove that he has given notice to the plaintiff not to supply the goods to his wife; but it lies on the plaintiff to satisfy the jury that the defendant's wife contracted the debt by the authority of her husband. *Spreadbury v. Chapman*, 8 id. 371.

A husband who allows his wife a maintenance, is not liable for debts contracted by her after a notorious separation (*Tod v. Stokes*, 12 Mod. 244; 1 Ld. Raym. 444; 1 Salk. 116; 1 Holt, 100. *Ramsden v. Ambrose*, 1 Stra. 127. *Atkins v. Curwood*, 7 C. & P. 756); especially if the tradesman has personal notice of the separate maintenance. *Rawlyns v. Vandyke*, 3 Esp. 250. *Beaumont v. Weldon*, 2 Vent. 155. Provided the husband pays the allowance (*Nurse v. Craig*, 2 N. R. 148. *Ozard v. Darnford*, cited 1 Selw. N. P. 273. *Hindley v. Westmeuth*, 6 B. & C. 200), or she has a sufficient separate maintenance, although no part of it is supplied by the husband (*Clifford v. Laton*, 1 M. & M. 101), whether the tradesman has notice or not (*Mizen v. Pick*, 3 Mee. & W. 481); and it be sufficient according to his degree and circumstances; the adequacy of which is a question for the jury. *Hodgkinson v. Fletcher*, 4 Camp. 70. *Dennys v. Sargeant*, 6 C. & P. 419; 2 Smith, L. C. 422–426.

It is for the jury to decide, where she has funds of her own, whether she has such means as are adequate to her support, according to her husband's situation in life. *Liddlow v. Wilmot*, 2 Stark. 86. See *Holder v. Cope*, 2 C. & Kir. 437. *Reeve v. Conynham*, id. 444. And where the husband, in an action for necessaries supplied to the wife living separate, showed a deed transferring to trustees a large sum for her use, it was holden that he must go farther, and show that the trustees took possession of it for her benefit. *Burrett v. Booty*, 8 Taunt. 343. The husband is liable for the debts of the wife, although he does not cohabit with her, if when the goods are furnished he is present and does not cause them to be returned. *Waithman v. Wakefield*, 1 Camp. 120. And if the articles be corresponding with the appearance the husband allows her to assume, the tradesman may recover, though inconsistent with his real situation. *Waithman v. Wakefield, supra.* So the husband may be sued on a promise, even though made under a mistake, as to his legal liability. *Hornbuckle v. Hornbury*, 2 Stark. 177. And if a man permit his children to live with his wife after the separation, he gives her an implied authority to purchase neces-

(*a* 1) *By mutual Consent.*
(*a* 2) „ *Husband's Ill-treatment.*[1]
(*a* 3) „ *Voluntary Departure of the Wife.*[2]
(*a* 4) „ *Imprisonment of the Wife.*[3]

saries for them. *Rawlyns v. Vandyke*, 3 Esp. 250.

It is no defence to an action brought against a husband for necessaries supplied to his wife, that at the time they were so supplied he was confined in an asylum as a dangerous lunatic. *Read v. Legard*, 6 Ex. 637; 15 Jur. 494; 20 L. J. Ex. 309.

[1] If the husband abandon his wife (*Todd v. Stokes*, 1 Ld. Raym. 444; 12 Mod. 244; 1 Salk. 116. *Harris v. Morris*, 4 Esp. 41); or if, after having been absent from home, she return, and he shut the door against her (*Thompson v. Hervey*, 4 Burr. 2178. *Rawlyns v. Vandyke*, N. P. 3 Esp. 250); or if, by bringing another woman under his roof, he renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, he is bound to provide her with necessaries (*Aldis v. Chapman*, MS. 1 Selw. N. P. 275. Or where a deed of separation has been executed by husband and wife, but not by the trustee appointed on her behalf, and consequently void, and he refuses to receive her into his house (*Ewers v. Hutton*, 3 Esp. 255); or if he ill-treat and refuse to cohabit with her, he will be liable for necessaries furnished to her, although he caution the plaintiff individually (*Boulton v. Prentice*, cited 1 Selw. N. P. 275; S. C. 2 Stra. 1214. *Harris v. Morris, supra. Robison v. Gosnold*, 6 Mod. 171; 1 Salk. 119. *Howliston v. Smyth*, 2 C. & P. 22; 3 Bing. 127. *Horwood v. Heffer*, 3 Taunt. 421. *Reed v. Moore*, 5 C. & P. 200), or the public generally, not to trust her (*Harris v. Morris, supra*). But nothing less than personal violence towards the wife will justify her in leaving his house so as to make him responsible for necessaries supplied to her. *Horwood v. Heffer, supra.* For example: where she is so ill-treated as to render it unsafe for her to live with him. *Hodges v. Hodges*, 1 Esp. 442.

If a wife be justified in leaving her husband, an offer on his part for her to return does not vary his liabilities as to necessaries supplied to her. *Emery v. Emery*, 1 Y. & J. 501.

The husband is liable for costs if he compel his wife to exhibit articles of the peace against him. *Shepherd v. Mackoul*, 3 Camp. 326. *Turner v. Rookes*, 10 Ad. & E. 47; 2 Per. & D. 294. So where the wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence, it was holden that he was liable to an attorney whom she had employed to defend her. *Shepherd v. Mackoul, supra.* But on separation he is not liable for the expense of the counterpart obtained by her trustee. *Ladd v. Llynn*, 2 Mee. & W. 265.

Assumpsit lies against a husband for the (reasonable) costs of proceedings at law and in equity, instituted by an attorney against him on behalf of his wife, who had been forced to leave his house by extreme ill-treatment, the husband having previously tendered to the plaintiff the rent of a cottage occupied by the wife after her departure, and undertaken to pay the bill of costs, if reasonable. *Williams v. Fowler*, 1 M. & Y. 269. But money lent to the wife, or expended at her request in supporting an indictment against the husband for assaulting her, cannot be recovered in an action against him, such a proceeding not being necessary to her protection; *aliter*, in the case of exhibiting articles of the peace against him. *Grindall v. Godmand*, 1 Nev. & P. 168.

In an action against a husband for necessaries supplied to a wife while living apart, the plaintiff's case being that the wife had originally left the defendant with his consent; had been since, by his instrumentality, wrongfully temporarily confined in a lunatic asylum, and, after her discharge, had for a time received from him a weekly allowance wholly inadequate for her support, and had been compelled to accept this inadequate allowance in preference to returning to live with him, in consequence of his threat that if she did return he would send her to a lunatic asylum. It was held the form of question to be left to the jury was — "Was the wife justified in leaving her husband, without his consent, by his conduct? If not so justified — Did he agree she might pledge his credit?" *Held* also, that the nature of the threat which would justify her in refusing to return to her husband ought to have been explained to the jury. *Johnston v. Sumner* discussed. *Biffin v. Bignell*, 31 L. J. Ex. 189.

[2] A tradesman who supplies a woman who has voluntarily left her husband, after notice not to do so, does it in his own wrong, and the husband cannot be sued. *Manby v. Scott*, 1 Lev. 4; 1 Sid. 109; 1 Mod. 124; Bridg. Rep. 253.

[3] A husband is not liable for provision furnished his wife without his consent by the gaoler of a prison where she is confined. *Calverly v. Plummer*, 2 Lev. 16. *Fowles v. Dineley*, 2 Stra. 1122.

A reasonable apprehension on the part of a wife that her husband intends to place her under improper restraint, will warrant her removal to a separate residence, and thereby render him liable for necessaries. *Tempany v. Hakewill*, 1 F. & F. 438: *Channell.* But an order for protection obtained by her under the 20 & 21 Vic. c. 85, will bar an action for such necessaries. (Id.)

(6) *For Necessaries obtained by a Wife after a Judicial Separation or Dissolution of the Marriage.*[1]

(7) *On Deeds executed by her.*[2]

(8) *For Torts committed by her.*[3]

(9) „ *Crimes committed by her.*[4]

(10) „ *Money paid by a Third Person for her Funeral.*[5]

(C) *Of the Interest and Power acquired by the Wife by the Marriage.*

(*a*) *In the Person of her Husband.*

(1) *To enforce Cohabitation.* *See post*, Marriage.

(2) „ *protect him from Injuries.*[6]

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[1] The liability of the husband for debts of his wife does not continue after a sentence of nullity of marriage (*Anstey v. Manners*, Gow. 10); or where alimony is decreed and paid regularly. *Wilson v. Smyth*, 1 B. & Adol. 801); but the husband is liable for necessaries supplied to wife pending a suit for alimony, until alimony be regularly assigned. *Keegan v. Smith*, 5 B. & C. 375; 8 D. & R. 118.

Where a husband turns his wife out of doors, a decree of alimony, unless duly paid, will not discharge the husband from his liability for necessaries. *Hunt v. De Blaquiere*, 5 Bing. 550; 3 M. & P. 108. These cases were before 20 & 21 Vic. c. 85; 22 & 23 id. c. 61; and 23 & 24 id. c. 144. As to their effect, *see post*, Marriage.

[2] Where a wife has executed a deed without her husband's authority, the latter may be sued upon the implied simple contract. *White v. Cuyler*, 6 T. R. 176; 1 Esp. 200.

[3] The husband is answerable for all the *torts* and trespasses committed by the wife during coverture (1 Bac. Abr. Baron and Feme, L.); and for which they must be jointly sued for penalties incurred by her under a penal statute.

A *feme covert* is responsible for all *torts* committed by her during coverture, and the husband must be joined as a defendant, and consequently they are liable for frauds committed by her as for other personal wrongs, but when the fraud is directly connected with a contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband cannot be sued for it together with the wife. *Liverpool Adelphi Loan Association v. Linshurst*, 9 Ex. 422. Therefore an action will not lie against a husband and wife for a false and fraudulent representation made by the wife to the plaintiff, that she was sole and unmarried at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff was induced to advance a sum of money to that person. (Id.)

In trover, the plaintiff having proved a taking of the goods from his premises by the defendant, and a subsequent demand and refusal, the defendant may prove, under "not possessed," that the plaintiff's wife, with his authority, gave the goods to the defendant in discharge of a debt due to him from the plaintiff. *Bingham v. Clements*, 12 B. B. 260.

[4] The husband is in no case amenable for the criminal acts of his wife, and he need not be included in the prosecution. *Rex v. Taylor*, 3 Burr. 1679.

Where the husband could not be civilly liable for necessaries supplied to his wife, he cannot be charged criminally. *Rex v. Flinton*, 1 B. & Adol. 227.

[5] An action lies by the wife's father against the husband, to recover the money which he may have expended after her death in defraying the expenses of her funeral, in the latter's absence. *Jenkins v. Tucker*, 1 H. Black. 90. And where a wife dies her husband is bound to provide her with a funeral at a reasonable expense, and if he does not do so any person who voluntarily employs an undertaker, and pays him for performing such a funeral, is entitled to recover the sum so expended from the husband in an action for money paid. *Ambrose v. Kerrison*, 10 C. B. 776; 20 L. J. C. P. 135. So an infant widow is liable on his contract to pay for her deceased husband's funeral expenses. *Chapple v. Cooper*, 13 Mee. & W. 252; 13 L. J. Ex. 286. See *Smout v. Ilbery*, 10 Mee. & W. 1.

Where the wife dies when living apart from her husband, and is buried by the person in whose house she dies, in a manner suitable only to her rank, the husband is liable to repay the funeral expenses, although he has never been asked to bury his wife, if he has not been prevented from discharging that duty by any fraud or misconduct of the person who is at the expense of such funeral. *Bradshaw v. Beard*, 31 L. J. C. P. 273.

[6] It has already been shown that an assault may be justified by a wife in defence of her husband, but she cannot recover damages for an injury to the person of her husband, for she in law has no separate interest during her coverture.

A married woman cannot maintain an action for being deprived of the society of her husband by the slander of another upon her character, though the husband desert her in consequence. *Lynch v. Knight*, 5 L. T. (N. S.) 291, H. L.

An action having been brought by a wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt, the defendant paid the money into court. The

(3) *In the Domicile of her Husband.*[1]

(*b*) *In the Property of her Husband.*

(3) *Rights of Wife in her Husband's Chattels Real.*[2]

(4) „ „ *Chattels Personal.*

(*a* 1) *In General.*[3]

(*a* 2) *Of her Pin-money.*[4]

(*a* 3) „ *Allowance for Keeping House, &c.*[5]

(*a* 4) „ *Paraphernalia.*[6]

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court made absolute a rule for payment of the money out to the wife. *Gleddon v. Treble*, 9 C. B. (N. S.) 367.

[1] The domicile of the husband is that of the wife. She cannot acquire a separate domicile for herself, though the husband may have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights. *Yelverton v. Yelverton*, 1 S. & T. 574; 6 Jur. N. S. 24; 29 L. J. M. C. 34. *Dolphin v. Robins*, 5 Jur. N. S. 1271. *In re Daly*, 25 Beav. 256; 27 L. J. Ch. 751.

[2] The marriage transfers to the wife no legal or equitable interest in her husband's chattels real.

[3] The husband is entitled to the absolute power and unlimited control over his own personal estate (*Manby v. Scott*, Bridg. Rep. 257), and if he make a will disposing of the whole of it to others, however arbitrarily or capriciously, the wife cannot claim any part of the property in opposition to such a disposition. The only interest she possesses in his effects is under the Statute of Distributions (22 & 23 Car. 2, c. 10, made perpetual 1 Jac. 2, c. 17, s. 5). This act confers upon the wife, if she survive her husband, who dies intestate, *leaving children*, and without having made any settlement upon the marriage to the prejudice of her right, *one-third* part of his personal estate, and if there be no child, then to a moiety. This share to her husband's personal estate might, before 19 & 20 Vic. c. 94, have been augmented by particular customs. *See* Distributions, Statute of, vol. iv. p. 117.

A widow may maintain an action against a wrong-doer for a chattel in her possession, though purchased by her during coverture. *Oughton v. Seppings*, 1 B. & Adol. 241.

[4] *See* observations on this subject, *Spectator*, No. 295. *Lord Eldon*, in *Wheatley's case*, MS. 1804, cited 1 Mad. Eq. 489, n. said, "I detest pin-money, and have a strong prejudice against it." 2 Bright, 288.

Although, as will be hereafter shown, transfers of property by the husband to the wife are void by law, yet they will be supported in equity (*post*) when the transaction is *bonâ fide*, and not intended as a cover for fraud, nor such an unreasonable act as to prevent that court's interference. *Beard v. Beard*, 3 Atk. 72. Hence gifts by the husband to his wife for clothes, or to purchase ornaments, or for her separate expenditure, will be good in equity. Smith, Eq. 372.

If an annual sum be secured for the wife's pin-money, for her apparel and expenses, and the husband and wife cohabit together, and the husband maintain her, the arrears of pin-money are not recoverable (*Thomas v. Bennet*, 2 P. Wms. 341; *see* id. 353) beyond the year (2 Ves. 190); for in such case she is supposed to have been satisfied. But if the wife lives separate, and has no allowance, an account of arrears of pin-money will be decreed. *Aston v. Aston*, 1 Ves. 267. But if she has pin-money secured by a term, and runs away and lives in adultery, and the trustees proceed at law to recover the term, it seems they may be restrained; but if she left her husband on account of ill-usage, or other reasonable grounds, or the husband acquiesced in her departure, courts of equity will not interpose. *More v. Scarborough*, 2 Eq. Abr. 156. 2 Bright, 88.

[5] This is a species of allowance to the wife by the husband, somewhat analogous to pin-money. It occurs when he permits his wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries; or when he makes to her a yearly allowance for the keeping of his house. The profits in the first case, and the savings in the other, will in equity be considered as the wife's own separate estate, although at law they belong to the husband, upon the principle that all the personal property which a married woman acquires is that of her husband. *Sir Paul Neale's case*, cited in *Herbert v. Herbert*, Pre. Ch. 44; 3 P. Wms. 337; 2 Eq. Ca. abridg. 156. These savings being deemed the separate property of the wife, she may either bequeath them by will as a *feme sole*, or dispose of them in her lifetime. Pre. Ch. 44; 2 Vern. 535; 2 Bright, 302.

[6] The articles comprised under the term of paraphernalia include such apparel and ornaments of the wife as are suitable to her condition in life. What are to be so considered are questions to be decided by the court, and will depend upon the rank and fortune of the parties. *Bindon's case*, Moor, 213; 2 Leon. 166; Cro. Car. 343; 1 Roll. Abr. 911; Pre. Ch. 27. Pearls and jewels usually or sometimes worn by the wife, or gold rings given to her at the funerals of relations (2 Eq. Ca. Ab. 156), properly fall within this term. 1 Roll. Abr. 911; 3 Atk. 394.

Paraphernalia is not allowed against cre-

(*a* 5) *Of Alimony on a Judicial Separation.* *See post*, Marriage.

(D) *Of her Right to a Settlement,*[1] *and Power over her Own or Separate Property, and Liability in respect thereof.*[2]

ditors (2 Ves. 7), except when given by a stranger (3 Atk. 393), but is preferred to legacies (*Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Snelson*, 3 Atk. 369); and the assets may be marshalled. 2 P. Wms. 542. And where a wife's paraphernalia had been exhausted in payment of her husband's debts, upon the deficiency of personal assets, though the court could not decree satisfaction out of the real estates devised, yet it was decreed out of the real estates descended (Amb. 6. *Probert v. Clifford*, Reg. Lib. fo. 310; 0 Atk. 369; *see* 2 P. W. 544, n.); nor is a wife barred of her paraphernalia by a bequest of furniture, plate, and linen, &c. for her life (*Marshall v. Blew*, 2 Atk. 217); nor her claim disappointed by the effect of the option of a creditor having a double fund to resort to in administration of the assets. *Aldrich v. Cooper*, 8 Ves. 397. And if a husband pledges his wife's paraphernalia, his personal estate, if sufficient, shall be liable to redeem them. 1 Bright, 286–294; Smith, Eq. 373.

[1] The interests which the husband acquires in the property of his wife are given him by the law, in consideration of the obligation which he contracts of maintaining her, her present children, and any future children he may have by her, until they are of age. But the common law possessed no means of insuring the performance of the duty thus imposed upon the husband, since in many cases he might sell or give away all the property which he had in right of his wife; or, by becoming bankrupt or insolvent, he might cause it all to vest in his assignees for the benefit of his creditors, and thus the wife, however great may have been her fortune, might, with her children, be left utterly destitute.

The Court of Chancery has endeavoured to remedy this defect in the common law, by giving to the wife, in certain cases, a provision out of her own property. This right is called her "equity to a settlement" (1 Bright, 88; Smith, Eq. 386), and will be enforced by the Court of Chancery where there is property of the wife under its control, and no provision, or no adequate provision, has been made for her on the marriage. 2 Bright, 106.

Where the property is already under the control of the court, it will not be parted with unless an adequate settlement is made upon the wife. 2 id. 245.

The property may come within its control by being the subject of a suit, whether hostile or friendly; or where a bill is filed for the administration of trust property, to a portion of which the wife is entitled, or when she is legatee or creditor of some deceased person whose estate is being administered by the court.

Where the property is *not* already under the control of the court, the wife may herself apply to the court for a settlement out of the fund.

The rule in general is, that one-half the wife's property shall be settled upon her. But the court will, in the exercise of its discretion, award less, when the husband is living with and supporting his wife, and she has either brought him no fortune, or a fair settlement was made on her at the time of the marriage. And nothing will be awarded her if there is already a sufficient settlement, or if she is otherwise provided for. 1 Bright, 240.

But where there has been no settlement at all, or where, without impropriety of conduct on the wife's part, her husband deserts and ceases to support her, or is in insolvent circumstances, or of profligate and spendthrift habits, the court will settle the greater portion, and sometimes even the *whole* of the property, on the wife. 1 Bright, 249.

On the principle that marriage is a gift of the personal property of the wife to the husband, there is no distinction between property to which the wife is entitled in equity, and property to which she is entitled at law.

The wife's equity for a settlement does not depend on any right of property in her, but rests on the control which courts of equity exercise over property falling under their dominion.

The right to a settlement is an obligation which the court fastens, not upon the property, but upon the right to receive it. *Osborn v. Morgan*, 9 Hare, 432; 21 L. J. Ch. 318.

Separate Property.—A. and B. married in 1811. In 1817 they verbally agreed to separate, and not to interfere with each other, and divided then their furniture and effects. They never again cohabited, and the wife supported herself by her own industry, and acquired property which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property:—*Held*, that the property had been acquired to the wife's sole use, and the *jus disponendi* would therefore attach to such property. *Haddon v. Fladgate*, 1 S. & T. 48; 27 L. J. Prob. 21. *See* 2 Bright, 204.

Savings of Separate Estate.—The savings of money transmitted from time to time by a husband to his wife, from whom he was living separate, for her maintenance and support:—*Held* to be separate estate of the wife. *Brooke v. Brooke*, 4 Jur. N. S. 472; 27 L. J. Ch. 639.

[2] In prior parts of this work we have seen that, with very few exceptions, the *common law* will not permit the wife to take or enjoy

real or personal estate separate from, and independent of, her husband. But this rule or disability has been in many instances relaxed, and it will be seen from the few cases abridged in this note, that the capacity of the wife to enjoy property separate from her husband has been acknowledged, even in courts of law.

A court of law has extended its protection to the wife against her husband, even where no trustees were appointed in the deed by which her title to separate property was created, holding that persons named in a will as trustees for the person from whom she claimed, were also to be considered as trustees for her. *Davison v. Atkinson*, 5 T. R. 434.

And such will be the case when the intention is considered to be sufficiently clear to raise a trust for the wife's separate use against a second husband. *Beable v. Dodd*, 1 T. R. 193.

A *feme covert* may dispose of property *in autre droit* by will without her husband's consent. *Scammel v. Wilkinson*, 2 East, 552.

A married woman cannot, by a will made during coverture, even with the husband's consent, dispose of property acquired by her after his death. (Id.)

The interposition of trustees seems at first to have been essentially necessary, in order to protect the wife's separate interest (1 P. Wms. 125 ; 2 id. 19); and regularly, where property is intended to be given or settled upon married women for their separate use, it ought to be vested in trustees (Barn. 187, 206 ; 2 Bright, 205. *See post*, Marriage Settlement); but it has now been long established, that if land or personalty be devised to or settled upon a married woman, for her separate use, without the precaution of vesting it in trustees, still in equity the intention will be effectuated, and the wife's interest protected by the conversion of her husband into a trustee for her (2 P. Wms. 316; 9 Ves. 583 ; id. 375) ; and this principle of equity still more strongly applies when the estate is given to the husband for her separate purposes (3 Atk. 399 ; 9 Ves. 369); and the trusts will be enforced against his assignees in bankruptcy, and under the Insolvent Debtors' Act, and against trustees under a conveyance from the husband to pay debts. But the title of a purchaser from the husband, *without notice* of the trust, will not be disturbed. 9 Ves. 583.

Femes covert having separate estates are, as to such estates, considered in equity as *femes sole* (*Freeman v. More*, 3 Bro. P. C. 378. *Fettiplace v. Gorges*, 3 Bro. Ch. Ca. 8); therefore, whether a power of disposal be vested in them (13 Ves. 190 ; 9 id. 520) by the deed creating such estates, or not, they may absolutely dispose of such estates, or of money saved out of them (2 Vern. 535. *Gore v. Knight*, 3 Atk. 709. *Hearle v. Greenbank*, 1 Ves. 303 ; 1 Eq. Abr. 346, pl. 18), and this without examination (13 Ves. 190), or joining trustees (*Grigby v. Cox*, 1 Ves. 517. *Essex v. Atkins*, 14 Ves. 547. Real property too is subject to such disposition, as well as personal (*Wright v. Cadogan*, 6 Bro. P. C. 156); and personal estate to the wife's separate use for life, and after her death to such person as she should by will appoint, or in default of such appointment to her executors, seems to give her the absolute disposal during life, for personal property, limited to one and his executors, is as absolute as land to one and his heirs; and the case of *Socket v. Wray*, 4 Bro. C. C. 483, seems overruled by that of *Heatly v. Thomas*, 15 Ves. 596. *See* also *Anderson v. Dawson*, id. 536. *Bradley v. Peixoto*, 3 Ves. 325. *Hales v. Margerum*, id. 299; 2 Bright, 235; Smith, Eq. 373.

Where then the wife has assigned her separate property, the assignee may have the trust executed in equity, but a general creditor, it has been thought, cannot in equity be paid out of that property; neither will equity, in general, make good a contract against a married woman on which she cannot be sued at law. 2 Ves. jun. 150, 156. *Duke of Bolton v. Williams*, 4 Bro. Ch. Ca. 309, 311. However, a woman having a separate estate will be bound to a specific performance, unless there be proof of fraud or undue influence on the part of the husband. 3 Br. Ch. Rep. 340. *Pybus v. Smith*, 1 Ves. jun. 189. *See* 2 Bright, 249.

The separate estate of a *feme covert*, it is said, is liable in equity when she has obtained goods upon credit, though there is no contract in writing nor reference to her separate estate. *Burke v. Tuite*, 10 Ir. Ch. Rep. 467. But if the separate estate is an interest in realty, the provisions of the Statute of Frauds prevent such liability being enforced, if there is no writing. (Id.)

But the general rule seems to be that the separate estate of a married woman living apart from her husband is not chargeable for debts contracted by her during that period, without fraud or deception on her part, where there is no evidence of a charge by her of such debts on her separate estate. *Johnson v. Gallagher*, *Johnson v. Cazenove*, *Johnson v. Sturgis*, 7 Jur. N. S. 30; L. J. Ch. 298 ; 9 W. R. 506; 4 L. T. (N.S.) 72 : *Knight Bruce, L.J.*

Also if a *feme covert* having separate property borrows money, and executes a bond (*Balkin v. Clark*, 17 Ves. 365), or enters into a bond jointly with her husband as a security for his debts, this will give a foundation to demand the money out of her separate estate ; and her declarations in such case may be read in evidence against her. 2 Ves. 190. *Norton v. Turvil*, 2 P. Wms. 144. *Hulme v. Tenant*, 1 Br. Ch. Rep. 16. *Stanford v. Marshall*, 3 Atk. 68. The bond, though a nullity, is evidence of her intention. *Per Lord Eldon*, in *Parkes v. White*, 11 Ves. 209. So, a grant of an annuity by a married woman out of her separate estate was established (notwithstanding notice by the trustees that they would only pay to the wife herself) : the transaction, though for her husband's benefit, being her deliberate act when aware of what she was doing. 14

(E) *Of the Remedies against the Husband for Actual or Threatened Violence.*[1]

(F) *Of the Remedy against a Person who has Married the* Feme *when the Marriage is Void.*[2]

Ves. 542. *Essex v. Atkins*, 9 id. 520. 2 Bright, 223.

On a review of all the authorities, it seems that a *feme covert* having a power of disposition over it, may give her estate to her husband, as well as to any one else, however formally and strictly it may be limited to her separate use. *Parkes v. White, supra.* But though the cases never intended to forbid this, where the husband behaves well, yet it is an act that the court looks on with the utmost jealousy. 2 Bright, 223.

Where trustees for the separate use of a wife admitted that they held a certain sum to her separate use, but refused to pay it over without her separate receipt:—*Held*, that an action for money had and received, and on an account stated, would not lie by husband and wife for the sum so admitted to be due to her. *Bond v. Nurse*, 16 L. J. Rep. (N. S.) Q. B. 196; 10 Q. B. Rep. 244.

A clause in restraint of anticipation in a gift to a married woman for her separate use is valid, whether the subject of the gift be real or personal estate, and whether it be a gift in fee or for life. *Baggett v. Meux*, 15 L. J. Rep. (N. S.) Ch. 262; 1 Ph. 627; 2 Bright, 276.

By a marriage settlement, the wife has power, notwithstanding her coverture, to appoint to the children of the marriage, and in default of such children she has a power, "during and notwithstanding her coverture," to appoint to other persons. The latter power cannot be exercised during widowhood. *Quære*, Whether the former can? *Burnham v. Bennett*, 2 Coll. C. C. 260.

Where a bequest of stock to a married woman for her separate use for life, and after her decease for her appointees by deed or will, directs that any appointment by deed shall not operate until after her death, she is not restrained from anticipation or from appointing the fund by an irrevocable deed. *Alexander v. Young*, 6 Hare, 393.

Where, by marriage articles, it was agreed by the intended husband that any money which might devolve by will or otherwise to the intended wife should be settled on her, and his children by her, he drawing the interest, and the wife's father afterwards bequeathed to her a legacy for her separate use, as to which the wife died intestate in the lifetime of the husband:—*Held*, that the legacy was not subject to the trusts of the articles, but that the husband took it *jure marati*, and that a settlement which had been prepared at his own instance, by which the interest of the legacy was settled upon himself for life, and the principal upon the children of the marriage, should be carried into execution. *Drury v. Scott*, 4 You. & C. 264; 5 Jur. 405.

By lease and re-lease, by way of marriage settlement, lands, the inheritance of the wife, were conveyed by her to trustees, and their heirs, to the use of the wife and her assigns until the marriage, and from the solemnisation of the marriage, in trust for the wife and her assigns during her life, for her own sole and separate use, independent of the debts, control, or engagements of the husband, and from her decease to the use of the husband, his heirs and assigns:—*Held*, that the trustees did not take the legal estates during the life of the wife, but that the use was executed in her notwithstanding the words "to her own sole and separate use." *Williams v. Waters*, 14 Mee. & W. 166.

Household furniture, linen, and plate belonging to B., were assigned to him by deed, in contemplation of his marriage to plaintiff, in trust after the marriage, to stand possessed thereof during the joint lives of B., the settlor, and his intended wife, for her sole and separate use, independently of A. The marriage took place, and B. afterwards became bankrupt. The settled furniture, &c. was then in the house in which he resided with his wife:—*Held*, that it was not at the time of his bankruptcy "in his order and disposition, with the consent of the true owners," so as to pass the property in it under 6 Geo. 4, c. 16, s. 72, to the defendants, his assignees. *Simmons v. Edwards*, 16 Mee. & W. 838. *Held*, also, that the fact of the furniture, &c. not having been the wife's before marriage, is immaterial. (Id.)

[1] If the husband beat, or threaten to beat his wife outrageously, or otherwise use her ill, she may bind him to keep the peace by application to the Court of Queen's Bench in term time (Fort. 359; Ca. Temp. Hard.; 2 Lev. 128), or to a justice of the peace, or (*Manby v. Scott*, Bridg. Rep. 233) or to Chancery; or she may apply to the court for a judicial separation (*post*, Marriage). And we have seen (*ante*, p. 63) that in cases of unreasonable or improper confinement, the courts will relieve the wife on *habeas corpus*. *Lord Ferrers' case*, 1 Burr. 634. And if, upon the return of the *habeas corpus* sued out by the husband to bring up the wife, it appear that he has used her ill, and she exhibit articles of the peace against him, the court will not order her to be delivered to him. *Anne Gregory's case*, 4 Burr. 1991. The husband cannot seize, and force to live with him, a wife separated by articles entered into in consideration of money received by the husband. *Ante*, p. 63.

[2] If the husband was disabled from marrying in consequence of a previous marriage, the deceived *feme* may recover back the money obtained by him from her. *Hasser v. Wallis*, 1 Salk. 28; 11 Mod. Rep. 146.

(G) *Of the Incapacity of Husband and Wife to Contract with each other,*[1] *and Effect of Marriage on Contracts made by her before Marriage.*

[1] It has been shown in a prior note that husband and wife are as one person in law, and that upon this union depend almost all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage; and among the numerous consequences which ensue, none are more important than the rule that the husband could not, by any common-law conveyance, give or grant any estate to the wife, either in possession, reversion, or remainder; and the same disability prevailed in regard to the wife (Litt. sect. 168; Co. Litt. 187, b); but an exception to this rule was introduced by the Statute of Uses. The wife may take an estate from her husband by limitation of an use, or by devise, because that does not take effect until after the marriage is determined. For the same reason, a donation *mortis causa* by the husband to her will be good. 1 Bright, 30. And a wife can contract with her husband whenever the circumstances sufficiently show that she can form an independent judgment, totally free from his control; but such capacity is limited to contract in relation to the circumstances which enable her to be thus independent. *Vansittart v. Vansittart*, 4 Kay & J. 63; 4 Jur. N. S. 276; 27 L. J. Ch. 222.

The capacity of the wife to contract with her husband is not confined to the case where she has a separate estate, and contracts in reference to it. (Id.) Therefore, where a wife has instituted a suit in the Ecclesiastical Court for a divorce, an agreement between the husband and wife alone for the compromise of the suit will be supported, provided it contains no stipulations which the court cannot enforce. (Id.) But where an agreement for the compromise of a suit for a divorce provided that the wife should have the custody of two of the children, and should educate them in a particular manner, the first part of such provision being contrary to public policy, and the latter incapable of being enforced against the wife, a demurrer to a bill filed by her for specific performance was allowed. Id. affirmed on appeal, 2 De Gex & J. 249; 4 Jur. N. S. 519.

If a will be made by a woman before marriage, and her husband anterior to such marriage, but after the date of the instrument, agree "that she may dispose of her real estates by will," the will referred to must be considered as a subsequent will, so that the agreement cannot authorise or protect the will previously made, which is therefore revoked by the marriage. *Doe d. Hodsden v. Staple*, 2 T. R. 684.

And it is a well understood and universal rule, that if a woman make a will, and afterwards marry, the marriage will be a revocation of the will. 2 Bro. C. C. 544; 2 T. R. 697; 1 Bright, 12.

In vol. i. p. 436, the cases as to the effect of marriage upon a submission to arbitration were collected; and it was there shown that the marriage of a woman after submission, but before the making of the award, was a revocation of the arbitrator's authority; and that it made no difference whether the arbitrator had notice of the event or not.

But marriage will not destroy any prior contract between the parties upon which a right of action cannot accrue during the coverture. *Cage v. Acton*, 1 Ld. Raym. 515; 1 Salk. 325; Carth. 511; 1 Com. Rep. 67; Holt. 309; 12 Mod. 288; 5 T. R. 384. *Gibbons v. Davies*, Comb. 242. And it was upon this principle that *Lord Thurlow* decided, in *Ewbank v. Hallowell*, 2 Bro. C. C. 226, that a legacy given to the wife by her husband's will, made before marriage, was not revoked by such marriage. But *see* 1 Vic. c. 26, s. 18. But care must be taken always to keep in view the difference between a suspension of the right and an extinguishment of it; in the former case, as we have seen, it has been holden (*Cage v. Acton, supra*, and *Milbourn v. Ewart*, 5 T. R. 381), the marriage does not destroy the contract; but in the latter, that is, where the right is founded upon contracts for debts which are due *in præsenti*, or which *may* become payable at some period during the marriage, are avoided or extinguished by the intermarriage (Co. Litt. 264, b; Hob. 216; Cro. Jac. 571; Cro. Car. 376): hence, if the obligor in a bond conditioned for the payment of money during the coverture marry the obligee, the debt is released; so in any case, if a creditor marry his debtor, the claim and remedy thereon is extinguished; or if a *feme* be warden of the Fleet, and she marries a prisoner, he then becomes free. 2 Vent. 19.

Hence, a bond conditioned for the payment of money after the obligor's death, made to a woman, in contemplation of the obligor marrying her, and intended for her benefit if she should survive, is not released by their marriage. *Milbourn v. Ewart, supra.* And the same rule would apply to covenants, or any other contracts entered into by the husband with his intended wife. And if the widow be executrix to her husband she may, out of the assets, retain the sum of money conditioned to be paid by the bond. *Marriott v. Thompson*, Willes, 186. *Rockelley v. Godolphin*, T. Raym. 483; 2 Show. 403; Skin. 214. *Loan v. Casey*, 2 Bl. Rep. 965. *Thompson v. Woods*, 3 Salk. 65; 3 Lev. 218.

Marriage is no revocation of a *feme's* acceptance of a warrant of attorney to confess judgment. *Anon.* 1 Salk. 117; *ante*, p. 71. And we have seen that a warrant of attorney given by a *feme sole* is not revoked by the marriage. *Ante*, p. 71. If judgment be entered up on such an authority without the leave of the court, it is irregular, and will be set aside. *Marder v. Lee*, 3 Burr. 1469. *Reynold v. Davis*, 12 Mod. 383; Salk. 399. *Anon.* Lofft. 329. And in support of

(H) *Of the Disabilities to which the Wife is rendered subject by the Marriage.*

(*a*) *With reference to the Disposal of her Person.*[1]

(*b*) ,, *her Inability to Make or Discharge Contracts.*[2]

(*c*) ,, *her being Responsible as a* Feme Sole.[3]

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an application to the court for this purpose, an affidavit of the marriage, life of the defendant, and non-payment of the money, must be produced. *Metcalf and Wife v. Body*, K. B. MS. And in *Blunden v. Baugh*, Cro. Car. 304, it was holden, that where a woman lessee at *will* marries, or where a single woman grants a lease at *will*, and then takes a husband, although she has placed the will in his hands, yet the marriage shall not be considered a determination of it without the election of the lessor, or husband, to the contrary. *See* S. P. *Henstead's case*, 5 Co. Rep. 10.

[1] In a prior page, *ante*, 63, it has been shown that the husband is entitled to the custody of the person of his wife; and that he is entitled to impose upon her such a degree of restraint as may be necessary for the purpose of enforcing marital obedience, and preserving her inviolate; it will, therefore, only be necessary to add, that during her coverture with one man, she cannot be wedded to another individual, without being guilty of an offence punishable by the criminal law. *See* Bigamy, vol. ii. p. 395.

[2] The owner of goods hired out to a *feme covert* living apart from her husband does thereby divest himself of the present right of property in such goods, since the contract of hiring is void. *Smith v. Plomer*, 15 East, 607. So, where a *feme covert*, without her husband's knowledge, and without disclosing that she was married, rented a tenement, the landlord, on discovering her situation, may repudiate the contract. *Rex v. the Inhabitants of Ashton-under-Lyne*, 4 M. & S. 357.

So, if a bill be made payable to a *feme covert*, though her husband permit her to trade as a *feme sole*, the right to transfer it is in the husband, not in the wife, unless, perhaps, as his agent, and even then only in his name. *Barlow v. Bishop*, 1 East, 432. *See* 2 Black. 12, 69; 3 T. R. 481; affirmed Dom. Proc. 1 H. Black. 569, 625; and *see* Bills and Notes, vol. ii. p. 400.

If a husband allows his wife to receive for several years the rents of property that accrued to her after separation, and never received them himself, he virtually gives her a general authority to that end. *Doe d. Leicester v. Biggs*, 1 Taunt. 367.

The obligor of a bond given to A. B. and conditioned to pay an annuity to his wife, cannot be discharged from future payments thereof by such *feme covert*, without her husband's assent. *Brown v. Benson*, 3 East, 331.

An action is maintainable by a wife for earnings, after an order by a police magistrate upon desertion by her husband, notwithstanding that ever since the desertion she had been living in adultery, it not appearing that she had begun the adultery before the time specified in the order. *Thomas v. Head*, 2 F. & F. 88: *Hill.*

An order obtained pursuant to 20 & 21 Vic. c. 85, s. 21, by a married woman deserted by her husband, for the protection of property acquired since desertion, will not enable her to maintain an action, commenced before the date of the order, for injuries to or in respect of such property. *Midland Railway Co. v. Pye*, 10 C. B. (N. S.) 179; 30 L. J. C. P. 314; 9 W. R. 658; 4 L. T. (N. S.) 510.

A verdict in an interpleader issue, that goods are the property of one who is a married woman, is not necessarily a wrong verdict. *Birch v. Crabb. Shinger v. Holt*, 7 Jur. N. S. 866; 30 L. J. Ex. 318, 322.

[3] Formerly a *feme covert* separated from her husband upon an adequate maintenance for her support, was liable on her contracts if she notoriously lived as a *feme sole* (*Corbett v. Poelnitz*, 1 T. R. 5. *Stedman v. Gooch*, 1 Esp. 6); and the maintenance was *permanent. Ellah v. Leigh*, 5 T. R. 679. *Gilchrist v. Brown*, 4 id. 766.

But now a *feme covert* living apart from her husband with a separate maintenance secured to her by deed, cannot contract and be sued as a *feme sole. Marshall v. Rutton*, 8 id. 545. And coverture is an estoppel, though the defendant has sued as a *feme sole. Davenport v. Nelson*, 4 Camp. 26. Though a *feme covert*, sole trader by the custom of London, may bind herself by simple contract, she cannot by deed. *Jewson v. Read*, cited 4 T. R. 362. Nor can she sue (*Caudell v. Shaw*, id. 361. *Read v. Jewson*, *supra*); or be sued at Westminster as such. And even when sued in London, her husband must be made a party to the declaration, for conformity. *Beard v. Webb*, 2 B. & P. 93. *Anon.* 10 Mod. 6. *See* Broom's Party to Actions, 175.

By the custom of London, a *feme sole* merchant is where the *feme* trades by herself in one trade, in which her husband does not intermeddle, and buys and sells in that trade; then the *feme* shall be sued, and the husband named only for conformity; and if judgment shall be given against them, execution shall be against the *feme* only. Cro. Car. 68.

So, one to whom probate of the will of a *feme covert* separated from her husband, and a trader on her own account, has been granted, cannot be sued in respect of property in his hands acquired by her in such trade for debts also contracted therein. *Clayton v. Adams*, 6 T. R. 604.

But a *feme covert* whose husband has been transported may, after the expiration of the term, but before his return, sue upon

(I) *Deeds of Separation between Husband and Wife.*[1]

a cause of action which accrued during that period (*Carrol v. Blencow*, 4 Esp. 28); or where it appears the husband has never been heard of for seven years. *Lambert v. Atkins*, 2 Camp. 270. *Hopewell v. De Pinna*, id. 113. *See* B. & L. Pl. 349.

A *feme covert* is liable to be sued, though the husband be only banished for a limited time. *Sparrow v. Carruthers*, cited in 1 T.R. 6; and 2 Bl. Rep. 1197. Broom's P. A. 516.

In the case of banishment, abjuration, or exile, the law considers the husband as civilly dead, and therefore permits the wife to contract, and sue and be sued, as a *feme sole*, for it would be unreasonable that she should be remediless, and equally hard upon her creditor, who, not having any mode of redress against the husband, would be without relief against the *feme*. 1 Roll. Rep. 400; Co. Litt. 132, a; 133, a; 3 Bulst. 188; 1 id. 140; Mod. 85. And the same rule obtains where the husband resides abroad without any probability of returning (*Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147); or even where he has gone abroad with an intention of returning, but has not done so (*Walford v. Duchess de Pienne*, 2 Esp. 554. *Franks v. Duchess de Pienne*, id. 587); but where the husband resided in the West Indies, and allowed the wife a weekly sum for her subsistence (*M'Namara v. Fisher*, 3 id. 18); or where a tradesman has knowledge that an allowance is made by a husband to his wife, for the payment of necessaries during his temporary absence (*Holt v. Brien*, 4 B. & A. 252); or where a *British* subject resided in an enemy's country, not with a view of adhering to the enemy, it was holden that the wife could not be charged as a single woman (*Marsh v. Hutchinson*, 2 B. & P. 226), though she appear and act as such. *Farrar v. the Countess of Granard*, 1 N. R. 80. *Anon.* 12 Mod. 603. And where it appears the husband has at any time lived with her within the realm, although he be abroad at the time of the action, she cannot be charged as a *feme sole* (*Kay v. Duchess de Pienne*, 3 Camp. 123); but where she is otherwise liable, the fact of her receiving a separate maintenance makes no difference. *De Gaillon v. L'Aigle*, 1 B. & P. 357.

A woman who states her husband to be dead at the time she contracts, is liable if she offer no evidence to the contrary. *Barber v. Holmes*, 3 Esp. 190. And proof by showing the muster-roll of a ship that a person of his name was living, is of no avail. (Id.) And as the relation of marriage between a *British* subject and his wife is not suspended by his deserting her and going abroad, it has been holden that she cannot maintain trespass for an injury committed to her property. *Boggett v. Frier*, 11 East, 301. As to effect of judicial separation, *see* 27 L. J. Ch. 630; 28 id. 334, 788.

[1] Deeds of this description, when made through the intervention of trustees, are valid at law and in equity (8 T.R. 521; 2 Bro. C. C. 90; 3 Merv. 256); hence where, by articles of separation, the husband was to receive a certain annuity out of the wife's estate while he should leave her unmolested, it was holden that, on molestation, the annuity ceased. 2 Anstr. 345. But the court have refused to interfere on an agreement between *baron* and *feme*, whereby the *feme* was to give up part of her property in consideration of their living separate, although the application was made by the *feme*. 2 Cox, 207. *See* 2 Bright, 305.

A proviso in a deed of separation, that the wife surviving shall be entitled to her dower and thirds of real and personal estates, whereof the husband shall die seised or possessed, was construed not as a covenant to leave such a portion of the personal estate as she would be entitled to under the statute, had he died intestate; but that she should be in the same situation as if not separate as to dower and thirds. 19 Ves. 63.

The existence of the wife being, during the marriage, merged in that of the husband, they can neither of them contract with the other, and therefore the covenants in a separation deed are entered into by each party to a trustee. But *see* 2 Bright, 329.

After a deed of separation executed, the wife is not, "to all intents and purposes," a *feme sole;* she could not, before 16 & 17 Vic. c. 83, have been a witness against her husband, or be now guilty of felony in his presence; nor can, we have seen, an action be maintained against her alone. 11 Ves. 530.

The operation of a deed of separation ceases on a reconciliation. (Id. 537.) But where the husband agreed to allow his wife 100*l.*, the court decreed its performance, though the husband offered to receive the wife again. 6 Bro. C. C. 614. There is no doubt of the general jurisdiction of a court of equity to decree the specific performance of articles between husband and wife for a separation and a separate maintenance; but the court exercises its discretion very cautiously, and will not give its assistance until it has seen whether, from the circumstances of the case, there is or is not a probability of the parties being reconciled. 2 Cox, 100; 10 Ves. 191; 2 Bright, 319.

A stipulation by a husband to pay to his wife's trustees an annuity as a separate maintenance in the *event of a future separation*, with the approbation of the trustees, has been holden a legal covenant. *Rodney v. Chambers*, 2 East, 283.

The validity of such covenants does not appear to have been doubted in *Chambers v. Caulfield*, 6 id. 244; 1 Atk. 277; 2 Bright, 310, and cases there cited.

A deed of separation between husband and wife contained a covenant by the wife and her trustee that she, her executors or administrators, or the trustees, or some or one of them, should and would, at all times, save, defend, and keep harmless and indem-

nified, the husband from and against the debt or debts, sum or sums of money which the wife had then, and at the time of the making of the indenture, contracted, or which she should at any time thereafter contract:—*Held*, that this covenant included debts previously contracted by the wife for necessaries while living with the husband. *Summers v. Bull*, 8 Mee. & W. 596. To an action on this covenant, assigning a breach in not indemnifying against a debt of the wife, the defendant pleaded that the debt was not contracted within the true intent and meaning of the covenant, concluding to the country:—*Held* bad, as being a traverse of matter of law. *Borlock v. Hume*, 8 Scott, N. C. 590; 7 Man. & G. 893.

By such a deed before the recent act (20 & 21 Vic. c. 85), on a separation of defendant with Ann, his then wife, on the ground of the wife's adultery, which was recited in the deed, defendant covenanted with plaintiff that he (defendant), his executors or administrators, or some or one of them, would, during the natural life of the said Ann, pay her a certain annuity, and in consideration thereof plaintiff covenanted with defendant that the said Ann should not sue for alimony, and also that plaintiff would indemnify defendant from all debts which might be contracted by the said Ann. After the passing of the Divorce Act, the marriage between the defendant and the said Ann was dissolved by a decree of the Divorce Court, by reason only of the adultery recited in the deed. It was held that such dissolution of the marriage was no defence, even on equitable grounds, to an action against the defendant for breach of his covenant to pay the annuity. *Goslin v. Ctark*, 31 L. J. C. P. 330.

In an action on a covenant by the husband, contained in a deed of separation, to pay the plaintiff, his wife's trustee, a yearly sum for her maintenance, it is no defence at law or in equity that the deed contains a covenant of license to the wife to live as if she was *sole* and unmarried, in such way as she might think fit, free from all restraint in her way of living; nor if the deed has been acted upon, is it any defence to such an action that, at the instance of the plaintiff, the wife concealed from the husband the fact of her pregnancy, in order that defendant might be induced by such ignorance to execute the deed, and that he was induced by such ignorance to execute it. *Kendall v. Webster*, 31 L. J. Ex. 492.

A deed of separation between husband and wife contained a covenant by the husband that he would pay the whole expense of the education, maintenance, and support, except as thereinafter mentioned, of their three children, all of whom, it was agreed, should be and remain in the custody, and under the complete control, of the husband, provided that the wife, or if she should fail to do so, the trustees of the deed, should pay the expense of the education, maintenance, and support of such of the children as should be permitted by the husband to reside with her during the period of such residence: — *Held*, that, with the particular exception mentioned, this was a general covenant on the part of the husband to maintain the children at all times, and, therefore, he was responsible, notwithstanding they were of age, and were not residing with his wife, nor were under his care, custody, or control. *De Crespigny v. Crespigny*, 9 Ex. 129.

By a deed of separation, the husband agreed to pay an annuity to a trustee for the use of his wife. The annuity being in arrear, and the trustee refusing, upon indemnity, to sue the husband, an action was commenced in the trustee's name, but without his authority, for the recovery thereof. Under the circumstances, the court refused to stay proceedings at the instance of the defendant. *Auster v. Auster and Holland*, 7 B. C. Rep. 104; 10 Jur. 786; 15 L. J. Q. B. 229.

A deed of separation, by which the husband covenanted with a trustee for the wife, "that as, by way of a provision for the wife, he and his executors would pay to the trustee or to the wife, or one of them, during her life, 10s. weekly," provided "that in case the husband and wife should, at any time thereafter, voluntarily and mutually consent and agree, by any writing under both their hands, subscribed and attested by and in the presence of two or more credible witnesses, to live and cohabit, and should accordingly live and cohabit together as man and wife for one calendar month next thereafter, the deed should thenceforth be void." Equitable plea, that before the arrears of the weekly allowance accrued, the husband and wife, without any writing under their hands, cohabited together for six months: — *Held*, that the deed was not impliedly avoided by such cohabitation. *Randle v. Gould*, 8 El. & Bl. 457; 4 Jur. N. S. 304; 27 L.J.Q.B. 57.

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separately, the husband covenanted to pay to the trustee an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false and fraudulent misrepresentations made by the plaintiff to him, that is to say, by the plaintiff, before the making of the deed, falsely and fraudulently representing to him that the wife was a virtuous woman, whereas, in truth, she was not a virtuous person, and that the plaintiff had carnally known her, subsequently to the intermarriage of her and the defendant, and before the making of the deed; which last-mentioned facts the plaintiff concealed from the defendant, and induced him to make the deed in order that the plaintiff might continue an adulterous intercourse with the wife. At the trial, the plea was found, and the verdict thereon entered for the defendant: — *Held*, on motion to enter judgment for the plaintiff *non obstante veredicto*, that, although the plea did not show that the re-

(J) *Actions by Husband and Wife.*[1]

(*a*) *When and in what Manner they may Sue.*[2]

presentations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that the wife was the defendant's wife at the time he had intercourse with her; yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action. *Evans v. Edmonds*, 13 C. B. 777; 17 Jur. 883: 22 L. J. C. P. 211.

And such a covenant, it seems, would be valid, even if the wife was to be sole judge of the propriety of living apart from her husband. *Gawden v. Draper*, 2 Vent. 217.

And if a man grant an annuity to his wife on separation, he is liable to its payment, though the wife may have committed adultery before he gave the annuity, and though he was ignorant of it at that time. *Field v. Serres*, 1 N. R. 121.

A clause in a deed, that it shall not be affected by the parties agreeing to live together again and cohabiting, does not render the deed invalid. *Wilson v. Mushett*, 3 B. & Adol. 740.

A covenant by husband to allow his wife separate maintenance out of his salary, ceases to be obligatory on his dismissal from office. *Hope v. Albert*, 3 M. & Rob. 406.

Where a deed of separation recited, that it had been agreed that the plaintiff should be paid an annual sum out of the personal estate of the wife, and the defendant covenanted on the behalf of the wife, and by her consent, testified by her being a party thereto, to pay the same out of such personal estate: — *Held*, that the whole deed being founded on the assumption that there was such personal estate, no express averment was necessary. *Groome v. Debenham*, 6 M. & S. 345.

A plea of adultery is no answer to an action for nonpayment of maintenance. *Baynon v. Batley*, 8 Bing. 256; 1 M. & Scott, 339.

A provision in a separation-deed for all and every the children who should attain twenty-one does not include a child born after a reconciliation. *Hulme v. Chitty*, 9 Beav. 437.

[1] The Common-Law Procedure Act, 15 & 16 Vic. c. 76, s. 40, provides that "in actions brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit." This clause is not imperative, and therefore does not affect the husband's legal right to maintain a separate action for such claims. *Brockbank v. the Whitehaven Junction Railway*, 31 L. J. Ex. 349.

Husband and wife may sue jointly a railway company for dividends on stock of the company purchased by the wife out of her own earnings, and of which stock she is the registered owner in the books of the company; and if the wife sues alone, the nonjoinder of the husband is only a plea in abatement. *Dalton v. Midland Railway Co.* 13 C. B.; 17 Jur. 719; 22 L. J. C. P. 177.

In actions brought on promises made by the wife before marriage, the husband and wife ought to be sued jointly. *France v. White*, 1 Man. & G. 731. If the wife is sued alone, she may plead her coverture in abatement, but cannot take the objection in any other manner. *Lovell v. Walker*, 9 Mee. & W. 299. *Milner v. Milnes*, 3 T. R. 631. If the husband is sued alone, and the objection appears on the record, it may be met by demurrer, or by motion in arrest of judgment, or by error, or if it transpires upon the evidence, it will be ground of nonsuit. *Mitchinson v. Hewson*, 7 T. R. 348. *Richardson v. Hall*, 1 B. & B. 50. If the husband dies before action, the right of action remains against the widow; if the wife dies before action, the right of action lies only against her administrator. In actions brought to charge a husband on contracts made by his wife during coverture, the husband must be sued alone, and the pleadings take the ordinary form. The wife can contract only, we have seen (*ante*, p. 71), as agent for the husband, and the liability of the husband depends upon the authority of the wife to pledge his credit, which must be proved by the plaintiff. *Lane v. Ironmonger*, 13 Mee. & W. 368. *Reneaux v. Teakle*, 8 Ex. 680. In certain matters, an agency in the wife (*see ante*, p. 72) to contract for her husband is presumed from their relation and circumstances. *Manby v. Scott*, 2 Smith's L. C. 5th ed. 375. *Montague v. Benedict*, id. 408. *Seaton v. Benedict*, id. 414. *Read v. Teakle*, 22 L. J. C. P. 161. *Jewsbury v. Newbold*, 26 L. J. Ex. 247. *Atkyns v. Pearce*, 26 L. J. C. P. 252; 2 C. B. (N. S.) 763. At law, a wife cannot make any contract to bind herself personally. If sued alone upon a contract made during the marriage, she may plead her coverture either in abatement or in bar. In equity, a married woman may contract in respect of her separate estate, even with her husband. *Vansittart v. Vansittart*, 27 L. J. Ch. 222; 2 De Gex & J. 249. *Vaughan v. Vanderstegen*, 23 L.J.Ch.793, 800; *ante*, p. 82.

[2] A *feme covert*, we have seen, cannot sue in any case *alone*, unless her husband be *civiliter mortuus*, or transported for some crime (*see* 4 T. R. 361; 2 B. & P. 105; 4 Esp. 27; Cro. Car. 519; 11 East, 301), or there has been a judicial separation. Moore, 665; Bac. Abr. Baron and Feme, L. She may in all cases join in an action with her husband, when the cause of action would survive to her, or when she is the meritorious cause of action, and there has been an express contract with her. Cro.

Eliz. 61. And she *must* join when the cause of action would necessarily survive to her (1 Wils. 224), or when she sues as executrix or administratrix. 11 Mod. 177.

In *assumpsit* on a promise made to husband and wife *after coverture* to pay money to the *latter*, they may both join. *Hilliard v. Hambridge*, All. 36. So a *feme covert* may join in an action on a note made payable to her during coverture. *Phillipskirk v. Pluckwell*, 2 M. & S. 393. But husband and wife cannot join in an action for money lent by him and his wife. *King v. Basingham*, 8 Mod. 199; 341. Nor for work done by the wife during the coverture. *Buckley v. Collier*, 4 Mod. 156; 1 Salk. 114; 3 id. 63; Carth. 251. So on a promise to a husband to pay him money due to his wife as executrix, in consideration of his forbearing to sue for it, the husband may sue alone. *Yard v. Eland*, 1 Ld. Raym. 368; 12 Mod. 207; 1 Salk. 117; Carth. 462. And he may sue without his wife to recover back money paid by her in the purchase of property without his consent. 2 Ld. Raym. 225; S. C. Comb. 450.

By a marriage settlement, leaseholds of the wife were assigned upon trust to pay or permit the wife to receive the rents and annual profits during her life for her separate use. During the coverture the wife received some of the rents from the trustee, and deposited a portion with the defendant, and then died: — *Held*, that an action for money lent would lie by the husband in his own right to recover the money deposited. *Bird v. Pegrum*, 13 C. B. 639; 17 Jur. 577; 22 L. J. C. P. 166.

Assignees of a bankrupt cannot, in their names alone, maintain an action on a chose in action (*e. g.* a promissory-note) made to the wife of the bankrupt before her marriage. *Sherrington v. Yates* (in error), 1 D. & L. 1032; 12 Mee. & W. 855; 13 L. J. Ex. 249, Ex. Cham.

Where an action by husband and wife had been referred, and the master ordered the sum due to be paid to the husband only, and the defendant escaped, it was holden that husband and wife might join in an action for the escape. *Huggins v. Durham*, 2 Stra. 726. But not, it has been said, on bond made to the wife before *coverture; sed qu. infra. Howell v. Maine*, 3 Lev. 403; 3 Salk. 64. And on a bond given to them both during coverture, he may sue alone. *Beaver v. Lane*, 2 Mod. 217; Jones, 367. Or the husband and wife may join (Bro. Baron and Feme, pl. 14, 55; *see* 2 P. Wms. 497); in which case, if the husband dies, the wife shall have the bond. Bro. Baron and Feme, pl. 60. So where husband and wife have recovered judgment on a bond made to wife *dum sola*, husband and wife may join in an action on such judgment, or the husband may sue alone. *Wolverston v. Fynnamore*, cited 1 Selw. 291. But in an action on a bond given to her *dum sola* they ought to join. 2 Atk. 280; 3 T. R. 634; 1 M. & S. 180; 1 Roll. Abr. 437, R. pl. 3; 3 Mod. 186; see *Howell v. Maine, supra, contra.* And after her death he must sue as her administrator. *Day v. Padrone*, 2 M. & S. 396, n.

The husband may sue alone as on a bond made to himself, on such security being given to him, and his wife as administratrix. *Ankerstein v. Clarke*, 4 T. R. 616.

The wife may sue in the name of her lunatic husband. *Rock v. Slade*, 7 Dowl. P. C. 22.

If a wife be living apart from her husband as a servant in the family of A., and so maintaining herself, and she be dismissed from the service by A. in consequence of a letter written by B. reflecting on her character, her husband may maintain an action for special damage. But if A. dismissed her colourably, intending to take her back again, the action will not lie. *Coward v. Wellington*, 7 C. & P. 531.

Husband and wife should join in action for an injury to their reversionary interest in premises leased to them (*Wallis v. Harrison*, 7 Dowl. P. C. 395; 5 Mee. & W. 142. *Nurse v. Wills*, 1 Nev. & M. 765; 4 B. & Adol. 739); but special damage, by loss of the wife's service, can be recovered by the husband alone, and not in joint action. *Dengate v. Gardiner*, 4 Mee. & W. 5. So, special damage arising from slanderous words spoken of a separate establishment kept by the wife, will not enable her to join with her husband in the action. *Saville v. Sweeney*, 1 Nev. & M. 254.

Where the right to sue in trover will survive, the husband may sue alone, or jointly with the wife. *Ayling v. Whicher*, 1 Nev. & P. 416.

Where the wife is separated from her husband, and sued in his name, the court stayed the proceedings until indemnity given. *Morgan v. Thomas*, 2 C. & M. 388; 2 Dowl. P. C. 332.

Before the Statutes of Amendment, a declaration, describing an agreement as made by husband and wife and one A., when only made by agent of the wife and A., was a fatal variance. *Saunderson v. Griffiths*, 5 B. & C. 909; 8 D. & R. 643.

A declaration, that the debt was due to the wife *dum sola*, and after marriage there was an account stated with the husband, and a promise to pay them, is bad. *Hopkins v. Logan*, 7 Dowl. P. C. 360; 5 Mee. & W. 241.

But where a married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single. Having paid rent to A., of whom she took the premises, under a threat of distress, she was distrained upon by B., claiming to be the landlord, for the same rent. She brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his pleas and avow, in which case the plaintiff's

coverture should not be set up: — *Held*, that such an order could not be made without the defendant's consent, though in a case of obvious oppression, and the court set aside the order. *Eubanke v. Owen*, 6 Nev. & M. 799; 5 Ad. & E. 298.

To a declaration in *assumpsit* for work and labour, against several defendants, charging the promise to have been made by the defendants generally, the defendants pleaded in abatement the non-joinder of two others. The court refused to arrest the judgment, on the ground that one of the defendants was a *feme covert*, sued jointly with her husband, and the declaration did not state that the promise was made by her before the marriage, the ambiguity in the declaration being aided by the plea. *France v. White*, 1 Scott, N. S. 604.

Husband and wife may join in covenant for rent of the wife's lands, due upon a lease granted by them. *Aleberry v. Walby*, 1 Stra. 229.

So they may join in covenant where a lease is granted to them for a term of years, and the lessor evicts them. Bro. Abr. Baron and Feme, pl. 25. So they may maintain covenant against a lessee for years for not repairing during the coverture, or the husband may sue alone (Cro. Jac. 399; S. C. Bulst. 163. *See* Cro. Car. 505); and in general in all actions for a profit, &c. accruing during coverture from the *real estate* of the wife, they may join, or the husband may sue alone.

Husband and wife must join in detinue of charters of the wife's inheritance (1 Roll. Abr. 347; R. pl. 1); but for the recovery of personal chattels he must sue alone. Bull. N. P. 50. *Infra.*

The dippers at Tunbridge Wells and their husbands brought *case* against the defendant for exercising the trade without being duly appointed; it was holden that the action was well brought in the names of the husbands and wives. *Weller v. Baker*, 2 Wils. 414. So in an action upon the case for stopping up a way to the wife's land (Cro. Car. 418), or for cutting down trees, the tops of which were reserved to the wife for her life (id. 437), husband and wife may join. So in an action for waste committed on her land. 7 Hen. 4, c. 15, a; 3 Hen. 6, c. 34.

A declaration by husband and wife stated that the defendant was the maker and seller of lamps called "The Holliday Lamp," and thereupon the husband bought of him one of those lamps, to be used by his wife and himself in his shop, and that the defendant then fraudulently warranted that the lamp was reasonably fit and proper for that purpose, whereas the lamp was dangerous and unsafe, by reason whereof, when the wife attempted to use the lamp, it exploded, and injured her. At the trial, it appeared that the accident arose from the defective construction of the lamp; but there was no proof that the defendant knew of the defect, and the jury found that he was not guilty of any fraudulent or deceitful representation: — *Held*, the action could not be maintained by the wife, there being no misfeasance towards her, independently of the contract, which was with the husband alone. *Longmeid v. Holliday*, 6 Ex. 761.

But it seems that the husband ought to sue *alone* for maliciously indicting his wife. *Harwood v. Parrott*, 7 Mod. 104. *Smith v. Hixon*, 2 Stra. 977.

The distinction is between actions brought for the personal suffering of the wife and actions for pecuniary losses accruing to him individually; in the former, he should be joined, and not in the latter. And a husband seised of premises in right of his wife, may sue without her for disturbing him in the enjoyment of them. *Frosdick v. Sterling*, 2 Mod. 270. And in an action for slandering his wife, whereby he sustained special damage (*Anon.* 1 Sid. 346); as for saying *his wife kept a bawdy-house*. *Coleman v. Harcourt*, 1 Lev. 140. But husband and wife may join in a suit for words actionable in themselves, and the declaration may conclude *ad damnum ipsorum*. *Baldwin v. Flower*, 3 Mod. 120.

In trover for a personal chattel of wife before, and conversion after, marriage, *baron* and *feme* may join. *Blackborne v. Greaves*, 2 Lev. 107; 3 Keb. 62, 263, 329; Vent. 260.

In replevin, a husband may *avow alone* for rent due in right of his wife. *Osborne v. Walleeden*, 1 Mod. 272; 2 Saund. 197; 2 Keb. 712. So if the goods of a *feme sole* be taken, and she marries, her husband *alone* may bring the replevin; for the property being personal, is transferred by the marriage, and vested absolutely in the husband (Gilb. Replev. 156); or the husband and wife may join. *Post*, Replevin. Or where it does not appear that the taking was during the coverture, husband and wife may declare in replevin for taking their goods, for they might have been jointly possessed before marriage. *Berne v. Mattaire*, Ca. Temp. Hard. 119; 2 Stra. 1015. In the replevin of goods which the wife has, as executrix, husband and wife shall join. F. N. B. 159. Where a cognisance is made in replevin as bailiff of B. and wife, and it is proved that the receipts and the authority to distrain were by B. solely, it is a fatal variance. *Parry v. Hindle*, 2 Taunt. 180.

The wife cannot be joined in an action of trespass *de bonis asportatis*. *Dunwell v. Marshall*, 2 Lev. 20. *See* 1 id. 3; 8 Mod. Rep. 379; 7 Mod. 105. But *baron* and *feme* must join in an action of trespass for an injury done to the goods of the *feme dum sola*. *Milner v. Milnes*, 3 T. R. 627. And if a stranger *cuts* trees upon the land of the *feme*, they may join (15 Edw. 4, 9 b); but in trespass for cutting down and carrying away corn, although it grows upon the wife's land, she should not be joined. Cro. Eliz. 138; 18 Bant. 277; 2 Vent. 195. In an action of battery by the husband and wife for imprisonment of the wife till he paid 10*l.*, exception was taken, that the husband and wife could not join, but judgment was given for the plaintiff. 2 Keb. 230.

And if in trespass for an assault it can be shown that the *feme consented* to the assault,

(*b*) *Husband's Power over the Proceedings when she Sues alone.*[1]

(*c*) *Where Marriage abates the Suit, and Proceedings under it, or Error.* *See* vol. i. p. 11.

(*d*) *Declaration by.*[2]

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the action must be brought by the husband alone. *Rogers v. Goddard*, 2 Show. 255. So he may sue alone for the injury sustained by himself from the loss of the society, comfort, and assistance of his wife, in consequence of the battery (Cro. Jac. 538); or for wounding the plaintiff and assaulting his wife *per quod*, &c. (Id. 501.) So they cannot join in an action for battery on them both. *Newton v. Hatter*, 2 Ld. Raym. 1208. S. P. *Hocket v. Stiddolph*, 2 Mod. 66; 1 Vent. 29.

In an action for negligence against a coach-owner for overturning the plaintiff's wife, in consequence of which she lingered and died, damages are only to be reckoned for the injury sustained during the wife's illness, and not from the grief occasioned by her death. *Baker v. Bolton*, 1 Camp. 493. And in an action for an assault, her death may be shown as evidence of the violence of the assault, but not in aggravation of damages. *Huxley v. Berg*, 1 Stark. 98.

If *baron* and *feme* are disseised of the land of the *feme*, they must in general join in an action for the recovery of it. Bulst. 121. But it is said that he may, in such case, bring an ejectment *alone*. 2 Mod. 270.

Where the right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly. Bro. Baron and Feme, pl. 41.

[1] If a wife be beaten or slandered, she cannot, by law, compel the husband to bring an action. *Manby v. Scott*, Bridg. Rep. 232. The husband must appoint an attorney for himself and his wife, she not being competent to give such an authority. 2 Saund. 213; Yelv. 1; but *see* Cro. Car. 165.

The court will not stay the proceedings in an action brought by a wife separated from her husband in his name, for an injury to her property, upon the defendant's application by the husband's affidavit that the suit has not his sanction. *Chambers v. Donaldson and others*, 9 East, 471. And where the husband by deed of separation relinquished all his marital rights and control over the wife, she having as executrix commenced an action in the names of her husband and herself, and the husband having released the debt, which was pleaded *puis darrein continuance*, the court held that the husband could not so defeat the action. *Innell v. Newman*, 4 B. & A. 419.

It is no defence to an ejectment that defendant is the wife of one of the lessors of the plaintiff. *Doe d. Daley v. Daley*, 8 Q. B. 934; 10 Jur. 691; 15 L. J. Q. B. 295.

[2] Declaration at the suit of husband and wife cannot be delivered on process at his suit only.

Commencement and Conclusion of Declarations by and against Husband and Wife.

In the

The day of A.D.

(Venue.) A. B. and C. [*the Christian name of the wife*] his wife, by D. E., their attorney [*or* in person], sue F. G. for [*here state the cause of action, and conclude thus:*] — And the plaintiffs claim £

If the declaration contain a count by husband and wife for an injury done to the wife, and also a count by the husband in his own right under the C. L. P. Act, 1852, sect. 40, the conclusion may be thus: — And the plaintiffs claim under the count £ and the plaintiff A. B. claims under the count £

Against Husband and Wife.

In the

The day of A.D.

(Venue.) A. B. by C. D., his attorney [*or* in person], sues E. F. and G. [*the Christian name of his wife*], his wife, for [*here state the cause of action, and conclude thus:*] — And the plaintiff claims £

A declaration against husband and wife stated that the wife *dum sola*, together with J. A., made their joint and several promissory notes, payable to the plaintiff. The declaration was amended by adding that the husband, after the marriage, in consideration of the premises, promised to pay the plaintiff the note. The defendants pleaded the Statute of Limitations. The evidence was that the note was made in 1837, and that interest was paid on it regularly until 1843, when the defendants married. On the 10th of August, 1844, a year's interest was paid by the female defendant, but without her husband's privity. The action was commenced on the 2d of August, 1850:—*Held*, that under these circumstances no promise was proved within six years, as none could have been made by the wife *dum sola* within that period; and as the payment made by the wife within six years was without her husband's privity, no promise by him could be inferred. *Neve v. Hollands*, 16 Jur. 933; 21 L. J. Q. B. 289.

A declaration by husband and wife on an account stated, must show that the accounting was concerning matters in which the wife had an interest. *Johnson v. Lucas*, 1 El. & Bl. 659; 17 Jur. 1066; 22 L. J. Q. B. 174.

A husband, as administrator to his deceased wife, declared that the defendant was in occupation of a brewery and office, and a passage leading thereto from the public street, used by the defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet he wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open without being properly guarded and lighted, and the wife, who had been to the office as a customer of the defendant, and was lawfully

(*e*) *Appearance;*[1] *Pleas to Action by, or when the* Feme *Sues alone.*[1]

(*f*) *Replication in Actions by.*[2]

(*g*) *Evidence in Actions by.*

(1) *By Husband and Wife jointly.*[3]

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passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open, and not properly guarded and lighted, whereby she was killed:—*Held*, first, that the husband's right to sue as administrator under the 9 & 10 Vic. c. 93, sufficiently appeared without express allegation of pecuniary damage. *Chapman v. Rothwell*, 1 El. Bl. & El. 168; 4 Jur. N. S. 1180; 27 L. J. Q. B. 315.

In an action by husband and wife for slander, imputing incontinency to the wife, alleging that by reason thereof the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her:—*Held*, that the declaration showed no cause of action. *Allsop v. Allsop*, 5 H. & N. 534; 6 Jur. N. S. 433; 29 L. J. Ex. 315; 8 W. R. 449.

A declaration by husband and wife must state the *interest* of the wife (*Bidgood v. Way*, 2 Black. 1236); for the court will not intend it upon a demurrer (2 N. R. 405); or even after verdict (Cro. Jac. 644): but the latter proposition seems doubtful. See *Bourne v. Mattaire*, MS. Bull. N. P. 52.

In an action by husband and wife for the battery of the wife, the declaration charging under a *per quod* that the husband's business remained undone, and concluding *ad damnum ipsorum* (*Russell v. Corne*, 2 Ld. Raym. 1031; 1 Salk. 119. *Baker v. Barber*, Comb. 184), or a declaration stating that the defendant drove a coach over the wife and bruised her, by reason whereof the husband laid out, &c., for her cure, *et alia enormia iisdem intulit ad grave damnum ipsorum* (*Todd v. Redford*, 11 Mod. 264); or a declaration for an assault and battery by *baron* and *feme*, alleging it to have been committed on both, are cured by verdict. *Hocket v. Stiddolph*, 2 Mod. 66; 2 Vent. 29.

[1] A married woman cannot appoint an attorney. *Oulds v. Sansom*, 3 Taunt. 261. Where a husband and wife sue or are sued jointly, the husband may appoint an attorney for both. 2 Saund. 213. A married woman sued alone must appear in person, and may then plead her coverture in abatement (2 Chit. Pr. 10th ed. 1193); or if the action is founded upon a contract made during coverture, the coverture may be pleaded in bar. (Id. 1195.)

[2] When the wife has no interest in the subject-matter of the suit, and consequently ought not to be made a party, and she sues either with or without her husband, the plaintiff will be nonsuited on the general issue. (*Sed qu.* vol. i. p. 19.) But where the wife was interested *before* or *during* her coverture in the cause of action, and might join with the husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be given in evidence under the general issue, or pleaded in bar.

To an action on a promissory note, the defendant pleaded, in bar, that at the time of making the note the plaintiff was the wife of one G., and that the consideration for the note was money of G., advanced by the plaintiff, without G.'s knowledge, and that the plaintiff received and held the note without the authority of G., and never had any property in or right to the note:—*Held*, that this was an informal plea of coverture, and bad for not being pleaded in abatement. *Guyard v. Sutton*, 3 C. B. 153; 15 L. J. C. P. Rep. (N.S.) 225.

To an action by husband alone, the defendant cannot plead as a set-off a debt due from the wife *dum sola*. *Wood v. Akers*, 2 Esp. 594.

A. and B. drew a joint promissory note, six years elapsed without an acknowledgment being given by them, but after the marriage of B., and within six years, A. promised to pay it; the court held, that at least under a declaration without counts, upon promises made after the marriage, that the case was not taken out of the Statute of Limitations. *Pittam v. Foster*, 1 B. & C. 248; 2 D. & R. 363.

To an action against the sheriff for the escape of the debtor taken in execution under a *ca. sa.* on a judgment, the defendant pleaded in bar that at and from the time of the accruing of the debt on which the judgment was recovered, and until the time of the arrest and escape, and hitherto, the plaintiff was and is married to H. S., who is still living:—*Held*, bad on special demurrer, as being properly pleaded in abatement only. *Morgan v. Cubitt*, 3 Ex. 612; 6 D. & L. 444; 18 L. J. Ex. 288.

Where trustees for the separate use of the wife admitted that they held a sum of money to her separate use, but refused to pay it over without her separate receipt:—*Held*, that an action for money had and received, and on account stated, would not lie by husband and wife for the sum so admitted to be due to her. *Bond v. Nurse*, 10 Q. B. 244; 11 Jur. 655; 16 L. J. Q. B. 196.

To an action by husband and wife for slander of the wife, a plea that the female plaintiff was not the wife of the other plaintiff, is a good plea in bar. *Chantler v. Lindsey*, 16 Mee. & W. 82; 4 D. & L. 332; 16 L. J. Ex. 16.

[2] To a plea of coverture the plaintiff may reply that she is sole (Ast. Ent. 9, 10); or that her husband is dead, and that she is now sole. 9 H. 5, 1.

[3] It is unnecessary, unless the defendant deny the marriage by plea, to give any evidence of it. *Dickenson v. Davis*, 1 Stra. 400;

(2) *By Husband alone.*[1]

(3) *By Wife alone.*[2]

(*h*) *Witnesses in Actions by.*[3]

(*i*) *Costs in Actions by.*[4]

Where the action is brought in respect of an injury done to the wife, as by slander or imprisonment, and consequential damages to the husband are also laid, for which he ought to have sued alone, no evidence ought to be given of such special damage, and the defect will be aided by a special verdict confining the damages to the detriment of the wife. 2 Mod. 66; 2 Lev. 101; 1 id. 3; Com. Dig. Pl. C. 87. *See* 11 Mod. 264; Stra. 1094; 1 Salk. 119; 2 id. 642. These cases were before 15 & 16 Vic. c. 76, s. 40; *ante*, p. 85.

So proof may be admitted on the part of the plaintiff, of the wife's declaration as to her intention and purpose in leaving his house, to rebut all suspicion of connivance. *Hoare v. Allen*, 3 Esp. 276.

The wife's declarations suing with her husband, it has been said, are inadmissible. *Alban v. Pritchett*, 6 T. R. 680. *Winsmore v. Greenbank*, Willes, 577. *Kelly v. Small*, 2 Esp. 716. But it has since been holden, in an action by a husband, on a policy of insurance on the life of his wife, that the declaration of the deceased wife as to her state of health when ill in bed, might be adduced in evidence against the husband on a warranty of good health. *Avison v. Lord Kinnaird*, 6 East, 188; S. C. 3 Smith, 286.

[1] In trespass for breaking and entering plaintiff's house, he may prove the assaulting and menacing his wife, servants, and children, in aggravation, in order to show the enormity of the trespass (*Newman v. Smith*, 2 Salk. 642). And although the contrary has been holden (id. 624), it seems the husband may, in an action of trespass for breaking and entering his house, give in evidence loss of service, or other consequential damage, which has occurred from a trespass on his wife or daughter. 2 T. R. 166; 2 N. R. 476. In an action by the husband for the service or labour of his wife, a receipt given by the wife is not evidence (Bull. N. P. 136); unless, perhaps, there be some evidence to show that the husband had constituted her his agent. *Hall v. Hill*, *infra*.

In an action by the husband for the wife's earnings, her acknowledgment of having been paid cannot be admitted for the defendant (*Hall v. Hill*, 2 Stra. 1094); but where a doubt is thrown on his legal right to recover, the admissions of the wife may be good evidences. *Carey v. Adkins*, 4 Camp. 692. *Anon.* 12 Mod. 546.

[2] If the wife alone bring an action, and, upon the trial, evidence be given of coverture, which would, being unanswered, show that the wife herself had no cause of action, she may rebut that evidence by proof of the husband's civil death by exile and abjuration, or transportation for felony. *Belknap's case*, 2 Hen. 4, 7, a. *Carrol v. Blencow*, 4 Esp. 27.

In an action of debt for goods, in which defendant pleads her coverture, and the plaintiff in his replication denies the coverture, and there be no other issue, defendant must begin.

On this issue, proof that the defendant and the person alleged in the plea to be her husband have cohabited together as husband and wife for four years, is some evidence of the marriage, which the judge will leave to the jury. *Woodgate v. Potts*, 2 C. & Kir. 457.

In an action on a promissory note, in which defendant pleads coverture, and the plaintiff takes issue on that plea, defendant has the right to begin; although, as the note did not bear interest on the face of it, the plaintiff claimed interest in the shape of damages.

On these pleadings it lies on the defendant affirmatively to prove the coverture; and if she does so, it is no answer to the defence that at the time of the making of the note she represented herself to be a widow. *Cannam v. Farmer*, 2 C. & Kir. 746.

An order of the court is necessary for leave for a defendant who was sued as discovert, but who was then married, to put in a plea of coverture. *Higgonson v. Wilson*, 17 L. J. Rep. (N. S.) Ch. 22.

A married woman, who had obtained a magistrate's order for protection under sect. 21 of the 20 & 21 Vic. c. 85, was subsequently made a defendant in a suit as a *feme sole*, in respect of property in which she was interested, for her separate use by virtue of the order of protection. After a decree had been made, such protection order was discharged, and the plaintiff obtained a common supplemental order, making the husband a party:—*Held*, that such supplemental order was a correct and proper order. *Rudge v. Weedon*, 5 Jur. N. S. 723, L. J.

[3] The rule that husband and wife could not be a witness for or against each other was universal, but now by stats. 14 & 15 Vic. c. 19, and 16 & 17 id. c. 83, they are competent witnesses either for or against each other, except in criminal proceedings, or proceedings in consequence of adultery.

[4] The 4 Anne, c. 19, giving costs to the defendant in error where the writ is quashed, &c., extends to a case where the plaintiff is a married woman. *M'Namara v. Fisher*, 8 T. R. 302.

Where a wife brings an action jointly with her husband, for money had and received to their use in right of the wife as executrix, yet they shall pay costs on being nonsuited, the cause of action having arisen in their

(K) *Actions against Husband and Wife.*[1]

(*a*) *When and in what Manner they may be Sued.*[2]

own time, and therefore unnecessary to name the wife as executrix. *Jenkins v. Plombe*, 6 Mod. 92; 1 Salk. 207; 3 id. 105; Holt. 313; 11 Mod. 174. So if in an action by husband and wife they be nonsuited, and the wife survive, she is liable to costs. *Tilt v. Bartlet*, Sayer, 126. *Hoad v. Matthews*, 2 Dowl. P. C. 149.

Although husband and wife may be parties to a suit, an attachment for nonpayment of costs will not be granted against the latter. *Doe d. Allanson v. Canfield*, 6 Dowl. P. C. 523.

[1] In actions brought on promises made by the wife before marriage, the husband and wife ought to sue jointly. *France v. White*, 1 Man. & G. 731. If the wife is sued alone she may plead her coverture in abatement, but cannot take the objection in any other manner. *Lovell v. Walker*, 9 Mee. & W. 299. *Milner v. Milnes*, 3 T. R. 631. If the husband is sued alone, and the objection appears on the record, it may be met by demurrer, or by motion in arrest of judgment, or by error; or if it transpires upon the evidence it will be ground of nonsuit. *Mitchinson v. Hewson*, 7 T. R. 348. *Richardson v. Hall*, 1 B. & B. 50. If the husband die before action the right of action remains against the widow; if the wife die before action, the right of action lies only against her administrator.

In many brought to charge a husband on contracts made by his wife during coverture, the husband must be sued alone, and the pleadings take the ordinary form. The wife can contract only as agent for the husband, and the liability of the husband depends upon the authority of the wife to pledge his credit, which must be proved by the plaintiff. *Lane v. Ironmonger*, 13 Mee. & W. 368. *Reneaux v. Teakle*, 8 Ex. 680.

In many matters, an agency in the wife to contract for her husband, we have seen, *ante*, p. 71, is presumed from their relation and circumstances. *Manby v. Scott*, 2 Smith's L. C. 4th ed. 346. *Montague v. Benedict*, id. 374. *Seaton v. Benedict*, id. 381. *Read v. Teakle*, 22 L. J. C. P. 161. *Jewsbury v. Newbold*, 26 L. J. Ex. 247. *Atkyns v. Pearce*, 26 L. J. C. P. 252; 2 C. B. (N. S.) 763.

At law, a wife cannot make any contract to bind herself personally. If sued alone upon a contract made during the marriage, she may plead her coverture either in abatement or in bar.

In equity a married woman may contract in respect of her separate estate, even with her husband. *Vansittart v. Vansittart*, 27 L. J. Cr. 222; 2 De Gex & J. 249. *Vaughan v. Vanderstegen*, 23 L. J. Ch. 793, 800.

[2] Where a *feme sole* bought goods and married, and the husband, for some new consideration, expressly promised to pay the debt, the husband, it was holden, might be sued alone on such undertaking. *Drue v. Thorn*, Alleyn, 72. So he may be sued alone for money lent to his wife at his request. *Stephenson v. Hardy*, 3 Wils. 388; 2 Black. 872. But in an action for a debt contracted *dum sola* the wife must be joined. *Mitchinson v. Hewson*, 7 T. R. 348. And the improper joinder of husband and wife, in an action for which he is solely liable, may be taken advantage of on general demurrer (*May v. House*, 2 Chit. Rep. 697), or made the subject of a motion in arrest of judgment. 2 Com. Dig. 258.

If a *feme sole* marry during the time of the giving and expiration of a notice to obtain double value, under 4 Geo. 2, c. 28, she need not be joined in an action to recover it. *Lake v. Smith*, 1 N. R. 174. So debt for rent lies against the husband alone, for rent incurred during the coverture upon a lease to the wife *dum sola* (Tho. Ent. 117; 11 Mod. 169); or upon a lease which the wife has as executrix or administratrix (id.); or for arrears of rent, of a rent-charge, *incurred after the coverture*, but otherwise for arrears *before marriage*. Thel. Dig. 45, lib. 5, c. 4, s. 14.

Covenant lies against husband and wife on a demise to her *dum sola*. *Anon.* 6 Mod. 239. *Wotton v. Heale*, 2 Saund. 173; 1 Sid. 466; 1 Lev. 301); and it may be stated as a general rule, that where there is a breach of covenant *during* coverture upon a lease by the *feme* whilst *sole*, the action may be against both, or against the husband alone. Com. Dig. Baron and Feme, y.

Detinue lies against husband and wife for goods taken by the *wife before the coverture* (Co. Litt. 351, b; but *see* 1 Leon. 312); but not against them jointly upon a bailment made to the husband and wife. Bac. Abr. Detinue.

An action on the case does not lie against the husband for his wife, affirming herself to be *sole*, and thereby procuring the plaintiff to marry her. *Cooper v. Witham*, 1 Lev. 247; Sid. 375; 2 Keb. 399); but it may be supported against husband and wife, for the latter having enticed away the servant of plaintiff (*Fawcett v. Beavres*, 2 Lev. 63); but they cannot be jointly sued for slander, or other *torts* committed by husband alone (*Burcher v. Orchard*, Style, 349); nor can she be joined in an action for a *devastavit* after the marriage (*Horsey v. Daniel*, 2 Lev. 145); but generally for torts committed by the wife, either before or after marriage, they must be jointly sued. Bac. Abr. Baron and Feme, L.

Trover lies against husband and wife for a conversion by the wife. *Draper v. Fulkes*, Yelv. 166. So it lies against *both* for a conversion before the marriage (Co. Litt. 351, b; 1 Leon. 312; 2 Saund. 47, h, i); or against the husband alone for a conversion by them jointly, since it shall be intended to be the act of the husband. 1 Roll. 348, 637; 2 Saund. 47, h, i.

(*b*) *When the Wife may be holden to Bail jointly with her Husband, or the Wife alone.*[1]

(*c*) *Of Entering an Appearance.*[2]

(*d*) *When Marriage abates the Suit.* *See* vol. i. p. 17.

(*e*) *Declaration against.*[3]

(*f*) *Pleas by, and Replication to.*[4]

An avowry for rent in arrear, for land in right of the wife, must be by husband and wife.

Trespass lies against husband and wife (*White v. Elridge*, 1 Ld. Raym. 443. *Vine v. Saunders*, 4 Bing. N. C. 23; 3 Scott, 359), whether it be for a trespass committed before or after marriage (Thel. Dig. 45, lib. 5, c. 4. s. 24); and the *feme* only may be found guilty. *Anon.* 1 Vent. 93. *Hare v. White*, 12 Mod. 19; 1 Show. 350.

Actions real (now abolished) for the land of the wife ought to have been against the husband and wife. 2 Com. Dig. 252, y.

[1] The numerous cases on this subject are now of little practical utility, as a party cannot be arrested on mesne process, except under a judge's order, founded on an affidavit disclosing the circumstances of the case, and showing that she was about to withdraw from the jurisdiction. *See* vol. i. p. 525.

A wife in custody for a debt contracted *dum sola* is not entitled to be discharged on her husband's taking the benefit of the Insolvent Act, if it appear she have separate property. *Sparkes v. Bell*, 8 B. & C. 1; 2 M. & R. 124.

A warrant of attorney, executed by a *feme covert*:—*Held* invalid, although at the time divorced *a mensâ et thoro*. *Faithorne v. Blaquiere*, 6 M. & S. 73. Where the defendant, a *feme covert*, having separate property, and living apart from her husband, retained the plaintiffs as her solicitors, and expressly promised to pay them their bills:—*Held*, that her separate property in the hands of the receiver of the court was liable. *Murray v. Bailee*, 4 Sim. C. C. 82. *Lewis v. Lee*, 3 B. & C. 291.

The court will not relieve *feme covert* summarily if there be any doubt as to the marriage, or the credit obtained by deception. *Freame v. Mitford*, 1 C. & M. 24; 3 Tyrw. 139.

Before the 1 & 2 Vic. c. 110, the court would discharge a married woman from arrest, unless, at the entering into the contract, she represented herself to be a *feme sole*. *Hollingdale v. Lloyd*, 6 Dowl. P. C. 565: S. C. 3 Mee. & W. 416. But the court refused a motion to discharge a *feme covert* in whose name a bill had been drawn. *Welsh v. Gibbs*, 4 Dowl. P. C. 683.

A contract made by a married woman after her husband's death is not binding upon his estate, but there is no objection to her entering into an express contract after the death of the husband, so as to bind herself. *Blades v. Free*, 9 B. & C. 167.

It seems that a wife is not liable for goods supplied to her before her husband's death. *Littlefield v. Shee*, 2 B. & Adol. 811. See *Smout v. Ilbery*, 10 Mee. & W. 10.

[2] If a *feme covert* be sued alone she must appear in person (Co. Litt. 135; 3 Taunt. 261); but if the husband and wife be sued jointly, they must appear by attorney; or if *feme sole* marry before appearance or plea, she may appear or plead by attorney without her husband. Ld. Raym. 1525; Stra. 811. But where a *feme sole* marries after issue joined, and has judgment, which is reversed before taking her in execution for the costs in error, the marriage should be suggested on the roll, otherwise an action for false imprisonment lies. 1 Com. Dig. 133, 5th ed.; *see* 6 Price, 139; 1 H. Black. 235; *ante*, vol. i. p. 390.

Where an action is brought, without the authority of the husband, in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against costs. *Harrison v. Almond*, 4 Dowl. P. C. 321.

In an action against husband and wife for a debt incurred by the wife *dum sola*, the court refused, at the instance of the husband, to set aside an appearance entered for both, it appearing that the wife had given instructions to the attorney. If an attorney appears for one without authority, and he applies quickly to the court:—*Semble*, that the court will interpose to protect him. *Williams v. Smith*, 1 Dowl. P. C. 632.

[3] A declaration against the husband, *pro diversis mercimoniis*, &c. sold, &c. *to the wife to the use of her husband*, is good. *Dyer v. East*, 1 Vent, 42. But a declaration for money lent to a *feme covert* should allege a *request thereto by the husband*, or the court will on error reverse the judgment, though the defendant below has suffered judgment to go by default. *Stone v. Macnair*, 1 Moore, 126; 7 Taunt. 432; 4 Price, 48. So in declaration against husband and wife for a debt contracted by the *feme dum sola*, an allegation of a promise by the *wife* after coverture is bad. *Morris and Wife v. Norfolk and another*, 1 Taunt. 212.

[4] If the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, as, in such a case, it cannot be pleaded in bar, or given in evidence upon the trial as a ground of nonsuit (2 Roll. Rep. 53; Sty. 280; 3 T. R. 631. And she must plead in person, and not by attorney (Comb. 376); nor can she obtain leave to plead separately from her husband. Ca. Temp. Hard. 101. When pleaded in bar, which it ought to be if covert at time of contract, it is an issuable plea. *Burch v. Leake*, 7 Man. & G. 377. See

(*g*) *Evidence.*

(1) *In Actions against the Husband and Wife jointly.*[1]

(*h*) *Witnesses in Action against.*[2]

(*i*) *Costs, Judgment, and Execution against.*[3]

Moss v. Smith, 8 id. 232. The 3 & 4 Wm. 4, c. 42, s. 8, does not apply to a plea of coverture. *Jones v. Smith*, 6 Dowl. P. C. 557; 3 Mee. & W. 526. See *Moss v. Smith*, 1 Man. & G. 172.

It may be pleaded that the wife took the benefit of the Insolvent Act before coverture for a debt *dum sola*, to an action by husband and wife. *Store v. Lee*, 9 Ad. & E. 868; 1 Per. & D. 633; *see* 5 B. & Adol. 303); and where she has held herself out as a widow, and been arrested, court will not summarily relieve her, but leave her to plead the coverture. *Hall v. Barber*, 1 Dowl. P. C. 8. Plea of payment to the wife must allege that she had authority to receive the money. *Offley v. Clay*, 2 Scott, N. C. 372; 2 Man. & G. 172.

To a plea of coverture, the plaintiff cannot reply that her husband is an alien abroad, and that she is living as a single woman (*Stretton v. Busnach*, 1 Bing. N. S. 139; 4 M. & Scott, 678); nor the absence of the husband under a charge of absconding from a *fiat* in bankruptcy. *Williamson v. Dawes*, 9 Bing. 292; 2 M. & Scott, 352. So, to a plea of coverture, the plaintiff cannot reply adultery without his knowledge, and that he thought her a *feme sole*, and that she promised to pay after her husband's death. *Meyer v. Haworth*, 3 Nev. & P. 462.

[1] It is sufficient to prove a marriage *de facto* by evidence of cohabitation, acknowledgment, and reputation cannot be defeated by the defendant proving that they were not legally married. *Norwood v. Stephenson*, And. 227. *Alleyn v. Gray*, 2 Salk. 436. *Mackell v. Garrett*, 1 id. 64. But in an action against husband and wife, in respect of the contract of the wife previous to the marriage, the defendant may prove under the general issue that she was, at the time of the supposed contract, the wife of another man. *Cowley v. Robertson*, 3 Camp. 438.

In an action for goods sold, &c. the admissions of the defendant's wife, who served in the shop, and conducted the business attached to it (*Clifford v. Burton*, 8 Moore, 16; 1 Bing. 199. *Emerson v. Blonden*, 1 Esp. 142), are receivable.

Although we have seen the wife cannot bind the husband by any act or contract of her own, yet he may be affected by them after proof that he gave her authority to act as his agent; or by evidence, from which a previous authority by him, or his subsequent assent, can be implied; hence, as already shown, a presumption arises from *cohabitation*, that the wife has authority from the husband to purchase such articles as are necessary for herself and family (*Etherington v. Parrot*, 1 Salk. 118); though proof that the articles were consumed in the defendant's family is but presumptive evidence of the assent.

As to the state of accounts between the plaintiff and her husband (*Anderson v. Sanderson*, 2 Stark. 204), or a letter written by her, promising payment, is admissible in evidence against the husband, even to take the case out of the Statute of Limitations. *Gregory v. Parker*, 1 Camp. 395. But an acknowledgment by a wife that her husband has absented himself to avoid his creditors cannot be received. *France v. Stephens*, 8 Taunt. 693; 3 Moore, 23. So it seems that in an action by a trustee, under an agreement between husband and wife to live separate, to recover the arrears of an allowance contracted to be made by the husband to her, declarations by the wife of having committed adultery during the time the allowance claimed accrued due, are not admissible in evidence. *Scholey v. Goodman*, 8 Moore, 350; S. C. 1 Bing. 349.

Where coverture is pleaded, letters from the husband to his friends, written within seven years, are admissible to rebut the presumption of his death. *Hopewell v. De Pinna*, 2 Camp. 113.

In an action on a promissory note, to which the defendant pleads her coverture only, the defendant has the right to begin, although the plaintiff seeks to recover interest upon the note, which is not made payable upon the face of the instrument. *Cannam v. Farmer*, 3 Ex. 698; 2 C. & Kir. 746. The note was signed by the defendant, "widow:"—*Held*, that such representation did not bind her by way of estoppel. (Id.)

[2] On a plea in bar by a married woman of her coverture, and a verdict in her favour thereupon, she is entitled to costs. *Findley v. Farquharson*, 3 C. B. 347; 4 D. & L. 185; 15 L. J. C. P. 262.

Judgment by default in an action against a married woman:—*Held*, irregular. *Dobson v. Easton*, 2 F. & F. 371: *Willes*.

A *feme covert*, who has been taken in execution on a debt contracted previous to marriage, is not entitled as of course to be discharged, though her husband is in custody on mesne process for the same cause. The court, in these cases, exercises a discretion. *Chalk v. Deacon and Wife*, 6 Moore, 128.

And if an action be brought against a *feme sole*, and pending it she marry, it seems she may be taken on a *capias ad satisfaciendum*, and the court will not discharge her. Cro. Jac. 323. *Cooper v. Hunchin*, 4 East, 521. So if the husband die before execution, and the action survive against the wife, she may be taken in execution, in the same manner as if the action were originally brought against her alone as a *feme sole*. 1 Roll.

(L) *Effect of Bankruptcy upon the Rights and Situation of Husband and Wife.*[1]

Abr. 890; 39 Hen. 6, c. 45; 46 Edw. 3, c. 23.

To discharge the wife out of custody for a debt before marriage, it must be sworn that she has no separate property (*Evans v. Chester*, 6 Dowl. P. C. 140; S. C. 2 Mee. & W. 847); or a writ of error must be brought. *Moses v. Richardson*, 8 B. & C. 421.

Property settled on the wife cannot be taken in execution against the husband. *Dean v. Brown*, 5 B. & C. 336; 8 D. & R. 95; 2 C. & P. 62. But the property in wearing apparel, bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees, vests by law in the husband, and it is liable to be taken in execution for his debts. *Carne v. Brice*, 7 Mee. & W. 183; 8 Dowl. P. C. 884. Unless fraud and collusion between the plaintiff and the husband to keep her in prison be shown. *Potts v. Meller*, 2 Show. 1167. *Chaworth's case*, 1 Lev. 51. *Cooper v. Old*, Prac. Reg. 208; id. 1237. *Finch v. Duddin*, 2 Stra. 237. And where a married woman, who had given a warrant of attorney, married during the term, and was afterwards taken in execution on a judgment signed in that term, it was holden that she could not be relieved. *Triggs v. Triggs*, Mang. Ex. Prac. 67.

On a warrant of attorney given by a wife *dum sola*, judgment may be entered against both. *Staples v. Purser*, 2 Dowl. P. C. 764; 3 M. & Scott, 800.

Where judgment is signed by mistake against a married woman alone, on a warrant of attorney given by her *dum sola*, a rule *nisi* only will be granted for vacating that judgment, and signing another against the husband and wife. *Pocock v. Fry*, 8 Dowl. P. C. 126. In an action by husband and wife pending the suit, the wife died:— *Held*, that the suit thereby abated, and that defendant could not have judgment as in case of non-suit; the property not being altered, unless judgment is obtained before the death of the wife. *Checchi v. Powell*, 6 B. & C. 253. *See* Abatement, vol. i. p. 7.

A warrant of attorney, or *cognovit*, given by a *feme* whilst *sole*, is not revoked by a subsequent marriage (*Anon.* 1 Salk. 117), but judgmust be entered against both; and where judgment had been entered up and execution issued on a warrant of attorney given by a *feme covert*, the court on motion refused to set it aside, she having acted as a *feme sole*. *Wilkins v. Wetherill*, 3 B. & P. 220. *M'Leon v. Douglass*, id. 128; S. P. 1 Salk. 400.

Under a *fieri facias* against a husband, the sheriff cannot take in execution goods fairly vested in *trustees*, under a settlement before marriage for the benefit of the wife; and the husband being in possession, if consistent with the terms of the deed, makes no alteration. *Cadogan v. Kennet*, Cowp. 432. Hence, where previous to marriage the wife's stock-in-trade, furniture, &c. were assigned to a trustee for her separate use, to enable her to carry on a separate trading, it was holden that if the husband did not intermeddle therewith, and in the absence of fraud, such effects, though fluctuating, were not liable to be taken in execution for his debts. *Jarman v. Woolloton*, 3 T. R. 618. And a settlement after marriage would, it seems, have the same effect if made in consequence of a prior agreement (2 Eq. Cas. Abr. 148); or for a good and valuable consideration without fraud. 8 T. R. 521. It is no objection in these cases that there is no inventory of the goods (3 id. 618; 6 East, 257) comprised in the settlement; or the husband being suffered to carry on the trade intended for his wife (3 T. R. 618), provided his possession be not inconsistent with the deed (*Darby v. Smith*, 8 id. 82); but a term vested in the wife before marriage, and which the husband is entitled to in her right, may be taken in execution for the husband's debt. 4 id. 638. Under a *fieri facias* against the wife, who marries pending the action, it would be irregular to take the goods of the husband (*Doe v. Butcher*, 3 M. & S. 557), if proved that they were really conveyed to a third person as a trustee for the wife, and possession at one time taken by him. *Cross v. Glode*, 2 Esp. 574.

Although a woman *cohabits* with a man, and suffers him to appear as the owner of *her* house in which they live, her goods cannot be taken in execution in an action against him. *Edwards v. Bridges*, 2 Stark. 396.

So, where a tradesman supplied a married woman, living apart from her husband, with furniture upon hire, it was holden that he did not thereby divest himself of the right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract, and, therefore, where the sheriff took such goods in execution at the suit of the husband's creditor, the court held that trover might be maintained by the tradesman. *Smith v. Plomer*, 15 East, 607.

[1] As the adjudication passes to the assignees the same rights as the husband possessed, her choses in action necessarily pass to them, who *may* reduce such securities into possession, subject to the same equity of making a provision for the wife as the bankrupt would have been liable to if he had sued for them.

Where the husband or his assignees can come at the wife's property at law, a court of equity will not interfere with the legal title; and till a bill filed, a trustee, who has the wife's property, may pay the rents and profits, and hand over the personal estate to the husband: but after bill filed, it is otherwise. 1 P. Wms. 382, n.; 4 Ves. 15; 10 id. 90. But where the husband, or his assignees, come into a court of equity for the recovery of the wife's property, the court

(M) *Criminal Prosecution connected with Husband and Wife.*[1]

will impose terms upon them by stipulating, as a consideration for lending its assistance, that a provision should be made for her out of the fund. 1 Atk. 192; id. 280; 10 Ves. 453.

[1] Where the wife must be considered as acting merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she be privy to his misconduct. *Rex v. Squire*, cited 1 Russel on Crimes, 24.

And the rule is general, that a *feme covert* shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes as equivalent to coercion. 1 Hale, 45; 1 Hawk. P. C. c. 1, s. 9. This compulsion, however, being only a presumption of law, it follows that if upon the evidence it distinctly appears that the wife was not incited or compelled to commit the offence by her husband, but she was the principal instigator of it, she is guilty as well as her husband; hence, if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of *treason*, *murder*, or *robbery*, in company with, or by the coercion of her husband, she is punishable as much as if she was *sole*. Hawk. P. C. c. 1, s. 11. And she will be guilty in the same manner of all such crimes which, like murder, are *mala in se*, and are prohibited by the law of nature (4 Bl. Com. 29); and in all cases where the wife offends *alone*, without being in the company and under the coercion of her husband, she is responsible for her offence as much as a *feme sole* (4 Bl. Com. 29); and if a wife offend against a penal statute, the husband may be made a party to an action or information, and shall be liable to answer what shall be recovered therein. 1 Hawk. P. C. c. 1, s. 13. *See* Arch. Crim. Pl. & Ev. 18, 19.

Where the prisoner was described in the indictment as a single woman, but had been stated by all the witnesses as the wife of the other prisoner, and passed and appeared as such, if the jury were satisfied that she was so in fact, the jury ought to acquit, notwithstanding she had pleaded to the indictment. *Reg. v. Woodward*, 8 C. & P. 561.

If a man and woman be jointly indicted for a larceny, the latter as a single woman, it is not sufficient to entitle her to an acquittal on the ground of a coercion to prove both jointly committed the offence, and that she had lived with the man for two years, and was reputed his wife; but such evidence must be given as to satisfy the jury that the prisoners are in fact married persons, although it is not absolutely necessary to prove the actual marriage of the parties. *Rex v. Hassall*, 2 id. 434.

Prisoner was indicted in one count for obtaining a sum of money from a savings' bank, by falsely pretending that a certain document presented to the bank by Eliza T., the wife of Daniel T., had been filled up by the authority of Daniel T. In another count, the prisoner was charged with conspiring with Eliza T. to cheat the savings' bank. It was held that as Eliza T. was not indicted, although alleged to be one of the conspiring parties, the evidence of Daniel T., the husband, was admissible on the first count to prove that the document had been filled up without his authority. The finding the prisoner guilty on the first count was held perfectly consistent with finding him not guilty on the second. *R. v. Halliday*, 1 Bell, C. C. 257.

And with regard to inferior misdemeanors, husband and wife may be indicted together, and she may be punished with him; as for keeping a bawdy-house (*Reg. v. Williams*, 10 Mod. 63; S. C. 1 Salk. 384); or a gaming-house. *Rex v. Dixon*, 10 Mod. 335. And the indictment in such case may be against the husband and wife, *et uterque eorum*. (Id.) And she may be indicted alone as a common scold (*Reg. v. Foxby*, 6 Mod. 213, 239; 1 Salk. 266; Holt. 274); or for forestalling (*Rex v. Fenner*, Sid. 410. *Semb. Rex v. Jordan*, 2 Keb. 634); or for an assault and battery (*Rex v. Ingram*, 1 Salk. 384); or forcible entry (1 Hale, 21; Co. Litt. 357; 1 Hawk. c. 64, s. 35); or for keeping a bawdy-house, if her husband do not live with her (1 Hawk. P. C. c. 1, s. 13, n. 11); or for sending threatening letters (*Rex v. John and Mary Hammond*, 1 Leach, C. L. 444; 2 East, P. C. 1119); or she may be committed for disobeying an order of bastardy. *Rex v. Taylor*, 3 Burr. 1679.

A stranger, however, cannot be found guilty of larceny, if it appear that he obtained possession of the goods by delivery of them to him by the owner's wife. *Rex v. Harrison*, 2 East, P. C. 559. For a *feme covert* cannot be guilty of felony in stealing the property of her husband, nor can any person be found so to whom the goods were delivered by her (1 Hale, 514); but trespass, it seems, would lie against such receiver (id.): and it is upon this principle of *identity* that a prosecution for a conspiracy is not maintainable against the husband and wife, they being only one person, and possessing only one will. 1 Hawk. P. C. c. 72, s. 8.

A *feme covert*, by procuring her husband to commit an offence, becomes amenable as an accessory before the fact, in the same manner as if she had been unmarried (1 Hale, 516; 2 Hawk. P. C. c. 29, s. 34); but she cannot be treated as an accessory for having received her husband with a knowledge of his having been guilty of felony (1 Hale, 47); nor if she conceal a felony jointly with her husband. Id.; 1 Hawk. P. C. c. 1, s. 10. Arch. Crim. Pl. & Ev. 11.

Under the stat. 1 & 2 Ph. & M. c. 13, s. 5, and 2 Ph. & M. c. 10, s. 2, which empowers magistrates to bind over witnesses to give evidence, a *feme covert* cannot be a party to the recognisance, but it is compulsory upon her to find others to be bound for her.

(*a*) *Evidence.*[1]

HYPOTHECATE.[2]

I.

IDEM est non esse et non apparere. Also, De non apparentibus et non existentibus eadem est ratio. 5 Rep. 6. *Where the Court cannot take judicial notice of a fact, it is the same as if the fact did not exist.* Broom's *Max.* 121. See *per Buller, J.: Rex v. Bishop of Chester*, 1 T. R. 404.[3]

IDEM Sonans.[4]

IDENTITY.[5]

[1] The rule that husband and wife cannot be witnesses for or against each other in criminal proceedings, is expressly confirmed by 14 & 15 Vic. c. 99. But where the husband is indicted for a personal injury to the wife (*Rex v. Azir*, 1 Stra. 633), or on an indictment for bigamy, the second wife is a competent witness against the defendant, the first marriage being previously proved, for the second marriage is void. *See* Bigamy, vol. ii. p. 395. Or for assisting another in committing a rape upon his own wife (*Rex v. Lord Audley*, 1 L. T. 393); or upon an indictment for forcible abduction and marriage; or upon an indictment against the husband for the murder of his wife, the dying declarations of the wife are receivable in evidence against him. *Rex v. Woodcock*, 1 Leach, C. L. 500. S. P. *Douglas's case*, 2 id. 561. *See* Dying Declarations, vol. iv. p. 147.

But consistently with the general rule upon an indictment for conspiracy, the wife of one defendant cannot be called on behalf of a co-defendant, though the parties appear and defend separately. *Rex v. Locker and Wainwright*, 5 Esp. 107. And in such a case, the wife of one of the conspirators should not be allowed to give evidence against any of the others, as to any act done by him in furtherance of the common design, particularly after evidence given connecting the husband with the defendant in the general scheme. Arch. Crim. Pl. 235. In Lord Hale's P. C. 301, the rule is thus stated: "A woman is not bound to be sworn, or to give evidence against another in case of theft, &c., if her husband be concerned, though it be material against another, and not directly against her husband." Or on an indictment for an assault, when the cases of the co-defendants cannot be separated. *Rex v. Fredrick*, 2 Stra. 1095. And it has been holden that the husband or wife cannot be admitted to give evidence which tends to the crimination of the other, even in a collateral case. *Rex v. the Inhabitants of Cliviger*, 2 T. R. 263. But this rule seems too general, and cannot now be sustained to its full extent. *Rex v. the Inhabitants of All Saints, Worcester*, 1 Phil. Ev. 68, 3d ed. At least, in no case can a woman be *compelled* to give any evidence charging the husband with an offence. *Broughton v. Harper*, 2 Ld. Raym. 752; Arch. Crim. Pl. & Ev. 235.

[2] To pledge a thing without delivering possession of it to the pledgee. "The master when abroad, and in the absence of the owner, may hypothecate the ship, freight and cargo, to raise money requisite for the completion of the voyage." 3 Kent's Com. 171; *post*, Insurance (Marine); Ship and Shipping.

[3] Where reliance is placed by a party on deeds or writings which are not produced in court, and the loss of which cannot be accounted for or supplied in the manner which the law has prescribed, they are to be treated precisely as if non-existent. Bell's *Dict. of Scotch Law*, 287. So in error in law, the court will not look out of the record. Steph. *Plead.* 128, 5th ed. And on special verdict they will neither assume a fact not stated therein, nor draw inferences of fact necessary for the determination of the case from other statements contained therein. *Tancred v. Christy*, 12 Mee. & W. 316. *Caudrey's case*, 5 Rep. 5.

[4] In general, the misspelling of a name, provided it be *idem sonans*, is immaterial, as Lawrance instead of Lawrence (*Webb v. Lawrence*, 2 Dowl. 81; 1 C. & M. 806), Beneditto instead of Benedetto. *Ahitbol v. Benedetto*, 2 Taunt. 401.

[5] It is not necessary to prove strictly the identity of the defendant with the person of the same name, concerning whom a witness gives evidence. The similarity of the names is sufficient to put the defendant to the proof that he is not the person spoken of. *Hamber v. Roberts*, 7 C. & Kir. 861; 18 L. J. C. P. 250. See *Giles v. Cornfoot*, 2 C. & Kir. 653. *Sewell v. Evans*, 4 Q. B. 626. *Roden v. Ryde*, id. 626; 12 L. J. Q. B. 276. A conversation with a party stating himself to be the individual is admissible to prove identity (*Reynolds v. Staines*, 2 C. & Kir. 745); so the acts of the party may be proved (*Collier v. Nokes*, id. 1012. *Sayer v. Glossop*, 2 Ex. 409; 17 L. J. Ex. 300), or admission of employment when called in court. *Smith*

IGNORANTIA facti excusat; ignorantia legis non excusat. *Ignorance of fact excuses; ignorance of the law does not excuse.* Broom's *Max.* 190.[1] *Mildmay's Case*, 2 Co. 36. The motion is applicable to foreigners. *R. v. Esop*, 7 C. & P. 456.

ILLEGAL Arrest. *See* Arrest, i. p. 519; False Imprisonment, iv. p. 428.

Contracts. *See* Contracts, vol. iii. p. 199.

Imprisonment. *See* Arrest, vol. i. p. 519; Constable, vol. iii. p. 182; False Imprisonment, vol. iv. p. 428.

ILLEGITIMACY. *See* Affiliation, vol. i. p. 256; Bastard, vol. ii. p. 384.

IMMATERIAL Issue. *See post*, Repleader.

IMMEDIATELY.[2]

IMMORAL Contracts. *See* vol. iii. p. 199.

IMPARLANCE.[3]

IMPEACHMENT. *See post*, Parliament.

IMPOSSIBILIUM nulla obligatio est. D. 50, 17, 185; 1 Pothier, Oblig. pt. i. c. 1, s. 4; Story, Eq. Jur. 736, 4th ed. See *post*, *Lex non cogit ad impossibilia*. Nor can a party who prevents a thing from being done, avail himself of the non-performance which he has himself occasioned. *See* Add. Cont. 1121 to 1124, 4th ed. *Hocksler v. De la Tour*, 22 L. J. Q. B. 455; 28 id. 275; 27 id. 345; and 29 id. 43. *Westwood v. Secretary for India*, M. T. 1862; 1 N. R. 262.

IMPOUNDING Document.[4]

Things Distrained. *See* Distress, vol. iv. pp. 78, 85.

IMPRESSMENT.[5] *See* also Habeas Corpus, vol. iv. p. 619.

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v. Henderson, 9 Mee. & W. 798. *Greenshields v. Crawford*, id. 314. Person producing license from Apothecaries' Company is evidence of his being the licensee (*Simpson v. Dismore*, id. 47. *Russell v. Smyth*, id. 810. As to proof of identity of libel, see *Fryer v. Gathercole*, 4 Ex. 262; 18 L. J. Ex. 389.

[1] Money paid with full knowledge of the facts, but through ignorance of the law, is not recoverable if there be nothing unconscientious in the retainer of it; but money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it, and there was no ground to claim it in conscience. 2 Smith's L. C. 244. *Wilkinson v. Johnston*, 3 B. & C. 429. *Bize v. Dickason*, 1 T. R. 286. See *Lee v. Merrett*, 15 L. J. Q. B. 289; and *post*, Money Paid; Money had and Received.

A negotiable security given by a party in satisfaction of a liability from which he was discharged in law, in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the means of knowing those facts. *Bell v. Gardiner*, 4 Man. & G. 11; 1 Dowl. N. S. 683; 4 Scott, N. R. 621. Means of knowledge are not equivalent to actual knowledge. (Id.)

[2] The word "immediately" cannot be satisfied if an interval take place. *Grace v. Clinch*, 4 Q. B. 610. Where a man is to make an obligation "immediately after an award," he ought to have such time as the doing of the act requires, and then, of necessity, there ought to be a mean time between the award and the performance of the act. *Butler and Baker's case*, 3 Rep. 34. *Page v. Pearce*, 8 Mee. & W. 677. *Christy v. Richardson*, 10 id. 688. *See* 10 C. B. 910.

[3] The term "imparlance," or *licentia loquendi*, in its most general signification, means time given by the court, to either party, to answer the pleadings of his opponent, as to plead, reply, rejoin, &c., and is said to be nothing else but the continuance of the cause till a further day. But the more common signification of the term is, time to plead. 2 Saund. 1, n. 2; 2 Show. 310; Barnes, 346.

By Reg. Gen. (Pr.) H. T. 1853, r. 31, it is directed, that no entry or continuance by way of imparlance shall be made upon any record or roll whatever, or in the pleadings.

[4] To authorise the judge to impound documents offered in evidence on the trial, the application must be made during the progress of the cause, and it is too late afterwards to do so. *Borton v. Ockford*, 7 Car. & P. 547.

[5] The right to impress, and the exemption from impressment, are founded upon im-

IMPRISONMENT. *See* Arrest, vol. i. p. 519; Assault, id. p. 562; False Imprisonment, vol. iv. p. 428.

IMPROPER Evidence. *See post*, New Trial.

IN Action. Attainable or recoverable by action—not in possession. *See* Chose in Action, vol. iii. p. 98.

IN æquali jure melior est conditio possidentis. Plowd. 296. *Where the right is equal, the claim of the party in actual possession shall prevail.* *See* vol. iii. p. 530, n. [2]; and Plow. 296. *Drury's case*, 4 Co. 90; Broom. 323.

IN alternativis est debitoris. *In a case of alternatives, the choice is the debtor's.* *See* Add. Cont. 1125–6, 4th ed.

IN fictione juris semper æquitas existit. 11 Rep. 51. *A legal fiction is always consistent with equity.*[1]

IN formâ Pauperis. *See* Bankruptcy, ii. p. 141; *post*, Paupers, Actions by.

IN jure, non remota causa sed proxima spectatur. Bac. *Max.* Reg. 1. *In law, not the remote, but the immediate cause is regarded.*[2]

IN Lieu.[3]

IN odium spoliatoris omnia præsumantur. Broom's *Max.* 726. *Every presumption is made against a wrongdoer.*[4]

IN pari delicto potior est conditio possidentis. *Where both parties are alike affected with wrongdoing, the position of him in possession is the stronger.*[5]

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memorial usage. *See* 19 Geo. 2; 26 Geo. 3; 50 Geo. 3. *Rex v. Tubbs*, Cowp. 512. *Rex v. Douglas*, 5 East, 477. *Ex-parte Fox*, 5 T. R. 276. *Rex v. Young*, 9 East, 466. *Ex-parte Drydon*, 5 T. R. 417. *Ex-parte Gallile*, 7 id. 673. *Ex-parte Brocke*, 6 East, 238; 2 Smith, 335. *Payner's case*, 1 M. & S. 223. As to application being made within the time mentioned in 13 Geo. 2, *Ex-parte Bruce*, 8 East, 27. But a person who causes another to be impressed when privileged is liable to an action. *Flewster v. Royle*, 1 Camp. 187.

[1] No fiction shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience, which might result from the general rule of law. 3 Bl. Com. 43. The court will not endure that a mere form or fiction of law should work a wrong contrary to the real truth and substance of the thing. *Johnson v. Smith*, 2 Burr, 962: *per Lord Mansfield, C. J.* See *Liford's case*, 11 Rep. 51, a. *Higgins v. M'Adam*, 3 Y. & J. 1. *Lyttleton v. Cross*, 3 B. & C. 317. *Cage v. Acton*, 1 Ld. Raym. 516. *See* vol. iv. p. 455.

[2] It were infinite for the law," says Lord Bacon, "to consider the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." Bac. Max. Reg. 1. Thus, in order to entitle the assured under a marine policy to recover, the loss must be a direct, and not a remote consequence of the perils insured against. Park, Ins. 131. The above maxim does not apply where the transaction was founded originally in fraud or covin: for there the other maxim, *Dolus circuitu non purgatur* (Bac. Max. Reg. 1), comes into operation: fraud is not purged by circuity, and the law will look to the corrupt beginning, and consider it as one entire act. Neither does it hold in criminal cases. (Id.)

[3] A fund provided by statute "in lieu" of other means of payment, becomes the primary fund. *Reg. v. St. Saviour's, Southwark*, 7 Ad. & E. 425.

[4] Where a person who has wrongfully converted property will not produce it, it will be presumed as against him of the best description. *Armory v. Delamirie*, 1 Stra. 504. *See* 1 Smith's L. C. 153; 1 Vern. 19. If a person is proved to have defaced or destroyed any written instrument, a presumption arises that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and accordingly slight evidence of the contents of the instrument will usually in such a case be sufficient. 1 Phil. Ev. 447, 9th ed. *Annesley v. Earl of Anglesey*, 17 How, St. T. 1430. *Roe d. Haldane v. Harvey*, 4 Burr. 2484. *Lord Trimlestown v. Kemmis*, 9 Clarke & Fin. 775. *Harwood v. Goodright*, Cowp. 86.

[5] Contribution cannot be enforced among wrongdoers; and a person who has committed an act declared by the law to be criminal, will not be permitted to recover compensation from one who has knowingly participated with him in the commission of the crime. *Merryweather v. Nixon*, 8 T. R. 186. But where the illegality is doubtful,

IN pari Materia.[1] *See post*, Statutes.

INCEST: Nullity of Marriage on account of. *See ante*, Husband and Wife, p. 59; *post*, Marriage.

INCIPITUR. *See post*, Judgment.

INCITING to commit Murder. 24 & 25 Vic. c. 100, s. 4; *post*, Murder.

INCLOSURE.[2] *See* also Commons, vol. iii. p. 147; *post*, Poor-Rate.

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indemnity or contribution may be obtained. *Shackell v. Rosier*, 2 Bing. N. C. 634. 3 Scott, 59. *Betts v. Gibbs*, 2 Ad. & E. 57. See *per Lord Lyndhurst: Colburn v. Patmore*, 1 C., M. & R. 83; *per Maule, J.*, 2 C. B. 309. *See* vol. iii. p. 158, n. [1]; id. p. 530, n. [2]; 10 B. & C. 826.

[1] It is an established rule of law, that all acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view. 4 T. R. 419; 5 B. & C. 162; Dougl. 30; 9 East, 468. If one statute prohibit the doing of a thing, and another statute be afterwards made whereby a forfeiture was inflicted upon the person doing that thing, both are considered as one statute. *Stradling v. Morgan*, Plowd. 206. When an action founded upon one statute is given by a subsequent statute in a new case, everything annexed to the action by the first statute is likewise given. Bro. Waste, Pl. 68. Indeed the latter act may be considered as incorporated with the former. Dwarris, 569.

[2] The statutes 22 Edw. 4; 35 Hen. 8, c. 17; 13 Eliz. c. 25; 12 Anne, c. 4; 29 Geo. 2, c. 36, and 31 Geo. 2, c. 41, were made for the preservation of woods, and were in some cases imperative on lords of manors, and owners of waste, to inclose places where woods had been lately felled, and to suspend the rights of the commoner for a specific period. Then came the 13 Geo. 3, c. 81, which was passed in the session 1773, when Great Britain had suffered considerably from want of sufficient corn to maintain her population, for the better cultivation, improvement, and regulation of common, arable fields, wastes, and pastures. Afterwards, the 41 Geo. 3, c. 109, called "The General Inclosure Act," was passed. See *Doe v. Spencer*, 2 Ex. 752. This statute was amended by the 1 & 2 Geo. 4, c. 23.

See stat. 3 & 4 Wm. 4, c. 35, as to rates; 3 & 4 Wm. 4, c. 87, as to inrolling the award. *See* Mr. Wingrove Cook's valuable Treatise.

These statutes operate as to matters not specially provided for by the local acts for the inclosure of lands in particular localities. But by the 6 & 7 Wm. 4, c. 115, parties are enabled to procure the inclosure of lands without the delay and expense of obtaining a local act for that purpose. By this statute it is enacted, "that such inclosure may take place in any open and common lands, whether arable, meadow, or pasture, without the sanction of an act of parliament, provided the consent of two-thirds in number or value of the persons entitled to rights of common or other rights therein be obtained for the purpose; and when the consent of seven-eighths shall be obtained, may take place even without the intervention of commissioners. Sect. 40: Provided that nothing therein contained shall in any case authorise the inclosure of any waste, whether the soil thereof shall or shall not be vested in the lord of any manor, or extend to places within ten miles of London, or within certain distances of other large towns comprising a certain amount of population. Sect. 55. By the 8 & 9 Vic. c. 118, the preceding act is amended. Commissioners are appointed, under the denomination of "The Inclosure Commissioners for England and Wales," who are empowered, on the application of one-third in value of the persons interested in any lands subject to be inclosed under the act, and provided the consent of two-thirds in value of the persons interested, and of the lord of the manor (in case the lands be waste of a manor), be ultimately obtained, to inquire into the case, and report for the information of parliament the expediency of making such inclosure; upon which report, if parliament think fit to pass an act to the effect that such inclosure be proceeded with, the allotment and inclosure of the lands shall take place accordingly, by the aid of a valuer to be appointed for the purpose, and under the superintendence of the commissioners. This act has been amended by the 9 & 10 Vic. c. 70; 10 & 11 Vic. 111; 11

I. Appointment and Powers of Commissioners.[1]

(A) *Appeals from Commissioners.*[2]

II. Party's Title under.[3]

& 12 Vic. c. 99; 12 & 13 Vic. c. 83; 14 & 15 Vic. c. 53; 15 & 16 Vic. c. 79; 17 & 18 Vic. c. 97; 20 & 21 Vic. c. 31; *see* 22 & 23 Vic. c. 43; also 24 & 25 Vic. cc. 1, 38.

Inclosure acts are not to be deemed merely private acts. *Riddle v. White*, 1 Anst. 281.

[1] A commissioner appointed at a meeting, by the major part in value of the proprietors, is sufficient, though the act directed the value to be decided by the assessment of poor-rates. *Doe d. Harris v. Bodenham*, 9 B. & C. 495.

The commissioners may make a rate to cover a deficiency, and that before passing their accounts (Id.) It will be presumed that commissioners act according to their jurisdiction, until the contrary appear. *Goodtitle d. Baker v. Milburn*, 2 Mee. & W. 853.

Under an act enabling commissioners to exchange lands or sell them, they may award land partly in exchange and partly for money. *Doe d. Lord Suffield v. Preston*, 7 B. & C. 392. And commissioners who are allowed to set out allotments in lieu of or in exchange for other lands within the parish, cannot make an allotment in lieu of and as a compensation for common rights. *Wingfield v. Tharp*, 10 B. & C. 785.

Commissioners have no power under 41 Geo. 3, to make and levy a rate for making roads: they are only to set them out. *Earl Falmouth v. Richardson*, 3 B. & C. 837; 5 D. & R. 664.

The commissioners have no authority to allot an ancient towing-path. *Simpson v. Scales*, 2 B. & P. 496. The commissioners' power is not determined absolutely by their award. *Haggerston v. Dugmore*, 1 B. & A. 82.

It seems to be necessary, in order to give the commissioners authority to act, that there should be three; if one die, the other two must, therefore, appoint a third. *Doe d. Nicholson v. Middleton*, 3 B. & B. 214; 6 Moore, 532.

No technical form is necessary in the award of the commissioners; if, therefore, they substantially pursue their powers in shutting up old roads, those roads effectually cease. *Pick v. Clarkson*, 2 Black. 1318. *See* further, as to the award, *Willoughby v. Willoughby*, 4 Q. B. 687; 9 id. 902. *Doe d. Roberts v. Mostyn*, 12 C. B. 268; 21 L. J. C. P. 178. *Turner v. Blamire*, 1 Drew, 402; 22 L. J. Ch. 766.

Commissioners under an inclosure act may take a bond of indemnification against the expenses of a suit, to be brought in pursuance of it, where there is a doubt whether those expenses are payable out of the fund provided by the act. *Iles v. Boxall*, 2 B. & P. 89. The determination of the commissioners as to the boundaries of a parish, not being retrospective, is not conclusive. *Rex v. St. Mary*, 4 B. & A. 462.

Commissioners under an Inclosure Act, who sell lots by auction to A., and, upon his refusing to complete the purchase, to B., cannot sue A. for lands bargained and sold. *James v. Shore*, 1 Stark. 426.

[2] The 6 & 7 Wm. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions an appeal to the quarter sessions. See *Duke of Beaufort v. Neeld*, 12 Clark & Fin. 248.

The appeal under the 55 Geo. 3, c. 68, must be preferred within the time limited (*Rex v. Justices of Wilts*, 13 East, 352), which, it seems, the sessions are bound to receive, but not to respite after the limitation has expired (*Rex v. Derby*, 4 T. R. 488), and the limitation will be construed strictly. *Rex v. Dean Inclosure*, 2 M. & S. 80. The time for appealing runs from the determination of the commissioners. *Rex v. Gloucestershire*, 3 M. & S. 127.

The word "proceeding," in the 13 Geo. 3, means not an act done, but legal proceedings. *Rex v. Bucks*, 2 M. & S. 230. The notice of appeal required by the 55 Geo. 3, c. 68, is not satisfied by giving it to the party interested (*Rex v. Essex*, 1 B. & A. 373), since it must be given to all parties notified in the statute. *Rex v. Lancashire*, 1 id. 630.

An appeal is not taken away by any expressions in an act, unless there be an affirmative declaration to that effect. Therefore, where a clause in an inclosure act directed that no item in the accounts of commissioners should be binding or valid, unless by a justice of peace, in the manner therein pointed out, the power of appeal given by a subsequent clause to parties grieved is not abrogated, and a *certiorari* to remove an order of sessions which, on appeal disallowed some items approved by a justice, was consequently refused. *See* 1 B. & C. 64. *Rex v. the Justices of Cumberland;* and *see* 2 M. & S. 80. Again, suppose the decision of a commissioner to be final, still if any acts are directed to be performed by him in conjunction with a justice of the peace, an appeal will lie, for this is a joint, not an independent, sentence. *See* 2 B. & C. 66.

[3] Lands allotted become liable to the uses of the estates in respect of which they are allotted; and, therefore, upon sale, it is necessary to investigate the title to the original estates. Smith, R. & P. P. 536. Inclosure makes the allotments freehold, unless the act otherwise directs. *Revell v. Joddrell*, 2 T. R. 415. Accordingly, where the waste of a manor is inclosed and allotted to commoners, they hold the allotments as freehold tenures, because they were freehold before the inclosure, namely, the freehold of the lord. *Doe d. Lowes v. Davidson*, 2 M. & S. 175. But the legal freehold does not vest in the allottee till after the execution and proclamation of the award. *Farrer v. Billing*, 2 B. & A. 171.

(A) *In case of Incroachments.*[1]

III. Of Allotments, and of the Construction of Inclosure Acts.[2]

When by an inclosure act certain waste lands of a manor were to be allotted in certain proportions, it was held that the freehold of a part of these lands not portioned out by the commissioners was in the lord of the manor. *Packe v. Mee*, 9 W. R. 335, Q. B.

Where an inclosure act provides that every proprietor shall stand and be seised of the lands to be allotted to him to such and the same uses, and for such and the same estates, as the lands in respect of which such allotments shall be made, would have been subject to in case the act had not been made, the allotments made under it are held subject to an outstanding term, to which the original lands were subject. *Garrard v. Tack*, 8 C. B. 231.

The party claiming under an inclosure act must take possession within twenty years. *Doe d. Nanney v. Gore*, 2 Mee. & W. 320. The title runs from the time of the allotment and not the award. *Doe d. Harris v. Saunders*, 1 Nev. & P. 119; 5 Ad. & E. 664.

After a purchaser of inclosed lands has been in possession twenty years, and paid interest on the purchase-money, he cannot object to the title, on the ground that the court had not made a formal award. *Doe v. Edgar*, 2 Bing. N. S. 498; 2 Scott, 732.

Where a common is allotted among the commoners, who are to inclose, one who does not inclose cannot distrain cattle trespassing on the common. *Wells v. Pearcy*, 1 Bing. N. C. 556; 1 Scott, 426. *See* vol. iii. p. 147.

A consent given by mistake under the 6 & 7 Wm. 4, c. 115, is revocable before the award is made. *Doe d. Beaufort v. Neeld*, 3 Scott, N. R. 618; 5 Jur. 751; 12 Clark & Fin. 248; 9 Jur. 813.

As to allotments in lieu of tithes, see *Banbury & Fuller*, 8 Ex. 111.

[1] A title may be derived by encroachment so as to operate against the Inclosure Acts (*Doe d. Bishop of London v. Wright*, 1 Stark. 349); which may exist independently of the saving clause usually inserted in such acts. *Doe d. Foley v. Wilson*, 11 East, 56. The encroachment ought, however, to have been enjoyed twenty years. *Creach v. Wilmot*, 2 Taunt. 160, n.

The encroachment generally vests in the landlord, and not in the tenant. *Doe d. Chalenor v. Davies*, 1 Esp. 461. *Bryan v. Winwood*, 1 Taunt. 208. But *see* 15 Mee. & W. 580; 2 El. & Bl. 349; 22 L. J. Q. B. 409; 23 L. J. C. P. 57; 17 Q. B. 373. And 20 years' occupation will bar the landlord. *Doe v. Massey*, 17 Q. B. 373; 40 L. J. Q. B. 434.

The justices to whom the valuer makes application under 15 & 16 Vic. c. 79, s. 13, for possession of any encroachment or inclosure, are not precluded from inquiring into the circumstances of the encroachment or inclosure, by reason of the piece of land sought to be recovered being included in the map and provisional order made by order of the commissioners. *Chilcott v. Youlden*, 29 L. J. M. C. 197. *See* further, vol. iii. p. 146.

[2] One-twentieth part of the waste is, by long custom, allotted to the lord of the manor, and often two fifteenths or sixteenths, as the act may direct, to the rector or vicar of the parish, in right of his patron; the remainder is divided among proprietors possessing appendant or appurtenant rights of common in respect of the land so divided.

The lord is not only entitled to one-twentieth part of the waste of an inclosure, but also to a further allotment in respect of his demesnes. *Arundell v. Falmouth*, 2 M. & S. 440. And the owner of a tenement entitled to common in the waste, as well of the manor in which the tenement is parcel, is, on the inclosure of both, entitled to a distinct allotment in each. *Hollinshead v. Walton*, 7 East, 485. So a copyholder, having a right of common in two manors, and having received an allotment out of one in lieu of his right in that manor, is entitled to his full allotment out of the other when inclosed, whether the manors be held under the same or different lords; and though the estate in respect of which he claims be partly enfranchised freehold, that does not extinguish as to the part enfranchised. *Barwick v. Matthews*, 5 Taunt. 365; 1 Marsh. 50.

If an award under an inclosure act allot herbage to the surveyors of the highways for the time being, the lord of the manor is a trustee for the surveyors for the time being. *Johnson v. Hodgson*, 8 East, 38.

In a case of exchange, the allotment must expressly state the exchange. *Cox v. King*, 3 Bing. N. S. 795; 4 Scott, 553.

The "thing done," in an inclosure act, means the "entry and signing the instrument;" and the time for bringing an action is computed from those acts. *Rex v. Nockolds*, 3 M. & R. 334; 1 Ad. & E. 245.

Allotment to be "free and clear from all rates, taxes, and deductions whatsoever:"—*Held*, exonerated from poor rates. *Chatfield v. Ruston*, 3 B. & C. 863; 5 D. & R. 675.

A private allotment act empowered deputies appointed under its provisions to make small allotments of land to resident freemen of the borough of Leicester, to be held by them so long as they should be willing to hold the same, and pay the rent, and conform to certain regulations. All the land was vested in deputies as trustees, and they had power to sell with the concurrence of the majority of a meeting of freemen occupiers. It was held that the allottees had freehold estates, which entitled them to vote

IV. The Stopping up of Roads and Ways under Inclosure Acts.[1]

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for members of parliament, as their estate might continue for life, and was not determinable on the mere will of the grantors. *Beeson v. Burton*, 12 C. B. 647; 22 L. J. C. P. 33.

Persons to whom allotments might be, but are not, made, are not barred by the statute of their prior rights. *Cooper v. Walker*, 4 B. & C. 36.

The term "fences" in the General Inclosure Act comprehends a ditch. *Ellis v. Arnison*, 1 B. & C. 79; 2 D. & R. 161. Mines under the waste pass to the allottees. *Townley v. Gibson*, 2 T. R. 701.

Owners of land which is parcel of common field may, if the custom allow it, mutually inclose against each other. *Hickman v. Thorne*, 2 Mod. 105. *Barber v. Dixon*, 1 Wils. 44. *How v. Strode*, 2 id. 269.

The 8 & 9 Vic. c. 118, s. 123, which gives a right to the Inclosure Commissioners, or their valuer, to enter land to be inclosed or dealt with under the act, extends to land over which there is a right of common, and which, by an order for inclosure, is to be retained by the owner, freed from the right of common. *Grubb v. Brown*, 7 W. R. 8.

As to the construction of a clause reserving seignoral rights, see *Greathead v. Morley*, 3 Scott, N. R. 388; 3 Man. & G. 139. *Wainman v. Rosse (Earl)*, 2 Ex. 800. *Earl Rosse v. Wainman*, 14 Mee. & W. 859; 15 L. J. Ex. 67. *Micklethwaite v. Wonter*, 6 Ex. 644; 20 L. J. Ex. 313. *Graham v. Ewart*, 11 Ex. 326. *Midgley v. Richardson*, 14 Mee. & W. 595; 15 L. J. Ex. 257.

As to the construction of a clause exempting the allotments from fines, see *Pochin v. Duncombe*, 1 H. & N. 842; 5 W. R. 354; of a clause to alter ditches, &c. *Dawson v. Paver*, 5 Hare, 415; 11 Jur. 766. *Sharp v. Hancock*, 8 Scott, 46; 7 Man. & G. 354.

As to partition of lands, see *Doe d. Knight v. Spencer*, 2 Ex. 752.

[1] Where public and private roads are authorised to be diverted and stopped up, and delineated on a map, roads not so mapped are not legally diverted or stopped up. *Rex v. Marquis of Downshire*, 6 Nev. & M. 92. It must appear in the order that the road was stopped up and diverted on view by the justices. *Rex v. Marquis of Downshire, supra.* And under the 41 Geo. 3, c. 109, s. 8, the concurrence of two justices must be had to authorise the stopping up of any way or ways. *Logan v. Burton*, 5 B. & C. 513; 8 D. & R. 299. *See* Shelford on Highways, 212.

The way over inclosure must be formed as a man would make it over his own land (*Abson v. Fenton*, 1 B. & C. 195); but where an allotment contains a way not set out, the right of way is extinguished. *White v. Reeves*, 2 Moore, 23. *See* 1 C. & M. 18; 4 Ad. & E. 698.

Where the provisional order of the Inclosure Commissioners for the allotment of certain land about to be inclosed made no mention of any private road to be made through it, it was held that it was competent to the valuer under 8 & 9 Vic. c. 118, and 11 & 12 Vic. c. 99, s. 4, to set out a private road in the land so allotted. *Grubb v. Inclosure Commissioners of England*, 30 L. J. C. P. 155; 9 C. B. 612; affirmed Ex. 10 W. R. 92.

Where the order of two justices was necessary to authorise the stopping up of a way, and the award stated that such order had been obtained, the award and enjoyment not inconsistent with it was presumed *primâ facie* evidence of the order having been made, although the order itself could not be found. *Manning v. Eastern Counties Railway Co.* 12 Mee. & W. 237; 13 L. J. Ex. 265.

Where no order of justices for stopping up an old road was obtained, it was held still existent, notwithstanding an award of commissioners altering the road in some parts and confining it throughout within narrower limits. *Reg. v. Cricklade*, 14 Q. B. 735; 14 Jur. 690.

Where an inclosure act directs that the roads set out shall be repaired by "such person and persons," it means only those interested in the inclosure. *Rex v. Cottingham*, 6 T. R. 20.

Where Inclosure Commissioners, having authority to stop up highways, &c. in the parish of A., ordered a footway in the parish of A. to be stopped up, which footway, however, was continued into the parish of B., and an inhabitant of B., conceiving that they had no authority to do so, trespassed upon the land in A., where it had been, in assertion of his right of way, for which the occupier of the land brought an action of trespass; it was held that the action lay, as the commissioners had clearly a right to stop up the road, and the remedy of the party should have been by appeal. *Gwyn v. Hardwicke*, 25 L. J. M. C. 97.

The right to take water from an ancient well was held not to be extinguished by the extinction of a right of way to it. *Race v. Ward*, 26 L. J. Q. B. 133.

[2] A feigned issue is the usual mode of trying the right to inclose; and where the right to bring such issue is limited to six months, it must be brought within that time, and if it abates by death, be recommenced within six months after. *Knight v. Bate*, Cowp. 738.

The time limited for bringing an action under an inclosure act does not, however, apply to a case not within it. See *Bailiffs, &c. of Godmanchester v. Phillips*, 2 Nev. & M. 713; 5 B. & Adol. 198.

The court, though empowered, will not consolidate several actions where the questions raised are different. *Crammer v. Pennington*, 5 Taunt. 167. And if an act which

INCOME-TAX.[1]

IN-COMING Tenant. *See post*, Landlord and Tenant.

INCOMPETENCY. *See post*, Witness.

INCORPORATION. *See* Corporation, vol. iii. p. 263.

INCORPOREAL Hereditaments.[2] *See* Advowson, vol. i. p. 219; Common, vol. iii. p. 143; Easements, vol. iv. p. 149; *post*, Watercourse; Way.

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authorises the levying of a sum of money on certain persons gives an appeal to the sessions in all cases where the parties think themselves aggrieved, an objection to the assessment cannot be tried in an action of trespass, but the party must appeal. *Bonnell v. Beighton*, 5 T. R. 182.

The defendant is entitled to judgment, as in case of a nonsuit, if the plaintiff delay proceeding to trial, or on a feigned issue, under 8 & 9 Vic. c. 18, s. 56. *Hancock v. Earl of Carlisle*, 7 D. & L. 219; 19 L. J. Ex. 45. *See* Feigned Issue, vol. iv. p. 447.

As to the necessary Evidence.—In order to prove an allotment, the lord must show he is owner of the soil, and the commoner, that he has exercised the particular right claimed (*Smith v. Smith*, 2 Price, 101); and produce the commissioners' allotments. *Bendyshe v. Pearse*, 4 Moore, 99; 1 B. & B. 460.

With respect to the Costs.—If the inclosure act makes no mention of costs, they abide the event under the Statute of Gloucester. *Fitzwilliam v. Maxwell*, 7 Taunt. 31; 2 Marsh. 355. But the usual method of regulating the costs is by introducing a special clause in the act. In that case, each party shall have costs on the issues found for him (*Brathwaite v. Bradford*, 6 T. R. 599), if the issues be distinct, *Durham v. Hertford*, 3 M. & S. 323.

Where the plaintiff, on an issue to try a question of boundary between two adjoining manors, failed, he was ordered to pay the costs of the issue. *Reg. v. Kelsey*, 20 L. J. Q. B. 283; 2 Prac. Rep. 134.

[1] The Property and Income Tax Acts are as follows:—5 & 6 Vic. c. 35; 6 & 7 Vic. c. 24, s. 7; 8 & 9 Vic. c. 4; 11 & 12 Vic. c. 8; 14 & 15 Vic. c. 12; 15 & 16 Vic. c. 20; 16 & 17 Vic. cc. 34, 91; 17 & 18 Vic. cc. 10, 24, 40, 85; 18 & 19 Vic. cc. 20, 35; 19 & 20 Vic. cc. 33, 80; 20 Vic. c. 6; 22 & 23 Vic. c. 18; 24 & 25 Vic. c. 26.

A person enjoying an annuity charged on real property, which is to be paid "free and clear of all taxes and assessments," is bound to allow the owner to deduct the income-tax charged in respect of the property. *Attorney-General v. Shield*, 28 L. J. Ex. 49; 3 H. & N. 49. *See* 1 Johns. & H. 334.

In paying a creditor who has proved in an administration suit in equity upon a bill of exchange, income-tax is deducted from the interest. *Dinning v. Henderson*, 3 De Gex & S. 702; 19 L. J. Ch. 273; 14 Jur. 1038.

Where A., in consideration of 1380*l.*, to be paid by instalments, granted to B. a coal-mine for 50 years, and B. was assessed to the income-tax in respect of the mine:—*Held*, that he was not entitled, under 5 & 6 Vic. c. 35, to deduct the income-tax out of the payments made to A. *Taylor v. Evans*, 1 H. & N. 101.

By a deed on the sale of an estate by A. and B., tenants in common, for 99,000*l.*, the purchaser covenanted to pay 6770*l.*, part of the purchase-money, on the execution of the deed, and to pay the residue of 92,230*l.* in equal instalments of 768*l.* 11*s.* 8*d.* to A. and B. respectively, on every 24th day of June and 24th day of December in every year after 1854, until the 24th day of December, 1884:—It was held that the instalments were not subject to income-tax, and, therefore, the purchaser was not justified in making any deduction in respect of income-tax. *Foley v. Fletcher*, 3 H. & N. 796; 28 L. J. Ex. 100.

A lease demising a parcel of land, with liberty to take clay, &c. and make bricks, contained three reservations; namely, an annual sum of 17*l.* 10*s.* for surface-rent, a royalty or brick-rent of 100*l.* by the year, and a sum of 2*s.* for every thousand bricks made in one year over a million. Each sum was declared by the lease to be free of all deductions, except for landlord's, property, and income-tax. It was held that the tenant was entitled to deduct in respect of income-tax on each payment; the two first payments being rent, and the third, if not rent, still a payment with respect to which the parties had agreed the deduction should be made. *Edmonds v. Eastwood*, 2 H. & N. 811; 27 L. J. Ex. 209.

A partner in a firm making all their profits abroad, is liable to make a return of the whole of the profits of the firm for assessment to the income-tax. *Attorney-General v. Sulley*, 4 H. & N. 769; 28 L. J. Ex. 320.

An annuity payable to a retired servant of the East India Company, out of the Bengal Civil Servant Annuity Fund, was held not subject to income-tax, the recipient residing in France, although the money, by his request, was received by his agent in London. *Udney v. the Honourable East India Co.* 13 C. B. 733. See *Sully v. Attorney-General*, 29 L. J. Ex. 464.

6 & 7 Vic. c. 24, s. 103, does not extend to wills or bequests of annuities.

[2] Incorporeal hereditaments, being incapable of visible transfer, are said not to lie in livery, but in grant. Bac. Abr. Grants,

INCORRIGIBLE Rogue. *See post*, Vagrant.

INCREASE, Costs of.[1]

INCROACHMENT. *See* Common, vol. iii. p. 146; Inclosure, *ante*, p. 101.

INCUMBENT. *See* Advowson, vol. i. p. 219.

INDEBITATUS Assumpsit. *See* Action, vol. i. p. 132.

Counts.[2]

E.; Co. Litt. 9a, 42; 2 Roll. Abr. Grant, G.; Vin. Abr. Grant, G. a. *Jones v. Robin*, 12 Jur. 308. An incorporeal hereditament is a "tenement," the word tenement including not only corporate inheritances, but also all inheritances issuing out of them, or concerning, or annexed to, or exercisable within them, as rent, estovers, common, or other profits whatever granted out of land. Co. Litt. 20, a. It is capable of being inherited by the heir, assigned to a purchaser, or otherwise conveyed. If a landowner grants to a man and his heirs a right to dig for and carry away stone, clay, or minerals, the incorporeal right may be demised by the grantee for years or for life, or conveyed away to another and his heirs. *Muskett v. Hill*, 5 Bing. N. C. 707. *Martyn v. Williams*, 1 H. & N. 827; 26 L. J. Ex. 117. See *Mountjoye's case*, Godb. 17. *Chetham v. Williamson*, 4 East, 476; Smith, R. & P. 4.

[1] Where any extraordinary costs have been incurred in a cause, and generally in country causes, an affidavit stating the particulars of such extra expenses is requisite to enable the proper officer to make an adequate taxation. Hull, L. of C. 653; Marsh. 264. This is called an affidavit of increase; and unless an affidavit of increase be made, the allowance to witnesses in the cause is limited in the whole to 40*s*. Dax, Pr. 254. In cases where there is an affidavit of increase, a copy of it must be served on the opposite party one day at least before taxation, in cases where notice of taxation is necessary. Reg. Gen. (Pr.) H. T. 1853, r. 59. Where the jurat of the copy affidavit served on the opposite party was defective, the court set aside the taxation. *Wheldale v. the Northern and Eastern Railway Co.* 13 Mee. & W. 9; 2 D. & L. 246. In order to obtain the master's allowance for the expenses of witnesses, it is absolutely necessary that their materiality should be sworn to in the affidavit of increase. Also, it must be sworn that they actually attended the trial, and that their expenses were paid. Marsh. on Costs, 264. *Pilgrim v. Southampton, &c., Railway Co.*, 8 C. B. 25. *Freeman v. Rosher*, 6 D. & L. 517. *Doe d. Mence v. Hadley*, 17 Q. B. 571. *Trent v. Harrison*, 2 D. & L. 941. *Pembrey v. Jones*, 11 Jur. 584.

[2] There are certain concise forms, stating the cause of action by a general description, applicable to cases in which simple contracts, express or implied, have resulted in mere debts. See *Stone v. Rogers*, 2 Mee. & W. 448. *Streeter v. Horlock*, 1 Bing. 37. They do not apply where the claim is for unliquidated damages (*Edwardes v. Bates*, 7 Man. & G. 594. *Hughes v. Thorpe*, 5 Mee. & W. 667. *Lawrence v. Wilcock*, 11 Ad. & E. 941), or where the debt is payable by specialty (2 Saund. 350, 2), or where, though originally a simple contract debt, it has been merged in a specialty debt or debt of record (*Middleditch v. Ellis*, 2 Ex. 623. *Baber v. Harris*, 9 Ad. & E. 532. *Edwardes v. Bates*, 7 Man. & G. 590. *Atty v. Parish*, 1 B. & P. 105. *King v. Houre*, 13 Mee. & W. 494); nor where a contract remains in part unperformed, or is still open. *Cutter v. Powell*, 2 Smith, L. C. 1. *Edwardes v. Bates*, 7 Man. & G. 599. *Fitt v. Casanett*, 4 id. 898. *Simmons v. Swift*, 5 B. & C. 857. *Paul v. Dod*, 2 C. B. 800.

The following are the common indebitatus counts:—

Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant.

Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.

Money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at his request.

Money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant.

Money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request.

Money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.

Money payable by the defendant to the plaintiff for interest upon money due from the defendant to the plaintiff, and forborne at interest by the plaintiff to the defendant at his request.

Money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.

Several of the above counts may be joined together, without repeating the words "For money payable," &c., thus:—For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for goods bargained and sold by the plaintiff to the defendant, and for work done, &c.

INDECENT Assault.[1]

Exposure.[2]

Prints. *See post*, Obscene Prints. 5 Geo. 4, c. 83, s. 4; 1 & 2 Vic. c. 38, s. 2; 20 & 21 Vic. c. 83, s. 1.

INDEMNITY. *See* Guarantee, vol. iv. p. 611; *post*, Principal and Surety.

INDENTURE. *See* Covenant, vol. iii. p. 443.

INDEPENDENT Conditions. *See* Conditions, vol. iii. p. 164.

Covenants. *See* Covenant, vol. iii. p. 455.

INDICTMENTS.[3]

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[1] By 24 & 25 Vic. c. 100, s. 52, "whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour." As to indecent assault upon a male, *see* 24 & 25 Vic. c. 100, s. 62.

[2] The *wilful* exposure of the naked person even for the purpose of bathing, and without any criminal intent towards females, is punishable as a misdemeanor. *Rex v. Crunden*, 2 Camp. 89. *See* Vagrant Act, 5 Geo. 4, c. 83, s. 4. Where a medical man persuaded a female patient to strip, under pretence that an examination of her person was essential to enable him to prescribe, he was convicted upon an indictment charging the special assault. *Rex v. Rosinski*, M. C. C. 12. *See* also *Rex v. Butler*, 6 C. & P. 368. *Reg. v. Case*, 1 Den. C. C. 580.

The offence of indecent exposure at common law is not committed unless more persons than one could, in fact, see it, however public the place may be, and an indictment charging it to have been done in the presence of one only is bad. *R. v. Watson*, 2 Cox, Cr. Ca. 376. *R. v. Webb*, 18 L. J. M. C. 39.

An exposure of person in or in view of any public street or place of resort, with intent to insult any female, is an offence under the Vagrant Act, 5 Geo. 4, c. 83, s. 5, and is also indictable at common law. Chit. Gen. Pr. p. 40. By 13 & 14 Vic. c. 100, s. 29, "any public and indecent exposure of the person," may be punished by imprisonment for any term now warranted by law, and by being kept to hard labour during the whole or part of such term of imprisonment.

[3] As to particular offences, *see* corresponding titles.

(A) *By* Certiorari. *See* Certiorari, vol. iii. p. 62.
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XXI. Of the Reservation of a Case for the Court for Crown Cases Reserved. *See* Appeal in Criminal Cases, vol. i. p. 387.

I. What Offences are Indictable.[1]

[1] In general, where a statute prohibits an act to be done under a certain penalty, though no mention is made of indictment, the party offending may be indicted and fined to the amount of the penalty.

If a statute prohibits any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not an indictment, the party may be indicted upon the prohibitory clause, and therefore fined, but not to recover the penalty; and it seems the fine ought not to exceed the penalty: but if the act be not prohibitory, but only that if any person shall do such a thing he shall forfeit so much, to be recovered by action of debt, bill, plaint or information, then he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. 2 Hale, 71; 2 Hawk. c. 25; 2 Burr. 803.

If a statute specify a mode of proceeding different from that by indictment, and the matter were already indictable at common law, the prosecutor may elect. *Rex v. Balme*, Cowp. 648. But an offence is not indictable where another method of punishment is appointed by a statute (*Rex v. Hemmings*, 3 Salk. 187), without naming an indictment. *Rex v. Buck*, 1 Stra. 679; 2 Burr. 803. Unless where a new offence is created by statute, and a penalty annexed to it by a separate clause, then the prosecutor may indict on the prior clause, as for a misdemeanor. *Rex v. Harris*, 4 T. R. 205.

An indictment will not lie for a mere civil injury, as for entering a close, &c. *Rex v. Storr*, 3 Burr. 1698. *Rex v. Atkins*, id. 1706. *Rex v. Bake*, id. 1731. *See* Arch. C. P. & Ev. 1.

Enticing away an apprentice (*Reg. v. Daniel*, 1 Salk. 380); unroofing a house in

II. Joinder of Defendants.[1]

which the prosecutor was in peaceable possession (*Rex v. Atkins*, 3 Burr. 1706, 1707); or for non-performance of a promise (*Rex v. Bradford*, 1 Ld. Raym. 366); because the offence ought to amount to a breach of the peace (*Rex v. Bake, supra*), and be of a public nature (*Young v. the King*, 3 T.R.104), contrary to the general laws of the land (*Rex v. Sharplegs*, 4 id. 177); which, however, may arise from the illegal manner of performing a lawful act (*Rex v. Burnett*, 4 M. & S. 272); or from mere solicitation to commit a crime, though not followed by an act. *Rex v. Higgins*, 2 East, 5. But it does not follow that because an action cannot be supported, an indictment lies (*Rex v. Richards*, 8 T. R. 634); though an indictment may lie, notwithstanding the party has recovered in a civil action. *Luttrell's case*, 6 Mod. 77.

A corporation aggregate may be indicted by their corporate name for breaches of duty, whether in the nature of a non-feasance, as the non-repair of highways or bridges (*Reg. v. Birmingham and Gloucester Railway Co.* 2 Q. B. 47; 9 C. & P. 469), or of a misfeasance, such as the obstruction of a highway by a railway company in a manner not authorised by their act of parliament. *Reg. v. Great North of England Railway Co.* 9 Q. B. 315.

A party is not the less indictable because he is a foreigner, and the offence charged is not punishable in his own country. *Rex v. Esop*, 7 C. & P. 456.

In an action for money had and received, if it appear that the defendant received the money from the plaintiff to carry to a bank, and that, instead of so doing, the defendant kept it, the judge will leave it to the jury to say whether the defendant received it with an intent to steal it, and then feloniously converted it; and if the jury find this in the affirmative, the judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this finding. *Prosser v. Rowe*, 2 C. & P. 421.

No indictment can be preferred for the following offences without the authorisation of a judge, or of the attorney-general, or unless the accused has been committed, or detained in custody, or has been bound by recognisance to answer an indictment for such offence; namely, perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gaming-house or disorderly house, or indecent assault. 23 & 24 Vic. c. 17, s. 1.

[1] Where several commit an offence, they may be indicted jointly or severally. *Rex v. Atkinson*, 1 Salk. 382. But defendants should not be joined where the offences are distinct and unconnected; and if defendants be misjoined, it may be objected to by motion to quash the indictment. *Rex v. Kingston*, 8 East, 41.

Several may be indicted jointly where they have acted in concert (*Young v. the King*, 3 T. R. 98), as where two join in singing a libellous song, they may be indicted jointly (*Rex v. Benfield and another*, 2 Burr. 980); and the same where two or more persons join in any other kind of publication of a libel. But if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. So for keeping a bawdy-house, two may be indicted jointly. *Reg. v. Williams*, 10 Mod. 63. So for fraudulently collecting rates. *Reg. v. Atkinson*, 11 id. 79. So for extortion, maintenance (*Rex v. Atkinson*, 2 Ld. Raym. 1248), or keeping a gaming-house, the indictment may be joint. *Rex v. Dixon*, 10 Mod. 335. But two or more cannot be indicted jointly for perjury. *Rex v. Phillips*, 2 Stra. 921. Nor can several partners, for unqualifiedly exercising their trade. *Reg. v. Atkinson, supra.* And where several commit a joint act, which act, however, is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally, and not jointly, they must be indicted separately. 2 Hawk. c. 25, s. 89.

Where two are indicted for a joint offence, the judge may sum up the evidence, and take the verdict against each separately. *Young v. the King*, 3 T. R. 106.

Principals in the first and second degree, and accessories before and after the fact, may all be joined in the same indictment (2 Hale, 173); or the principals may be indicted first, and the accessories after the conviction of the principals.

"Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice." 24 & 25 Vic. c. 95, s. 6.

By the 24 & 25 Vic. c. 96, s. 93, "whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

Where an indictment for stealing, and also for receiving the same goods, knowing them to have been stolen, has been preferred and found against two or more persons, the jury may find all or any of the defendants guilty either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same,

III. Of the Caption.[1]
IV. „ Form of an Indictment.[2]
(A) *Of the Venue.*[3]

or any part or parts thereof, knowing the same to have been stolen." 24 & 25 Vic. c. 96, s. 92.

[1] The caption is no part of the indictment. It is merely the description or style of the court. It is a formal preamble when it is removed by *certiorari* from an inferior court to the Court of Queen's Bench, or when the record is made up.

The statement of the caption must be certain. *Rex v. Haycock*, 2 Sess. Ca. 316. *Rex v. Holliday*, 3 Salk. 187.

The court where the indictment was found must be accurately described. *Rex v. Everard*, 1 Salk. 195. But it is not necessary to set forth the foundation of the court's authority. *Rex v. Royce*, 4 Burr. 2085.

The caption must not state an impossible day. *Rex v. Warre*, 1 Stra. 698.

If the justices before whom the indictment was preferred be misnamed, the misnomer may be amended. *Rex v. Darley*, 4 East, 174.

Formerly the words "then and there" were essential to the word "sworn." *Rex v. Morris*, 2 Stra. 901. But now they need not be introduced. *Rex v. Morgan*, 1 Ld. Raym. 710.

In support of the caption, it cannot be contended that July means October. *Rex v. Fearnley*, 1 T. R. 316.

[2] An indictment is a written accusation of one or more persons of a crime preferred to, and presented on oath by, a grand jury, returned to inquire of all offences in general in the particular county.

By 4 Geo. 2, c. 26, and 6 Geo. 2, c. 14, all indictments, inquisitions, and presentments, shall be in English, and be written in a common legible hand, and not court hand, on pain of 50*l.* to him who shall sue within three months.

[3] 14 & 15 Vic. c. 100, s. 22, enacts, "it shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue."

By the interpretation clause of 14 & 15 Vic. c. 100, s. 30, "in the construction of this act the word 'indictment' shall be understood to include 'information,' 'inquisition,' and 'presentment,' as well as indictment; and also any plea, replication, or other pleading, and any *nisi prius* record."

By stat. 7 Geo. 4, c. 64, s. 20, "no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper or perfect venue, where the court shall appear by the indictment or information to have jurisdiction over the offence."

By the stat. 7 Geo. 4, c. 64, s. 12, it is enacted, "that where a felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein."

An indictment laid an assault to have been committed at the parish of St. Martin, Stamford Baron, in the county of Northampton, and within the borough of Stamford. After a traverse and *certiorari*, a venue was awarded into Lincolnshire, and the defendant was convicted: the assault happened within five hundred yards of the boundaries of Northampton and Lincoln; but as the indictment positively stated the offence to have been committed in Northampton, the court arrested the judgment. *R. v. Mitchell*, 2 Q. B. 636; 2 Gale & D. 274. The calculation of the five hundred yards must be made by the direct line of measurement from the border, not by the nearest road. *R. v. Wood*, 5 Jur. 225. In counties of cities and towns corporate, prisoners may be committed for trial to the next adjoining county. See *Reg. v. Gallant*, 1 F. & F. 517. *R. v. Jones*, 3 C. & Kir. 346. *R. v. Milner*, 2 id. 310.

If the indictment state the offence to have been committed in the county at large, and it was committed in a town of a county, it is bad. *Rex v. Augustus Meller*, 1 Russ. & Ry. 144. But if the offence be properly laid in the county of a town, and the indictment is preferred at the county at large, it need not be stated that it is the next adjoining county to the county of the town. *Rex v. Goff*, 1 id. 179.

By the 14 & 15 Vic. c. 55, s. 19, all offences not triable at quarter sessions may be tried in the adjoining county when committed within a jurisdiction, but in which the queen has not for five years previously granted a commission of oyer and terminer.

A venue was stated to be, "Yorkshire being the next adjoining county to Kingston-upon-

Hull, to wit." There is no county of Kingston-upon-Hull: it should have been "town of Kingston-upon-Hull and county of the same town." It was, however, held sufficient. *R. v. Grundy*, 2 Cox, 357. Where an offence was committed in a borough, situate partly in one county and partly in another, the offence was held triable in either county under 14 & 15 Vic. c. 55, s. 19. *Reg. v. Gallant*, 1 F. & F. 517. It has been held that an indictment at the quarter sessions in Coventry was rightly tried by a jury of the whole county, although by 5 & 6 Vic. c. 110, the quarter sessions and assizes are to be held separately at Coventry for the city of Coventry, and certain other parts of the county of Warwick. *R. v. Holloway*, 12 Q. B. 319; Den. & P. 287.

If any felony (except murder), or any misdemeanor, be begun in some English county and completed abroad, or *vice versâ*, or is begun on shore and completed on the high seas, or *vice versâ*, such cases are untouched by this statute.

At common law, no offence committed in Wales could be tried in England (1 Hale, 150); but by the 1 Wm. 4, c. 70, s. 19, assizes for the trial of all criminal and civil matters are to be held in Chester and Wales, under and by virtue of the commissions of assize, oyer and terminer, gaol delivery, and other writs and commissions, to be issued in like manner and form as hath been usual for the counties in England.

A felony committed within part of a county included within the Municipal Boundary Act, is now triable within the new district. *Rex v. Piller*, 7 C. & P. 337. *Rex v. Simmonds*, 1 Moo. C. C. 408.

By 7 Vic. c. 2, s. 1, "her majesty's justices, or others her majesty's commissioners of oyer and terminer or general gaol delivery, shall have the powers of commissioners of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty." By sect. 2, "in all indictments so preferred before the said justices and commissioners last mentioned, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had, and all material facts shall be stated to have taken place 'on the high seas.'"

By the 24 & 25 Vic. c. 94, s. 7, "where any felony shall have been wholly committed within England or Ireland, the offence of every person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, and tried, determined and punished, by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony, may be dealt with, inquired of, determined and punished, by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea; and whether within her majesty's dominions or without, or partly within her majesty's dominions and partly without."

And by sect. 9, "where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of that person shall be felony, and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas:' Provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

The prisoners were indicted for feloniously wounding in the county of Glamorgan. The offence was committed at sea, close to Penarth Roads, in the British Channel, between the Glamorganshire and Somersetshire coasts. The indictment charged that the offence had been committed at Glamorgan, but there was no averment that it had taken place on the high seas, and therefore it was not framed under 7 Vic. c. 2. The court held that the place in question formed part of the county of Glamorgan. Both shores of the British Channel form part of England and Wales. Looking at the local situation of this sea, it must be taken to belong to the counties of the shores by which it is bounded. The Flat and Steep Holm Islands, which are abreast of the anchorage-ground close by which the felony happened, are always treated as part of the parish of St. Mary's, Cardiff. Therefore, as the whole of this inland sea must be distributed between the two counties, it followed that the *locus in quo* was within Glamorganshire. *R. v. Cunningham*, Bell, C. C. 72; 28 L. J. M. C. 66.

By 17 & 18 Vic. c. 104 (the Merchant Shipping Act), s. 267, "offences committed by any master, seaman, or apprentice, either ashore or afloat, who is or has been previously employed for three months in the service, shall be tried as if committed within the jurisdiction of the Admiralty, although actually committed out of the dominions of her majesty." See *R. v. Allen*, 7 C. & P. 664.

By 18 & 19 Vic. c. 91, s. 21, "if any British subject charged with a crime or offence on board a British ship at sea, or in any foreign port or harbour, or if any person, not being a British subject, charged with

any crime or offence on board a British ship at sea, is found within the jurisdiction of any court of justice in her majesty's dominions, which would have cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court may hear and try the case as if the fact had been committed within such limits."

Where the prisoner was a foreign sailor, one of the crew of the British ship *Ontario*, and he wounded the prosecutor, one also of the crew, and a foreigner, on the high seas, it was agreed that he was not found, but was brought, into the jurisdiction in custody and against his will. The court was clear that the conviction was right. *R. v. Lopez*, Dears. & B. 525; 27 L. J. M. C. 48. *R. v. Sattler*, Dears. & B. 539.

By the stat. 7 Geo. 4, c. 64, s. 13, for the more effectual prosecution of offences committed during journeys from place to place, it is enacted, "that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever employed on any voyage or journey, upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished, in any county through any part whereof such coach, waggon, cart, carriage, or vessel, shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side-bank, centre, or any part of any canal or navigation, shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished, in either of the said counties through or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county."

An assault was committed in a Brighton train, before its arrival at Three Bridges. There the parties separated. The defendant was indicted in the Central Criminal Court. It was objected that trains were not within the act; that the journey to New Cross, where the assault was alleged, was not performed in the same carriage; and that the words "should have passed" must be confined to the time of the offence. The recorder overruled the objection, and confined the words to the time of the trial. *R. v. French*, 8 Cox, 252.

At the Central Criminal Court a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of W." The prosecutor stated the correct name of the parish was "St. Mary, W." In the stat. 4 & 5 Wm. 4, c. 36 (the "Central Criminal Court Act"), s. 2, this parish is called "the parish of W.":—*Held* sufficient. *Reg. v. St. John's*, 9 C. & P. 40, *Reg. v. Howell*, id. 437.

A larceny of a post-office letter was stated to have occurred at Peterborough. Peterborough has an ordinary commission, and a commission to try all treasons, murders, &c. There is no *non intromittant* clause, but the county magistrates exercise no jurisdiction. There is a separate *custos rotulorum* and clerk of the peace. It was held that the jurisdiction of the gaol delivery at Northampton was not ousted. *R. v. Crane*, 3 Cox, 53.

A letter containing a false pretence was received in C., a borough. It had been posted out of the borough. The letter produced some money, which came to hand out of the borough. The venue in this case was held to have been well laid in the borough. *Reg. v. Leech*, 7 Cox, 100; 2 Hawk. c. 25, s. 34.

In libel the venue was "Central Criminal Court to wit," and the publication was said to have taken place "at the parish of St. Mary, in the county of Middlesex, within the jurisdiction of the Central Criminal Court." The defendant having removed the indictment by *certiorari*, afterwards withdrew his plea of not guilty, and moved to arrest the judgment; but the allegation was deemed sufficient, and judgment was pronounced by the court at Westminster. *R. v. Gregory*, 7 Q. B. 274; 14 L. J. M. C. 82. The withdrawal being, "whereby the queen remaineth against him without defence." This form was deemed sufficient. *Gregory v. Reg.* 15 Q. B. 957.

Notwithstanding the provision of the 14 & 15 Vic. c. 100, s. 24, that no want of a proper or perfect venue shall vitiate the indictment, judgment was arrested where the count had "Lancashire" in the margin, but no words of reference were added to show where certain unlawful assemblies mentioned in that count had been held; but in another count of the same indictment the assemblies were imperfectly stated as held "at divers places," without more; and the aiding and abetting at these assemblies was stated to have taken place at the parish aforesaid, in the county aforesaid; and there being Lancashire in the margin, it was held that the imperfect statement as to the places of meeting was cured by the statute, and that the venue of the latter statement was proper. *Reg. v. O'Connor*, 5 Q. B. 16. *Reg. v. Albert*, id. 37.

Where property is changed by destruction the venue must be laid in the county in which it was taken, and not where it was destroyed. *Rex v. Holloway*, 1 C. & P. 127. The venue may be laid in the county where the offender was taken, if the statute creating the offence so directs. *Rex v. Forsyth*, 2 Leach. C. L. 826.

It is a general rule, that where a statute creating a new felony directs that it may be tried in the county where the offender is

(B) *Degree of Particularity in Allegations.*[1]

apprehended, without containing any negative words, the provision is only cumulative, and he may still be tried in the county where the offence was committed.

The venue in the margin shows that the indictment was found by a grand jury in the county named, not as in civil cases, that the complaint is laid as arising within the county. *Reg. v. O'Connor, supra.*

The superior court, when an indictment is removed, has the power of changing the venue. *Rex v. Nottingham*, 4 East, 210.

A suggestion may be entered by leave of the court on the roll (which suggestion is not traversable), that a fair and impartial trial cannot be obtained. *Rex v. Gloucester*, 1 Black. 378; 3 Burr. 1330. *Rex v. St. Mary*, 7 T. R. 735.

The circumstance of the witnesses being in another county is not sufficient to induce the court to change the venue. *R. v. Dunn*, 11 Jur. 287. *R. v. Meade*, 3 D. & R. 301.

[1] By 14 & 15 Vic. c. 100, s. 24, "no indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved; nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace;' nor for the insertion of the words 'against the form of the statute,' instead of 'against the form of the statutes,' or *vice versâ;* nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue; nor for want of a proper or formal conclusion; nor for want of, or imperfection in, the addition of any defendant; nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence." See *Sill v. Reg.* Dears. 132; 22 L. J. M. C. 41.

The indictment must state all the circumstances necessary to constitute the offence. *Rex v. Airey*, 2 East, 30. The rule of law upon this subject is, that every averment necessary in an indictment must be stated with such a degree of certainty as will enable the party to learn the general nature of the crime he is accused of, and who are the accusers against whom he is to defend himself. *Rex v. Lovell*, 1 Leach, C. L. 248. Certainty to a certain intent, in general, however, is all that is required. *See* Co. Litt. 303, a; 5 Co. 121, a; Arch. Pl. & Ev. 108.

Where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them. Stating them as divers goods has been held sufficient. 1 Chit. Rep. 698.

Where essential, the precise technical expressions creating the crime must be used. *Rex v. Stevens*, 5 East, 244; 1 Smith, 437.

The words "there" and "said," in an indictment, must be taken as referring to the last intelligible antecedent. *Wright v. Rex*, 3 Nev. & M. 892; 1 Ad. & E. 434.

An indictment charging that "the prisoner on, &c., at L. &c., one coat, &c., of the goods, &c. of one D. J., in the dwelling-house of M. T., then and there being:"—*Held*, to show sufficiently that the house was situate at L., and the conviction proper. *Rex v. Napper*, 1 Moo. C. C. 44.

An indictment for fraud must state the means. *Peck v. Reg.* 9 Ad. & E. 686; 1 Per. & D. 508. The indictment for stealing in a shop must expressly aver a stealing therein, and merely averring that the goods were in the shop, and that the prisoner stole them, was held insufficient. *Rex v. Smith*, 2 M. & Rob. 115.

The first count of an indictment mentioned the wife of the defendant, and the third spoke of "the said wife." This was held sufficient to denote the defendant's wife. *R. v. Dent*, 1 C. & Kir. 249.

An omission to describe the jurors as "good and lawful men within the county of J." would be fatal. *Whitehead v. Reg.* 7 Q. B. 582.

By 6 & 7 Vic. c. 85, s. 2, in any legal proceedings, whatever proceedings may be set out it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath, but it may be set out that they served as jurymen, as if no act had passed for enabling persons to serve as jurymen without oath.

An indictment commencing, "the jurors *of*," instead of "*for* our lord," &c.:—*Held*, that no advantage could be taken thereof in arrest of judgment. *Reg. v. Turner*, 2 M. & Rob. 214.

The court will take notice of a *caret*, so as to read an interlineation in the indictment correctly. *Rex v. Davis*, 7 C. & P. 319.

There cannot be an amendment *after verdict* in respect of surplusage; as, to substitute C. D. (the prisoner) for A. B. in a count for receiving the goods of A. B., "the said A. B. well knowing," &c. *R. v. Larken*, Dears. 365: 23 L. J. M. C. 125.

In an indictment for feloniously shooting, the words were, "did shoot, discharge, and send forth," the words "send forth" were rejected. *R. v. Stokes*, 2 C. & Kir. 536; 17 L. J. M. C. 116. Where the charge was, that the defendant, being servant to A.,

(C) *It must not be Double.*[1]

(D) „ *Repugnant.*[2]

(E) „ *of an unnecessary Length; and of Indictments drawn by the Clerk of the Peace.*[3]

(F) *Name of Defendant.*[4]

(G) *Statement as to the Party Injured or Defrauded.*[5]

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stole her master's money, the evidence showed that B.'s money in A.'s possession was stolen, A. being agent to B. The words "servant to A." were rejected. *R. v. Jennings*, Dears. & B. 447. If there be a count containing a charge rightly made out in proof, and another not rightly laid, the latter may be rejected, and a general finding on the whole indictment will not be invalid. *O'Connell v. Reg.* 11 Clark & Fin. 155.

[1] The defendant must not be charged with having committed two or more offences in any one count of the indictment; for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like.

[2] Where one part of an indictment is repugnant to another the whole is void, unless amended; as, for instance, an indictment charging the defendant with forging a bond, by which J. S. was bound, &c. (which is impossible if the writing be forged), or with disseising A.; and it appear upon the face of the indictment that A. had but an estate for years (2 Hawk. c. 25, s. 62; 5 East, 244): but in the instances here given the court would now, probably, cure the defect by allowing an amendment.

[3] If the indictment be defectively drawn by the clerk of the peace, he must draw another without receiving a further fee, which, in strictness, when for treason or felony, is only 2*s.* for drawing each indictment (10 & 11 Wm. 3, c. 23, ss. 7 and 8); though there is no precise limitation of the fees for drawing indictments for misdemeanors. Burn, J., Indictment, X; Dick. J., Clerk of the Peace, Indictment, 6.

[4] The Christian and surname of the party indicted ought to be accurately stated. *Rex v. Shakespeare*, 10 East, 83. The former cannot be described with an *alias dictus* (*Rex v. Newman*, 1 Ld. Raym. 562), though the latter may. *Rex v. Semple*, 1 Leach, C. L. 420. If the prisoner refuse to disclose his name he may be indicted as a person to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison. *Rex v.* ——, 1 Russ. & Ry. 489. But in prosecutions against a parish or township for the non-repair of a highway, or the non-repair of a bridge, the indictment may be against the inhabitants of the parish, township, or county generally, without naming any of them. 2 Hawk. c. 25, s. 18. The indictment will not be vitiated by the want of, or imperfection in, the addition of the defendant. 14 & 15 Vic. c. 100, s. 24. It is, however, usual to state the addition; if erroneously stated, the court has power to cause the indictment to be amended in this respect. 7 Geo. 4, c. 16, s. 19.

[5] 14 & 15 Vic. c. 100, s. 8, enacts, "From and after the coming of this act into operation, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud."

By 14 & 15 Vic. c. 100, s. 24, no indictment is to be held insufficient on the ground that any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of his proper name.

Certainty to a common intent is all the law requires in the statement of the party against whom the offence was committed. In fact, if the description be sufficient to inform the prisoner who are his accusers, the indictment may be supported. *Rex v. Lowell*, 1 Leach, C. L. 248; 2 East, P. C. 990. *Rex v. Sulls*, 2 Leach, 861.

An illegitimate child, six weeks old, was baptized on a Sunday, and from that day to the following Tuesday was called by its name of baptism and its mother's surname: — *Held* to be sufficient evidence to warrant the jury in finding that the deceased was properly described by those names in an indictment for murder. *Rex v. Evans*, 8 C. & P. 765. But where the name of a child, only twelve days old, was alleged to be unknown, it appearing not to have been baptized, and the only evidence of a name was of the mother saying she should have the child named M. M.: — *Held*, that no name of reputation was thereby acquired, and the conviction proper. *Rex v. Smith*, 1 Moo. C. C. 402. *Reg. v. Willis*, Den. 80; 1 Car. & C. 722. So where the indictment charged the assault to have been "upon a female child of tender age, and not named," it was held sufficient. "Not baptized" would not have been enough, but "not named" means that she had acquired no name, either by baptism or usage. *Reg. v. Waters*, Den. 356; 2 C. & Kir. 864. It is sufficient to give the name by which the prosecutor is best known. *Reg. v. Gregory*, 8 Q. B. 508.

Upon a trial for larceny, the only proof

(H) *Allegation as to the Ownership of Property.*[1]

of a Christian name was the statement of a witness that he had seen the prosecutor sign his name to the charge against the prisoner, and to the depositions. This evidence was held admissible, though the documents themselves may not have been receivable. *R. v. Toole*, Dears. & B. 194; 26 L. J. M. C. 79. An indictment for forging a will charged the intent in one count to be to defraud some person or persons unknown. It did not appear that the forged will was capable of effecting a fraud upon any person; and it was therefore said that no person could be named as a person intended to be defrauded. The judges were equally divided upon the question, whether the count could be supported. *Reg. v. Tuffs*, 1 Den. C. C. 319. *R. v. Lallament*, 6 Cox, 204.

The title of a peer should be set forth. The "Earl of Cornwallis" was deemed an insufficient appellation, for "earl" is not necessarily a name of degree. *R. v. Caley*, 5 Jur. 709.

It is better to leave out Christian names which are uncertain, if a person can be otherwise well described. *Reg. v. Frost*, 24 L. J. M. C. 116. And where it appeared that the party injured had a parent of the same name, it was holden not necessary to describe her as "the younger." *Rex v. Ogilvie*, 2 C. & P. 230.

Where an indictment stated a suit pending in the Ecclesiastical Court between W. P. and R. M., and the record produced described it as between W. P. and R. M., the elder:—*Held*, sufficient. *Rev v. Bailey*, 7 C. & P. 264. Where the prosecutor, at the time of making his complaint, gave in his name as P., by which he was often familiarly called, but it was proved that his mother (deceased) always called him by the name stated in the indictment:—*Held*, sufficient. *Rex v. Williams*, 7 C. & P. 298. *Rex v.* ——, 6 id. 408. Description of a peer of Ireland by his Christian name, family name, and title:— *Held*, sufficient: and that the insertion of the surname was no variance, as the court would not intend two to be only his Christian name. *Rex v. Brinklett*, 3 C. & P. 416. But describing him as "lord," and not "baron:"—*Held*, insufficient. *Reg. v. Pitts*, 8 id. 771. A mere error in the spelling of the name does not afford any ground of objection.

Upon the question whether Darius and Trius were the same, the court said that the jury should have had the question submitted to them, and the conviction was quashed. *R. v. Davis*, Den. & P. 231; 20 L. J. M. C. 207.

[1] Where the prosecutors or parties injured are partners, joint-tenants, parceners, or partners in common, it will be sufficient to have one, and to state the property, &c. to belong to him "and another," or "others," and they may be described thus wherever it is necessary to mention them. 7 Geo. 4, c. 64, s. 14. Materials for making or repairing county bridges, gaols, or other buildings, may be stated to belong to the inhabitants of the county generally. (Id. s. 15.) Goods provided for the poor of a parish or township may be described as the goods of the overseers for the time being. (Id. s. 16.) Tools and materials for repairing highways may be described as belonging to the surveyors, without naming them. (Id.) Tools or materials for turnpike-roads, or the buildings, gates, &c., may be described to belong to the trustees or commissioners, without naming them. (Id. s. 17.) So property belonging to the Commissioners of Sewers may be described as belonging to such commissioners, without naming them. (Id. s. 18.)

In an indictment against a servant of the West India Dock Company for stealing a quantity of canvas and linen belonging to the company from their warehouses, it was held sufficient to state the property to be the goods and chattels of the West India Dock Company, and not necessary, notwithstanding the words of the 1 & 2 Wm. 4, c. 52, s. 33, to allege, in addition, that it was "feloniously taken from the said company." *Reg. v. Stokes*, 8 C. & P. 151. Where a servant, with his family, inhabited part of the house of business of a company, the whole being open to him, and he and his family the only persons dwelling there:—The judges held that it might properly be described as his dwelling-house; and *semble*, it might also have been laid as the house of the company (*Rex v. Witt*, 1 Moo. C. C. 248); but where a servant was sent out by his master to receive money from the master's customers, and having received the money he was robbed of it on his way home, *semble*, that an indictment for this robbery, in which the money was laid to be the property of the employer, could not be supported, as the money had never been in the possession of the master. *Rex v. Rudick*, 8 C. & P. 237. *Rex v. Finch*, 1 Moo. C. C. 418. *Rex v. Smith*, 7 C. & P. 147. Where a dwelling-house is occupied by distinct tenants, and the owner reserves no part to himself, each part may be stated as the separate dwelling-house of each. *Rex v. Bailey*, 1 Moo. C. C. 23.

Property of a joint-stock bank laid as the property of one of the partners was held sufficient, an objection that it was indispensable to allege that the property belonged to the public officer could not be sustained. *R. v. Pritchard*, 30 L. J. M. C. 169; 8 Cox, 461.

An indictment for stealing property bailed, may be described as that of the bailor. *Rex v. Remnant*, 1 R. & R. 136. The shroud of a dead person as the goods and chattels of the executor or administrator (2 Hale, 181); or if there be no will, or no administrator, it should seem that it may be laid to be the goods of the persons who defrayed the ex-

(I) *With respect to Value or Damage.*[1]

(K) *Statement of Offence.*[2]

penses of the burial; or of the ordinary, if the shroud were purchased with the money of the deceased.

Property stolen from a *feme sole* may be laid as hers, though she marry before indictment. *Rex v. Turner* (Maidstone), 1 Leach, C. L. 536. Clothes or other necessaries furnished by a father to his child may, it seems, be laid to be the property either of the father or the child, particularly if the child be of tender age (2 East, 654); but it is safer, perhaps, to allege it to be the property of the child. *See* 1 Leach, 463, 464, n.

[1] The want of a statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, does not vitiate the indictment in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence. 14 & 15 Vic. c. 100, s. 24.

[2] The indictment must set forth every fact which is a necessary ingredient in the offence (*Rex v. Roberts*, 4 Mod. 103); as on an indictment for an escape, the original cause of imprisonment (*Rex v. Freeman*, 2 Stra. 1226); or if notice be necessary to raise the duty which the defendant is alleged to have broken, it must be stated. *Rex v. Holland*, 5 T. R. 607. *Rex v. Phillips*, 6 East, 474. *Rex v. Dixon*, 3 M. & S. 11. But where the crime exists without circumstances which are constituent parts of the offence, they need not be stated, except in aggravation (*Rex v. Horne*, Cowp. 683); which is usually, however, proved in evidence at the trial. *Rex v. Turner*, 1 Stra. 140. So it is not necessary to state a conclusion of law resulting from facts. *Rex v. Smith*, 2 B. & P. 127.

The offence must not be stated in the disjunctive. *Rex v. Stocker*, 5 Mod. 137. As, that the defendant erected or caused to be erected. *Rex v. Staughton*, 2 Stra. 900. It is not necessary, however, to negative all the exceptions (except they be in the enacting clause) which the statute creating the offence contains, since that may be shown by the defendant as matter of discharge. *Rex v. Baxter*, 2 Leach, 578; 2 East, P. C. 781.

14 & 15 Vic. c. 100, s. 4, enacts, "in any indictment for murder or manslaughter preferred after the coming of this act into operation, it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased."

Unnecessary averments, or those not intimately connected with the circumstances, may be rejected; but those constituting the charge must be proved. *Rex v. Holt*, 2 Leach, C. L. 593. But the introduction of unnecessary averments is very objectionable, because it tends to confuse the grand jury (*Rex v. Fieldhouse*, Cowp. 325), who cannot find one part of the same count to be good and return *ignoramus* as to the residue. Cowp. 325; Hawk. b. 2, c. 25, s. 2, n. 1; 2 Roll. Rep. 52. The offence must not be stated by way of recital, as "that whereas" (*Rex v. Askman*, 1 Sess. Ca. 159); and must charge a man with a particular specified offence, and not with being an offender in general; for no one can know what defence to make to a charge which is thus uncertain: it cannot be pleaded in bar, abatement of a subsequent prosecution, nor can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him, nor will it judicially appear to the court what punishment is proper upon conviction.

In treason, also, if letters or other written instruments be laid as overt acts, it is sufficient to set forth the substance of them; for the gist of the offence is the compassing, &c., and the overt acts but proofs or evidences of it. Fost. 194. *Rex v. Preston*, 4 St. Tr. 411. *Rex v. Francia*, 6 id. 58, 73. In larceny of written instruments, such as bank-notes, bills of exchange, &c., it is not necessary that the indictment should set them out *verbatim;* describing them in a general manner is sufficient. 14 & 15 Vic. c. 100, s. 5; 2 East, P. C. 602, 777. And in all other cases where part only of a written instrument is included in the offence, that part alone is necessary to be set out. Where a libel is in a foreign language it must be set out in the indictment: 1st, in the language in which it is written, otherwise the defendant may demur, move in arrest of judgment, or bring in a writ of error (6 T. R. 162); and 2d, a translation of it must be set out, and must be proved to be a correct translation at the trial. And the same rule, it should seem, is equally applicable to all cases of written instruments in a foreign language.

The word "knowingly" is sufficiently expressive of a knowledge (*Rex v. Lawley*, 2 Stra. 904), which, if superfluously stated, may be rejected. *Williamson v. Allison*, 2 East, 452. The words "as follows," "that is to say," do not bind the party to an exact recital (*Rex v. Hart*, 1 Leach, C. L. 145); and the same rule applies to the words "in manner and form following," "that is to say." *Rex v. May*, 1 Dougl. 193, 194. *See post*, Libel.

The statement of an entry into a house, describing it as a messuage or dwelling-house, is good, because their signification is simi-

(L) *Allegations with respect to Time.*[1]
(M) „ „ *to Place.*[2]
(N) *Description of Instrument Forged or Stolen.*[3]

lar; but messuage or tenement would be bad, because the import of the latter word is uncertain. Cro. Jac. 634; 1 East, 441; 8 id. 357; 2 Stra. 891. So, an indictment for a nuisance, charging the defendant "with doing or causing to be done" the act complained of, is bad. 2 Stra. 901.

The omission of the words "with force and arms," does not vitiate the indictment. 14 & 15 Vic. c. 100, s. 24.

[1] By the 14 & 15 Vic. c. 100, s. 24, "no indictment shall be held insufficient for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, as on a day that never happened."

The old rule was, that in an indictment every fact which is issuable and triable must be laid with time (*Rex v. Holland*, 5 T. R. 607), which must be definite in allegation, though it may be indefinite in proof. *Rex v. Johnson*, 3 M. & S. 548.

After the time has been once named with certainty, it is sufficient to refer to it by the words "then and there," which have the same effect as if the day and year were actually repeated. All the facts are usually stated to have occurred at the same time and place.

Where a mere negative or omission is averred, no time need in general be stated. *Rex v. Holland*, 5 T. R. 616.

An indictment may charge the prisoner with committing the offence on divers days, only specifying one. *Rex v. Chandler*, 1 Ld. Raym. 581.

Where the offence was laid on the 21st of June, 1 Vic., and the indictment concluded "against the peace of her majesty," and the proof was of an offence committed in April, 7 Wm. 4, the prisoner was held entitled to an acquittal. *R. v. Pringle*, 2 M. & Rob. 276. *See* also *R. v. Fenwick*, 2 C. & Kir. 915. *R. v. Scott*, 25 L. J. M. C. 128. "Victoria the First" was held mere surplusage. *R. v. Bevis*, 1 Cox, 27.

An indictment for perjury stated the act as having been done on the 29th of June, in the year 1846. *Parke, B.*, after considering, said that he had never seen an indictment without the year of the monarch, or "the year of our Lord," but he left the defendant to his writ of error, and did not arrest the judgment. *R. v. Kimpton*, 2 Cox, 296.

The abolition of the necessity of strictness in the allegation of immaterial facts (7 Geo. 4, c. 64, s. 20; 14 & 15 Vic. c. 100, s. 24), and the extensive power of amendment conferred by the legislature (14 & 15 Vic. c. 100, s. 1; *see* vol. i. p. 340) have, to a great extent, rendered the above distinctions of comparatively slight importance.

[2] The 14 & 15 Vic. c. 100, s. 22, enacts "that it shall not be necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment: Provided that, in cases where local description is, or hereafter shall be required, such local description shall be given in the body of the indictment."

The indictment should be certain as to place. *Rex v. Matthews*, 5 T. R. 162. *Rex v. Holland*, id. 607.

The place must be such as in strictness the jury who are to try the cause should come from.

If a city or town contain one or more parishes, the parish must be stated; if, on the contrary, a parish contain two or more towns, and the offence have been committed in one of the towns, the town must be stated. 2 Hawk. c. 23, s. 92; Sid. 325; 9 Co. 66, b.

In London it is usual to name the ward as well as the parish. Thus, "in the parish of St. Mary-le-Bow, in the ward of Cheap;" but this is not requisite. 2 Hawk. c. 23, s. 92.

[3] 14 & 15 Vic. c. 100, s. 5, enacts, "in any indictment for forging, uttering, stealing, embezzling, destroying, or concealing, or for obtaining by false pretences any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof."

By sect. 6, "in any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful possession of any plate or other material, upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing, by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing."

By sect. 7, "in all other cases whenever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, with-

(O) *Description of Money or Bank-Notes.*[1]

(P) *Conclusion of Indictment.*[2]

V. Joinder and Election of Counts.[3]

out setting out any copy or fac-simile of the whole or any part thereof."

[1] By 14 & 15 Vic. c. 100, s. 18, "in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved; and in cases of embezzlement, and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin, or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly."

[2] The insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ*, does not vitiate the indictment. 14 & 15 Vic. c. 100, s. 24.

Where the offence, but for the statute, would not be indictable, the omission of the words "against the form," &c. held not cured by the 7 Geo. 4, c. 64, s. 20. *Rex v. Pearson*, 1 Moo. C. C. 313.

Where an indictment concluded "against the peace of our lord the present," instead of "the late" king:—*Held*, that a bad conclusion of *contra pacem* was as if none, but cured by the 7 & 8 Geo. 4, c. 64, s. 23, and that although the objection was taken at the close of the particular case. *Rex v. Chalmers*, 1 Moo. C. C. 352; S. C. 5 C. & P. 331. So, on a conviction of manslaughter, on an indictment for murder, not concluding *contra formam statuti*. *Rex v. Berry*, 1 M. & Rob. 463.

In order to warrant a sentence of transportation for life, on an indictment for larceny, after a previous conviction for felony, the indictment need not conclude *contra formam statuti*. *Rex v. Blea*, 8 C. & P. 735.

If an offence were felony at common law, but a special act of parliament ousts the offender of some benefit that the common law allowed him, when certain circumstances are in the fact, though the body of such indictment must express those circumstances according as they are prescribed in the statute, yet the indictment need not conclude "against the form of the statute." But yet if it should conclude in such case "against the form of the statute," it would not vitiate the indictment, but would be only surplusage. 2 Hale, 190; id. 192. *Rex v. Matthews*, 5 T. R. 162. *Rex v. Smith*, 2 Dougl. 445.

An indictment for misdemeanor concluded "to the great scandal of the liege subjects," &c. not saying "*ad communem nocumentum*;" but the court held that the 14 & 15 Vic. c. 100, s. 24, afforded an answer to the objection. *R. v. Holmes*, 22 L. J. M. C. 122.

[3] A defendant ought not to be charged with different felonies in different counts of an indictment. If the objection in such case be made before the defendant has pleaded or the jury are charged, the judge in his discretion may quash the indictment; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which count he will proceed. *Young v. the King* (in error), 3 T. R. 98. But it is no objection in arrest of judgment. See *O'Connell v. Reg.* 11 Clark & Fin. 155. *Reg. v. Hinley*, 2 M. & Rob. 524; 2 M. & S. 379.

By the 24 & 25 Vic. c. 96, s. 92, in any indictment containing a charge of feloniously stealing any property, a count or counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen, may be added; and in any indictment for feloniously receiving any property, knowing it to have been stolen, a count for feloniously stealing the same may be added; and the prosecutor is not to be put to his election, but the defendant may be found guilty either of stealing or receiving.

Several felonies of the same degree, though committed at different times, may be joined in the same indictment. *Rex v. Johnson*, 2 Leach, C. L. 1103. As, that defendant endeavoured to incite a soldier to commit mutiny, and also to commit traitorous practices. *Rex v. Fuller*, id. 791; 1 East, P. C. 92. So several misdemeanors may be joined. *Young v. Rex*, 3 T. R. 98. In arson, counts at common law and on the statute may be joined. A count for robbery may be joined with another for stealing privately from the person; and burglary and theft, forcible entry and detainer, have been frequently joined in the same proceeding; and where several forged receipts have been uttered at one and the same time, and might constitute only one offence, several counts for each receipt have been allowed; and a count for embezzlement may be joined with a count for larceny, because both these offences are felonies.

If the offences be misjoined it is no ground of demurrer, but application should be made to quash the indictment. *Rex v. Kingston*, 8 East, 41. Each count imports to be a different offence (*Young v. the King*, 3 T.

VI. Objection to Indictment.

(A) *Must be taken before the Jury are Sworn if Defect apparent.*[1]

VII. Of the Amendment of Indictments.

(A) *In Names and Matter of Description.*[2]

R. 106), and must depend upon itself alone (*Rex v. Holland*, 5 id. 607), though it may refer to a matter in another count to avoid unnecessary repetitions. *Phillips v. Fielding*, 2 H. Black. 131. The conclusion "as against," &c. is the mark distinguishing where the count ends. *Rex v. Haynes*, 4 M. & S. 214. And each count must have its appropriate conclusion. *Rex v. Mason*, 2 T. R. 581.

The application for a prosecutor to elect is to the discretion of the judge. Where several houses had been burnt, and the setting each on fire was alleged in distinct counts, being one transaction, the judge refused the application. *Reg. v. Trueman*, 8 C. & P. 727. Where there are several indictments for misdemeanors, being substantially the same offence, the court will order the prosecutor to elect, and abandon the others. *Rex v. Britton*, 2 M. & Rob. 297. But where an indictment contained counts charging a party as accessory, both *before* and *after* the fact committed by other prisoners:—*Held*, not improperly joined, and that the prisoner could not be put to elect. *Rex v. Blackson*, 8 C. & P. 43. Where two different indictments were preferred, one for a capital offence, and the other as for a misdemeanor, the court made the prosecutor elect, and directed an acquittal on the other. *Rex v. Smith*, 3 C. & P. 412.

Where there were counts for sedition for attending a seditious meeting and for riot, the court refused an application to quash the indictment or put the prosecutor to his election. *Reg. v. Fussell*, 3 Cox, 291.

Where an assault with intent to rob was joined with a count on misdemeanor for attempting to steal, and a verdict was found against the prisoner upon the count for felony only, the conviction was supported. *R. v. Ferguson*, 24 L. J. M. C. 61; Dears. 427. See *R. v. Jones*, 2 Moo. C. C. 94.

The court will not strike out any of the counts, however numerous. *Rex v. Pewtress*, 2 Stra. 1026; Ca. Temp. Hard. 203.

If there be several counts, one may be ignored and the other returned *billa vera*. *Rex v. Fieldhouse*, Cowp. 325.

If there be but one count, the jury may find the prisoner guilty of a minor offence included in the charge. *Rex v. Withal*, 1 Leach, C. L. 88.

The reason, therefore, in these cases for the introduction of second counts applicable to the inferior charge is, that the grand jury cannot, like the petit jury, select parts of counts as true, but must either find or reject the whole of every distinct count in the indictment. The rules, however, as to finding an inferior degree of guilt, must be understood with some limitation; for a felony cannot, upon the trial, be modified into a misdemeanor, unless authorised by the statute (1 Leach, 14; 2 Stra. 1133; Cro. Jac. 497); and if the indictment charge a felony, and a special verdict find the facts, which amount only to a misdemeanor, no judgment can be given against the defendant upon such indictment. 1 Leach, 702; 2 East, P. C. 737, 778.

[1] 14 & 15 Vic. c. 100, s. 25, enacts, "every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer on motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court, or other person, and thereupon the trial shall proceed as if no such defect had appeared."

[2] 14 & 15 Vic. c. 100, s. 1, enacts, that "whenever on the trial of any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the name of any county, riding, division, city, borough, town corporate, parish, township, or place, mentioned or described in such indictment, or in the name or description of any person or persons or body politic or corporate therein stated, or alleged to be the owner or owners of any property real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body corporate or politic, therein stated or alleged to be injured or damaged by the commission of such offence; or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named and described" [see *Reg. v. Lord Cardigan*, cited 24 L. J. M. C. 117; 1 Dears. 477, n.]; "or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such

(B) *In case of Variance between Writing given in Evidence and that set out in Indictment.*[1]

terms of postponing the trial, to be had before the same or another jury as such court shall think reasonable; and after such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend, shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment and filed, together with the indictment, in the records of the court: provided that in all such cases where the trial shall be postponed as aforesaid, it shall be lawful for such court to respite the recognisances of the prosecutor and witnesses, and of the defendant and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisances to appear and prosecute and give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

The verdict and judgment after the amendment is of equal force as if no amendment had been made. 14 & 15 Vic. c. 100, s. 2. And when necessary to draw up a record of the proceedings, it is drawn up in the amended form, without noticing the fact of the amendment having been made. Id. s. 3. The caption may be amended. *Rex v. Davies*, 1 C. & P. 470.

An information may be amended at the instance of the Crown, by adding counts even after plea. *Attorney-General v. Smith*, 5 Mee. & W. 372.

There must be something to amend by: accordingly, where the object was to show that twenty-eight entered of twenty-three persons had acted as grand jurors, the court could not interfere for want of minutes to amend by, the town-clerk of the place where the indictment was found swearing that he had none in his possession. *Reg. v. Marsh*, 1 Jur. 38.

An amendment which alters the nature or quality of the offence charged will not be made; therefore, where the defendant was indicted for a forgery charged as a statutable felony, but the document was held only to be the subject of misdemeanor at common law, the judge (*Hill, J.*) refused to allow the word "feloniously" to be struck out of the indictment. *Reg. v. Wright*, 2 F. & F. 320.

The statute does not empower the court to make an amendment in the indictment after verdict, in order to defeat a motion in arrest of judgment. *Reg. v. Larkin*, Dears. C. C. 365.

An amendment has been made by striking out an erroneous and unnecessary statement of the time of the passing of an act of parliament referred to in the indictment. *Reg. v. Westley*, 1 Bell, C. C. 193.

In an indictment for concealment, it was charged that the child's body had been laid in and among a heap of carrots. The evidence showed that it was laid "behind." The judge refused to allow an amendment. *R. v.* ——, 6 Cox, 391. An indictment for perjury assigned on the trial of a charge for arson, called the thing burned a "barn:" whereas it was a stack of barley; but it appeared that both barn and stack were destroyed, it was held the judge properly amended the indictment. *Reg. v. Neville*, 6 id. 69. In arson, where the house of the tenant was irregularly described as that of the landlord, *Crompton, J.*, allowed an amendment. *R. v. Kimbrey*, 6 id. 464. It has been said that, if the materiality of an averment on perjury be not sufficiently stated, the omission is not amendable under 14 & 15 Vic. c. 100. *R. v. Harvey*, 8 id. 99.

[1] Variance between written or printed matter given in evidence, and the recital or setting forth thereof in the indictment, may be amended.

11 & 12 Vic. c. 46, s. 4, enacts, "that it shall and may be lawful for any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital and setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in such manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared."

The same power of amendment is enjoyed by courts of general and quarter session. 12 & 13 Vic. c. 45, s. 10. *See* vol. i. p. 341.

Variances between matter in writing or

VIII. Quashing Indictment.[1]

IX. Of Demurrers.[2]

print and the indictment or information, might, before this act, be amended in cases of misdemeanors by virtue of the 9 Geo. 4, c. 15.

An amendment has been refused under the similar enactment of the 9 Geo. 4, c. 15, where no variance would have occurred if common care had been used in drawing the indictment. *Jelf v. Oriel*, 4 C. & P. 22. Where a judgment of one court was described as of another (*Bryant v. Eicke*, M. & M. 359), and where the date of a bill was misdescribed (*Bentzing v. Scott*, 4 C. & P. 24), amendments were allowed. So "commissioner" was inserted for "commissioners," in the title of a cause with reference to which perjury was assigned. *Reg. v. Christian*, Car. & M. 388. *See* also *Reg. v. Newton*, 1 C. & Kir. 469. The 9 Geo. 4, c. 15, was held to apply only to cases in which a written instrument was professed to be set out (*Ryder v. Malbon*, 3 C. & P. 594), and then only to mere verbal alterations, and not to omissions, which altered the effect of the part set out. See *Rutherford v. Evans*, 4 C. & P. 79. *Bentzing v. Scott, supra. Bryant v. Eicke*, M. & M. 357. *Reg. v. Christian, supra. Webb v. Hill*, 3 C. & P. 485.

[1] Where an indictment is so defective that no judgment can be given upon it, if the defendant be convicted, the court, upon application, may quash the indictment. See *Reg. v. Philpotts*, 1 C. & Kir. 112. *R. v. Sarmon*, 1 Burr. 516. *R. v. Weston*, 1 Stra. 623. *R. v. Rigby*, 8 C. & P. 770. *R. v. Bainton*, 2 Stra. 1088. *R. v. Tucker*, 4 Burr. 2046.

On motion, the court are not bound to quash an indictment, and in general, if they do, will impose terms (*Rex v. Webb*, 3 Burr. 1469), even on the application of the prosecutor, unless defective (*Rex v. Strattan*, 1 Doug. 240), and another sufficient one has been found. *Rex v. Wynn*, 2 East, 226.

An indictment cannot be quashed in part. *Reg. v. Withers*, 4 Cox, 17. Where a corporation was indicted for a misdemeanor the court discharged a rule for quashing the indictment, leaving the defendants to their demurrer, with liberty to plead over in the event of a decision against them. *Reg. v. Birmingham and Gloucester Railway Co.* 1 Gale & D. 457. Where two indictments were found against the same defendant, one for felony and the other for misdemeanor, both were removed, and it was moved to quash them upon affidavit that both related to the same transaction: the court refused the application. *Reg. v. Stockley*, 3 Q. B. 238. In *Reg. v. Dunn*, 1 C. & Kir. 730, the defendant was indicted for perjury at the spring assizes, 1843. He then entered into a recognisance to try at the summer assizes, 1844; but another indictment was preferred against him at these assizes for the same offence. The first indictment was quashed upon condition that the prosecutor should pay to the defendant the costs of the traverse and recognisance, and that the defendant should proceed to trial on the second indictment without traversing; for it was clear that the defendant had a right to have the first indictment disposed of before the trial of the second.

The motion for leave to quash an indictment is absolute in the first instance, even although the defendant has removed the indictment, and has neither appeared nor pleaded. *Reg. v. Stowell*, 1 Dowl. N. S. 320; 5 Jur. 1010.

The court of quarter sessions has the power of quashing indictments where an indictment for forcible entry, assault and riot, had been quashed at sessions; the court of Queen's Bench refused to enter upon the question whether it had been properly quashed, but left the parties to their writ of error. *Reg. v. Wilson*, 6 Q. B. 620.

If the foundation of the motion to quash the indictment be for a formal defect apparent on the face of it, the objection must be made before the jury are sworn; and the court has power, if it think necessary, to cause the indictment to be forthwith amended in such particular. 14 & 15 Vic. c. 100, s. 25.

[2] Demurrers are of rare occurrence in criminal cases. The judgment for the defendant upon the demurrer is that he be dismissed and discharged from the premises. The judgment against the defendant in misdemeanor is the same as upon demurrer in civil cases (*R. v. Taylor*, 3 B. & C. 502; 5 D. & R. 422), and the court has the same power of permitting the defendant afterwards to plead over. *Reg. v. Birmingham and Gloucester Railway Co.* 3 Q. B. 224. But in felonies the court, *in favorum vitæ*, will allow the defendant to plead over. 2 Hale, 225; 4 Bl. Com. 334. *R. v. Gibson*, 8 East, 107. *R. v. Taylor*, 3 B. & C. 502; 5 D. & R. 422. *Reg. v. Purchase*, C. & M. 617.

It is not of right, however, that the defendant in cases not capital demurs and pleads over in felony (*Reg. v. Odgers*, 2 M. & Rob. 479); but even in misdemeanor the court will, in its discretion, permit the *respondeat ouster*. *Reg. v. Birmingham and Gloucester Railway Co.* 6 Jur. 804. And in effect the prisoner may demur and plead over in felony at the same time. *R. v. Adams*, Car. & M. 299. See *R. v. Phelps*, id. 180. And he has even been allowed to do so after having, in the absence of his counsel, pleaded not guilty. *R. v. Purchase*, Car. & M. 617. In general, however, after plea, without surprise or advice, the prisoner cannot recur to a demurrer. He must not withdraw his plea of not guilty for the sake of a mere technical objection. *R. v. Hunt*, 3 Cox, 215. And if the judgment

X. Of the Plea.

(A) *Time and Mode of Pleading.*[1]

(B) *Not Guilty, or Plea in Bar.*[2]

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should be for the prisoner, the indictment not sufficiently charging the facts, such judgment will be no bar to a subsequent indictment for the same felony. *R. v. Richmond*, 1 C. & Kir. 240.

If the demurrer be for a formal defect apparent on the face of the indictment, it must be before the jury are sworn; and the court may amend the defect if it think it necessary so to do. 14 & 15 Vic. c. 100, s. 25.

[1] When the defendant has any special matter to plead in abatement or bar, as a former acquittal or conviction, a pardon, &c., he should plead it at the time of arraignment, before the plea of not guilty.

It is enacted by the stats. 60 Geo. 3 & 1 Geo. 4, "that where any person shall be prosecuted in his majesty's court of King's Bench, at Westminster or Dublin, for any misdemeanor, either by information or indictment there found or removed into that court, or shall appear in term time in either of the said courts respectively in person to answer to such indictment or information, such defendant, upon being charged therewith, shall not be permitted to imparle to a following term, but shall be required to plead or demur thereto within four days from the time of his or her appearance; and in default of his or her pleading or demurring within four days as aforesaid, judgment may be entered against the defendant, as for want of plea; and in case such defendant shall appear to such indictment or information by his or her clerk or attorney in court, it shall not be lawful for such defendant to imparle to a following term, but a rule requiring such defendant to plead may forthwith be given, and a plea on demurrer to such indictment or information enforced, or judgment by default entered thereupon, in the same manner as might have been done before the passing of this act in cases where the defendant had appeared to such indictment or information by his or her clerk or attorney in a previous term."

But by sect. 2, the court or a judge may, on sufficient cause shown, allow further time for the defendant to plead or demur.

In prosecutions for felonies, the plea will be insufficient if pleaded by attorney. Carth. 55, 56. But a defendant charged with a mere misdemeanor may, in the Queen's Bench, so plead, and is not obliged to be personally before the court. 10 East, 33.

[2] The general issue is pleaded by the prisoner *vivâ voce* at the bar in these words, "Not guilty;" by which plea, without further form, every person not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy, is deemed to have put himself upon the country for trial, by 7 & 8 Geo. 4, c. 28, s. 1. *See infra.* And if any person being arraigned upon, or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may, if it shall so think fit, order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. (Sect. 2.)

The general issue makes it incumbent on the prosecutor to prove every fact and circumstance constituting the offence as stated in the indictment or information; on the other hand, the defendant may give in evidence, under this plea, not only everything which negatives the allegations in the indictment, but also all matter of excuse and justification, except *autrefois acquit*, &c.

As all matters of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice; in fact, the only instance (with the exception of the plea of *autrefois acquit*, &c.), in which a special plea in bar seems requisite in criminal cases, is where a parish or county is indicted for not repairing a road or bridge, &c., and wishes to throw the *onus* of repairing upon some person or persons not bound of common right to repair it; in which case, they must plead specially the liability of the party to repair, and the reason of his liability, so as to take the case out of the common-law rule, that every highway shall be repaired by the parish, and every bridge by the county in which it is situate.

Nor more than one plea can be put in to answer any indictment or criminal information. See *Reg. v. Strahan*, 7 Cox, 85. In case of felony, however, if the prisoner plead in bar or abatement, and it be adjudged against him, he will have liberty at the same time, or even afterwards, to plead over to the matter of the indictment, as if he had never relied upon any other ground of defence: for though a man may lose his property by mispleading, he cannot forfeit his life by any technical nicety or legal error. This does not, however, include misdemeanors of any description as a matter of right; therefore, in these cases, if a defendant plead in abatement or bar, and an issue in fact thereon be determined against him, he will have totally lost the benefit of a trial on the offence itself, and sentence may be pronounced as though he had regularly been convicted.

It seems, however, to be in the discretion of the court to allow him still to plead not guilty.

By the stat. 7 & 8 Geo. 4, c. 28, s. 1, it is enacted, "that if any person, not having privileges of peerage, being arraigned upon

(C) *Plea in Abatement.*[1]

XI. Within what Time Indictment must be Preferred.[2]

XII. Relative to the Removal of.

(A) *By Certiorari.* *See* Certiorari, vol. iii. p. 62.

(B) „ *Writ of Error.* *See* Error, Writ of, vol. iv. p. 262.

(C) „ Habeas Corpus. *See* Habeas Corpus, id. p. 619.

XIII. Relative to the Finding of.[3]

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an indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall, by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court shall, in the usual manner, order a jury for the trial of such person accordingly."

In pleading a pardon, it should be described as under the great seal. *Bull v. Tilt*, 1 B. & P. 199. *See post*, Pardon. And on an indictment for returning from transportation, the king's sign manual may be given in evidence by the prisoner. *Rex v. Miller*, 2 Black. 797.

A plea to an indictment before filing may be amended. *Rex v. Knolles*, 1 Salk. 47.

14 & 15 Vic. c. 100, s. 28. "In any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment."

A plea, whether of guilty or not guilty, cannot be withdrawn without leave of the judge, in conceding or withholding which he exercises a judicial discretion, which will not be reviewed on a case reserved. *Reg. v. Brown*, 17 L. J. M. C. 145; Den. 291.

A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot afterwards be allowed to retract his plea, and plead not guilty. *Reg. v. Sell*, 9 C. & P. 346.

[1] Any sufficient defect apparent on the face of the indictment may be made the ground of a plea in abatement, and if found for the defendant, will abate the indictment. 2 Hale, 236, 238. It is always necessary to plead it before any plea in bar, and the defendant will be estopped by an issue. 2 Hale, 175; Fost. 16; Bac. Abr. Indictment, G. 2; Hawk. b. 2, c. 34, s. 4; Williams, J., Misnomer and Addition, 11. And the proper time to take advantage of it is upon the arraignment, when the prisoner is called upon to answer. 2 Hale, 175; Williams, J., Misnomer and Addition, 11.

A plea in abatement must be verified by affidavit. *Rex v. Grainger*, 3 Burr. 1617.

[2] By the 31 Eliz. c. 5, all indictments upon any statute penal, whereby the forfeiture is limited to the king, shall be brought within two years after the offence committed; if the forfeiture be limited to the king and prosecutor, the suit shall be in one year, and in default thereof, the same shall be sued for the king within two years after that year ended; but where a statute limits a shorter time, the suit shall be brought within such time limited. But for indictments of felonies and other misdemeanors, where there is no forfeiture to the king, or to the king and prosecutor, no time is limited at common law or by statute, but the several acts of general pardon have the effect of a like limitation.

[3] In ordinary cases, upon furnishing the clerk of the arraigns or clerk of the indictments at the assizes, or clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing the indictment, it is better to get it drawn by counsel, and then let it be engrossed on plain parchment without stamp. Indorse on it the names of the witnesses intended to be examined before the grand jury. As soon as the indictment is engrossed, the crier at the assizes, or clerk of the peace at sessions, will administer the oath to the witnesses; the proper officer will then lay the indictment before the grand jury. After the indictment has been taken to the grand-jury room it will come under the consideration of the grand jury in its turn. The witnesses are then called in, in the order in which their names are indorsed on the indictment, and examined by the grand jury; and if the offence should appear to a majority of the jury (consisting of twelve, at least) to have been sufficiently proved, the clerk of the grand jury will indorse on the indictment "A true bill;" but if the majority should be of opinion that the offence had not been sufficiently proved, the words, "No true bill," are in that case indorsed on the indictment.

If witnesses will not come forward voluntarily to give evidence before the grand jury, a subpœna, or subpœna *duces tecum*, may be sued out, either at the Crown Office in London or with the clerk of the arraigns in the county for the assizes, or at the Crown Office, or with the clerk of the peace for the sessions, and each of them served with a copy, or subpœna ticket, as it is termed: or, if the witness be in prison, he may be brought up by *habeas corpus ad testificandum*, to be sued out in the manner mentioned under title Habeas Corpus, vol. iv. p. 619.

A grand jury have no authority by law to ignore a bill for murder, on the ground of

XIV. Defendant's Right to a Copy of Indictment, Depositions, and Particulars of Offences.[1]

insanity, though it appear clearly from the testimony of the witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane; but if they believe the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill, otherwise the court cannot order the detention of the party during the pleasure of the Crown, as it can, either by arraignment or trial, under the stat. 39 Geo. 3, c. 94, ss. 1, 2. *Reg. v. Hodges*, 8 C. & P. 195.

The grand jury returned a bill of indictment, which contained *ten* counts, for forging and uttering the acceptance of a bill of exchange, with an indorsement, "A true bill on *both* counts," and the prisoner pleaded to the whole ten counts. After the case for the prosecution had concluded, the prisoner's counsel pointed this out. The grand jury were discharged, and the judge would not allow one of the grand jurors to be called as a witness to explain their finding. *Reg. v. Cooke*, id. 582. *Reg. v. Carlisle*, id. 584, n.

Preferring a bill of indictment is an act done by the party, as the commencement of a prosecution, although ignored; and *semble* sufficient to warrant a conviction of the party on another bill subsequently preferred after the time limited for prosecution of the offence. *Rex v. Kilminster*, 7 id. 228.

Should the bill be ignored, the jury may still find a bill for the same offence at the same assizes or sessions, if there be additional evidence. *R. v. Newton*, 2 M. & Rob. 503. *R. v. Simmonite*, 1 Cox, 30. But it seems that no second bill can be preferred on the same facts. *R. v. Humphreys*, 1 C. & M. 601. *R. v. Austin*, 4 Cox, 385.

If the bill be mislaid, and not discovered till the jury are discharged, they cannot find another bill, and the finding being insufficient, the prisoner will be admitted to bail until the next session. He is not entitled to his discharge until the second session. *R. v. Thompson*, 1 Cox, 268. But *see contra*, *R. v. Austin*, *supra*.

[1] By 60 Geo. 3 & 1 Geo. 4, c. 4, s. 8, in prosecutions for misdemeanors, instituted by the attorney or solicitor-general, in any of the courts therein mentioned, the court shall, if required, make order that a copy of the information or indictment shall be delivered after appearance to the party prosecuted, or his clerk in court, or attorney, upon application made for the same, free from all expense to the party so applying, provided that such party, or his clerk in court, or attorney, shall not have previously received a copy thereof.

Where the counts are framed in general terms, a judge will order a particular of the charges to be given, so as to disclose the same information to the party as would be done by a special count, but not to disclose specific facts, or dates, or places; but a particular ought not to state that the prosecutor will go also into other evidence. *Rex v. Hamilton*, 7 C. & P. 448. The court will grant an order, in some cases, on the prosecutor to deliver to the prisoner a particular of the charges. *Per Littledale: Rex v. Bootyman*, 5 id. 300. And by 6 & 7 Wm. 4, c. 114, copies of depositions are to be allowed to the prisoner.

The prosecutor is not bound to pay for the copy of the indictment found, but only the certificate. *Rex v. Redfern*, 1 M. & M. 198.

The prisoner, when arraigned, is entitled to have the indictment read over. *R. v. Newton*, 1 C. & Kir. 469. *R. v. Dowling*, 3 Cox, 509. See *R. v. Bernard*, 1 F. & F. 240.

By the 11 & 12 Vic. c. 42, s. 27, it is enacted, "that at any time after all the examinations aforesaid" (that is, of witnesses against a person charged with an indictable offence) "shall have been completed, and before the first day of the assizes or sessions, or the first sitting of the court at which any person so committed to prison, or admitted to bail as aforesaid, is to be tried, such person may require, and shall be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of 1½*d.* for every folio of ninety words."

The 6 & 7 Wm. 4, c. 114, s. 3, provides that all persons who shall be held to bail, or committed to prison (which means finally committed for trial, and does not apply to persons committed for further examination only: *Reg. v. Lord Mayor of London*, 5 Q. B. 555; D. & M. 484) for any offence against the law, shall be entitled to require and have on demand (from the person who shall have the lawful custody thereof, and who is thereby required to deliver the same) copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed, on payment of a reasonable sum for the same, not exceeding 1½*d.* for each folio of ninety words: Provided that if such demand shall not be made before the day appointed for the assizes at which the trial is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge, or other person appointed to preside at such trial, shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge, &c., if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged.

And by sect. 4, "all persons under trial are entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken

XV. Defendant's Right to Money for Defence.[1]
XVI. Of the Witnesses.
(A) *Subpœna.*[2]
(B) *Compensation to.*[3]
XVII. Of the Trial and Evidence.
(A) *Time of.*[4]

against them, and returned into the court before which such trial shall be had.

As these statutes apply only to the case of a person bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to prepare for trial, they do not extend to the case of a person committed to prison for default of sureties to keep the peace, and who has been discharged by the sessions. *Ex-parte Humphreys*, 19 L. J. M. C. 189.

[1] The court directed the governor of the gaol to attest the power of attorney, to enable a prisoner to obtain funds out of a savings' bank to enable him to conduct his defence, or for paying a *bonâ fide* debt. *Rex v. Coxon*, 7 C. & P. 651. And where, from circumstances, it might be presumed that the prisoner obtained a portion of money from other sources, the judge ordered 5*l.* to be given up for his defence. *Rex v. Rooney*, id. 515.

[2] In case of felony, the witnesses are usually bound over by recognisance to appear at the trial and give evidence; and if they do not appear accordingly, the recognisance may be estreated, and the penalty levied. In cases of misdemeanor, also, the witnesses are often bound over in the same way. But in all cases where the witnesses are not so bound over, and the prosecutor is not certain that they will attend voluntarily, he may compel their appearance at the trial by subpœna, &c. In ordinary cases, the common subpœna is sufficient. It may, we have seen, be sued out either at the Crown Office in London (*Rex v. Ring*, 8 T. R. 585), or with the clerk of the peace, or clerk of assize of the court in which the defendant is to be tried.

The 1 Wm. 4, c. 22, s. 4, which gives power to the court to issue commissions in certain cases for the examination of witnesses, does not apply to indictments. *Rex v. Briscoe*, 1 Dowl. 520.

[3] Where a subpœna, sued out at the Crown Office, has been served upon the witness, and he does not attend at the sessions or assizes, &c. in obedience to it, the Court of Queen's Bench, upon application, will grant an attachment against him. *Rex v. Ring*, *supra*. But it is doubtful whether the justices at sessions, &c. have authority to issue an attachment; the only mode of proceeding against the witness in such a case seems to be by indictment.

At common law, a witness in criminal cases was not entitled to his expenses (2 Hawk. c. 46, s. 173); at least if he attended upon the part of the prosecution. They are now regulated by statute in prosecutions for felony, and certain cases of misdemeanor.

By stat. 7 Geo. 4, c. 64, ss. 22, 23, where any person shall appear, on recognisance or subpœna, to prosecute or give evidence against any person accused of felony, the court may order payment to the prosecutor of the costs and expenses of the prosecution, and to the prosecutor and witnesses a reasonable allowance for their expenses, and for trouble and loss of time in attending before the examining magistrate and the grand jury, and in otherwise carrying on the prosecution, although no bill of indictment be preferred, provided the party has *bonâ fide* attended in obedience to such recognisance or subpœna. The amount of expenses, and compensation for trouble and loss of time before the examining magistrate, may be ascertained by the certificate of the magistrate, and the amount of the other expenses and compensation by the proper officer of the court.

[4] There is a material distinction between prosecution for felony and for inferior offences. When the defendant is indicted for a crime of the higher description, it is always the practice to try him at the same assizes, and generally soon after the bill is found against him, and at the time he is arraigned upon the indictment. It is usual to try the felonies first, and afterwards to proceed to the examination of minor accusations. *See* Cro. C. C. 9. At the quarter sessions, however, in prosecutions for misdemeanor, when the defendant is not in actual custody, the justices have no power to compel him to take his trial at the same court at which he pleaded, or traversed the indictment, though, if he consents, the trial may be had (*see* 2 Hale, 28, 48; Cro. C. c. 9; Dick. Sess. 104); and though it should seem to have been considered that justices of gaol delivery and oyer and terminer may proceed to trial immediately after the finding of a bill for a misdemeanor, yet it is not the practice to do so without the defendant's consent, but the defendant traverses over to the next assizes (*see* id.; 2 Hale, 28, 29; Dick. Sess. 104; 1 Leach, 111); and when the defendant is not in custody, he cannot compel the prosecutor to try till the next assizes; though by his consent, and giving notice of it to the clerk of assize, the trial may be had at the same assizes. *See* Cro. C. c. 9. If the proceedings have been removed by *certiorari* into the court of Queen's Bench, there is time allowed between the arraignment or

(*a*) *Postponement of Trial.*[1]

appearance and the trial for a jury to be impannelled by the sheriff as in civil proceedings. *See* 9 Co. 118, b; 4 Bl. Com. 350; Cro. Car. 448; Cro. C. c. 9; Bac. Abr. Trial, I.

In capital cases the court will not appoint the time of trial, unless the defendant be brought to the bar when the motion is made for that purpose. *Rex v. Johnson*, 2 Stra. 826.

By 60 Geo. 3, c. 4, s. 3, "when any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, or gaol delivery, having been committed to custody, or held to bail to appear to answer for such offence twenty days at least before the session at which such indictment shall be found, he shall plead to such indictment, and the trial shall proceed thereupon at such session, unless a writ of *certiorari* for removing such indictment shall be delivered at such session, before the jury shall be sworn for such trial." But the court may, in these cases, allow a further time for pleading or trial upon indictment, cause being shown for that purpose. (Id. s. 7.) Nothing in this act, however, shall extend to indictments for non-repair of a bridge or highway. (Id. s. 10.)

Where there are two indictments against different persons for different offences, but they are both founded on the same transaction, they may, by consent, be tried together. *R. v. Brett*, and *R. v. White*, 3 Cox, 79.

[1] The court may postpone the trial to allow time to the defendant to prepare for his defence, or otherwise.

The 14 & 15 Vic. c. 100, s. 27, enacts, "no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: Provided always, that if the court, upon the application of the person so indicted, or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms, as to bail or otherwise, as to such court shall seem meet, and may respite the recognisances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session, without entering into any fresh recognisance for that purpose."

On proper grounds the trial will be put off (*Rex v. D'Eon*, 1 W. Black. 517; 3 Burr. 1514); even the illness of the defendant's attorney has been deemed a reason. *Hayley v. Grant*, Sayer, 60. So, where the material witness was incompetent from want of religion (*Rex v. White*, 1 Leach, C. L. 430), the trial was postponed to give a clergyman time to instruct him. *Murphy's case*, 1 Leach, 433, n. But where the witness was an adult, postponement with a view to instruction ought not to be conceded. *R. v. Wade*, 1 Moo. C. C. 86. And where a child was of very immature age, *Pollock, C. B.*, would not postpone the trial for instruction, although he would have done so had she been ten or twelve years old. *R. v. Nicholas*, 2 C. & Kir. 246. So the absence of a material witness is the ground for postponing the trial, except where the absence happens after notice of trial (*Bourne v. Church*, Barnes, 442); or the witness is abroad, and not likely to return (*Rex D'Eon*, 3 Burr. 1514); in which case the court will allow a *mandamus* for the examination of the witnesses abroad. *Rex v. Jones*, 8 East, 31.

If at the assizes a prisoner is tried for a misdemeanor, under the commission of gaol delivery, and, during the trial, becomes ill, and is obliged to be assisted out of court, the judge will discharge the jury, and the consent of his counsel that the trial shall proceed in his absence, is considered not sufficient to authorise the trial to proceed. If the prisoner recovers during the assizes he may be tried, the proceedings of the trial to be commenced *de novo*. *Rex v. Streek*, 2 C. & P. 413. But it seems that where there are several indictments against prisoners, on all of which they have been arraigned, the prosecutor, having tried some of the indictments, and failed in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next session. *Reg. v. Fuller*, 9 id. 35.

In a case of murder, where it was proposed to show previous attempts upon the life of the deceased by witnesses who had not been examined before the justice, the court would not postpone the trial in order to allow time for investigating the characters of these witnesses, and of the proposed evidence. *R. v. Johnson*, 2 C. & Kir. 354. Where the defendant, who was charged with perjury, was arrested on the Wednesday before the trial, as he was going to deliver his brief; the case was called on on Saturday, and an application to postpone the trial on this ground was made. But the learned judge declined to order a postponement, unless it could be shown that the arrest was made in collusion with the prosecutor. *R. v. Gordon*, Car. & M. 410. Where the prosecutor has failed upon one or more indictments, he will not be allowed to postpone the remaining cases to a future session, the prisoners having been arraigned upon all the cases. *R. v. Fuller, supra.* It is not too late to postpone the trial on affidavit soon after the jury have been charged, but before any evidence has been offered. *R. v. Fitzgerald*, 1 C. & Kir. 201.

Before any application can be made to postpone the trial, notice must be given to the opposite party, in order that he may attend and oppose it; and in the Queen's Bench a rule *nisi* must be obtained. *See*

(B) *Relative to the standing Mute, and of Challenges.*[1]

(C) *What Allegations must be Proved.*

(*a*) *Time.*[2]

(*b*) *Place.*[3]

(*c*) *The Offence.*[4]

(*d*) *As to Matters not Stated.*[5]

(D) *As to the Manner of Proving the Question in Issue.*

(*a*) *By Confessions and Admissions.* *See* vol. iii. p. 173.

(*b*) „ *Presumptions.*[6]

(*c*) „ *Written Evidence.*[7]

(*d*) „ *Parol.*[8]

Cro. C. c. 22, 299. Upon this, an affidavit must be made, stating the names and places of abodes of the absent witnesses, and that they are material in the prosecution or defence. *See* 8 East, 33, 35, 36; Fost. 2. It is in general necessary, in the affidavit of the absence of a material witness, to state at what time his return may be expected. *See* 1 Bl. Rep. 514.

[1] By the stat. 7 & 8 Geo. 4, c. 28, s. 2, it is enacted, "that if any person being arraigned upon, or charged with, any indictment on information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same."

Id. sect. 3, "that if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, it shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made."

[2] The day and year, on which facts are stated in the indictment or other pleadings to have occurred, are not in general material; and the facts may be proved to have occurred upon any other day previous to the preferring of the indictment. *See* Holt, 301; 1 Salk. 288; 9 State Trials, 587, 605, 543, 552; Fost. 7, 8. Unless they apply to written instruments.

[3] It is not necessary to prove that the facts stated in the indictment or other pleading occurred in the parish or place therein alleged; it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction (2 Hawk. c. 25, s. 84); but they must be proved to have been committed within the county or other extent of the court's jurisdiction, otherwise the defendant must be acquitted.

[4] The offence charged must be proved as laid, and any material difference between the fact laid and the fact proved will be fatal.

On an indictment on the repealed statute (42 Geo. 3, c. 107, s. 1), for coursing deer, though there must be some evidence to negative the owner's consent, the owner need not be called for the purpose; his non-consent may be inferred from other circumstances, or proved by his agents. *Rex v. Allen*, 1 Moo. C. C. 154. *R. v. Hogg*, 2 C. & P. 458.

[5] It is a universal principle that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. There is, in fact, no exception to this rule in criminal cases, although there are certainly some cases which seem to be so. In high treason, by stat. 7 & 8 Wm. 3, c. 3, s. 8, no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment; yet this does not prevent overt acts not laid from being given in evidence, if they be direct proof of any of the overt acts which are laid. *Rex v. Rookwood*, 4 St. Tr. 661, 697; Holt, 683, 685; and *see* 4 St. Tr. 722, 731; 6 Id. 282, 284; Fost. 9, 22. *Rex v. Watson*, 2 Stark. 134. So in ordinary cases of conspiracy, acts done by some of the conspirators in other counties, may be given in evidence. *Rex v. Bowes*, 4 East, 171 n. And see *Rex v. Hunt and others*, 3 B. & A. 566.

[6] Presumptive evidence is admissible in criminal as well as in civil cases. *See* vol. iv. p. 308.

[7] The written evidence ought to be produced, and before secondary evidence is offered a foundation for it must first be laid, by proving that better evidence cannot be obtained. Thus, for instance, the best evidence of the contents of a deed or other written instrument is the written instrument itself; secondary evidence, a copy or parol evidence of the contents of the original. Therefore, before a copy of a written instrument or parol evidence of its contents can be received as a proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed. See *Brewster v. Sewel*, 3 B. & A. 296. *Freeman v. Arkell*, 2 B. & C. 494. If the deed or other written instrument is in the possession of a stranger, his attendance with the required instrument must be enforced by writ of *subpœna duces tecum*. *R. v. Hunt*, 3 B. & A. 566. *See* further, vol. iv. p. 299.

[8] Parol evidence is admissible in all cases which cannot be proved by written documents. *See* vol. iii. p. 313.

(*e*) *By Dying Declarations.* *See* Dying Declarations, vol. iv. p. 147.

(*f*) *Depositions.*[1]

Upon a question of insanity, a witness of medical skill may be asked, whether such and such appearances proved by other witnesses are, in his judgment, symptoms of insanity? but it is very doubtful whether he can be asked if, from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity? which is the very point to be decided by the jury. *R. v. Wright*, R. & R. 456.

[1] The 11 & 12 Vic. c. 42, s. 17, enacts, "that in all cases where any person shall be charged before any justice of the peace with any indictable offence, "such justice or justices, before he or they shall commit such accused person for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath in writing of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness be examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel; and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

It is not necessary, in order to render the deposition admissible, that the illness of the witness should be such as that travelling would be dangerous to his life; it is enough if he is not reasonably fit, from illness, to attend. *Reg. v. Riley*, 3 C. & Kir. 116. *Reg. v. Cockburn*, 1 Dears. & B. 203. See *Reg. v. Wilton*, 1 F. & F. 309. *Reg. v. Walker*, id. 534. *Reg. v. Inhabitants of Huddersfield*, 26 L. J. M. C. 169. The deposition may, under these circumstances, be read before the grand jury for the purpose of finding the bill, as well as before the petty jury at the trial. *Reg. v. Clements*, 2 Den. C. C. 251. But the indictment must be for substantially the same offence as that with which the defendant was charged before the justice, otherwise the deposition cannot be read. *Reg. v. Ledbetter*, 3 C. & Kir. 108. A deposition taken on a charge of feloniously wounding was admitted on the trial of an indictment for murder, the wounded person having in the meantime died. *Reg. v. Beeston*, Dears. C. C. 405. See *R. v. Radbourne*, 1 Leach, 457. *R. v. Smith*, R. & R. 339.

In a case affecting the life of a party it is very desirable that a magistrate, who took the depositions against a prisoner with his own hand, should be called as a witness before the depositions are read, to prove the correctness of what he took down; but it is not absolutely necessary in point of law that he should be called. *Rex v. Pilkesly*, 9 C. & P. 124. *Rex v. Hogg*, 6 id. 176.

A., who was a witness for the prosecution against B. on a charge of arson, had first been examined by the magistrate, before any specific charge was made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this, B. was charged with the offence, and A. examined as a witness, when A.'s statement made at that time was taken down, B. being then committed:—*Held*, that all these statements of A. so taken down ought to be returned to the judge, and not merely the statement made when B. was committed. *Rex v. Simons*, 6 C. & P. 540. But the deposition of a witness for the prosecution who has gone to sea cannot be read in evidence on the part of the prisoner, without consent on the part of the prosecutor; with such consent it may be. *Reg. v. Hagan*, 8 C. & P. 167. So in a case of rape, if it be proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoner, the judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, and the prosecutrix was not at the trial, evidence of complaints made by her recently after the outrage was rejected, as such evidence, is received as confirmatory evidence only. *Reg. v. Gutteridge*, 9 C. & P. 471. And where a magistrate returned with the depositions taken before him, and the prisoner said, "I decline to say anything:"—*Held*, that under these circumstances a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which he stated the prisoner made in the presence of the magistrate, and while under examination. *Rex v. Walter*, 7 C. & P. 267. So, a witness cannot be asked as to what he did or did not state before the magistrate; the deposition must be first put

(*g*) *Certificate of former Conviction.*[1]

(*h*) *Of an* Alibi.[2]

(*i*) *With respect to Character.* *See* vol. iii. p. 74.

(*k*) *Other Matters.*[3]

(E) *Duty of Counsel.*[4]

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in and read over to him. *Reg. v. Taylor*, 8 C. & P. 726. It is the duty of a magistrate to return all the depositions taken against a prisoner, and not merely the depositions of those whom he thinks proper to bind over as witnesses. *Rex v. Fuller*, 7 id. 269.

It is not necessary to make the depositions evidence that each should have a separate heading or caption; a general heading or caption at the head of the body of depositions sufficiently shows that they were all taken under the statute. *Reg. v. Johnson*, 2 C. & Kir. 355. It seems, indeed, that a deposition is admissible without any formal caption, if it be described as the examination of the witness, and the evidence contained in it be relevant to the charge. *Reg. v. Langridge*, 1 Den. C. C. 448; 2 C. & Kir. 975. But see *Reg. v. Newton*, 1 F. & F. 641.

Depositions taken in cross-examination at a subsequent time to those in chief, and not signed by the magistrate, were held to be so irregular as to prevent the whole of the depositions being read against the prisoner, although the magistrate swore that both were accurately taken. *Reg. v. France*, 2 M. & Rob. 207.

The depositions may be given in evidence by the prisoner, in order to show some material variance between the evidence at the trial and before the magistrate, and may be read by the prosecutor, it would seem, and certainly by the judge, to impeach the credit of a witness who gives evidence contradicting statements contained in the deposition made by such witness in a former proceeding in the same case. *R. v. Oldroyd*, R. & R. 88.

If the witness have been examined abroad under the stats. 13 Geo. 3, c. 63, or 1 Wm. 4, c. 22, and have there proved original documents, those documents themselves must be transmitted and given in evidence in this country; copies are not admissible. *Reg. v. Douglas*, 1 C. & Kir. 670.

[1] The 14 & 15 Vic. c. 101, s. 22, enacts, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court, or other officer of the court having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of 6*s*. 8*d*., and no more, shall be demanded or taken), shall, upon the trial of any indictment for perjury, or subornation of perjury, be sufficient evidence of such trial. *See post*, Perjury.

[2] Where the defence set up is an *alibi*, the prosecutor may show circumstances proving the prisoner present, although involving a distinct subject of charge against him. *Reg. v. Briggs*, 2 M. & Rob. 199. Where the defence was an *alibi*:—*Held*, that a witness examined in chief for the prosecution might be recalled to be asked as to statements made by the prisoner, as, where he was on the days stated by his own witnesses. *Rex v. Findon*, 6 C. & P. 132. *See* vol. i. p. 284.

[3] In order to prove the identity of a prisoner, who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates; it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate. *Reg. v. Crofts*, 9 C. & P. 219.

Evidence, which is only a confirmation of the original case, cannot be given in evidence in reply, even if it goes to cut down part of the defence; evidence tending to cut down an *alibi*, which supported the original case, refused. *Rex v. Hilditch*, 5 C. & P. 299.

A party present in court, although not subpœnaed, is bound to answer and give evidence in a criminal case; and a highway indictment is a criminal case in that respect. *Rex v. Sadler*, 4 C. & P. 218.

[4] In cases of felony it is the duty of the counsel for the prosecution to be assistant to the court in the furtherance of justice, and not to act as counsel for any particular person or party. *Reg. v. Thursfield*, 8 C. & P. 269. Wherever there is counsel for the prisoner, the case should be opened by the counsel for the prosecution. *Rex v. Gascoine*, 7 id. 772) and although there be none, if the circumstances of the case are peculiar. *Rex v. Bowler*, id. 773. In opening the case for the prosecution, counsel are entitled to state to the jury declarations by the prisoner as well as facts. *Rex v. Orrell*, 1 M. & Rob. 467. And the counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the Crown, and to state that if such attack should be made he shall be prepared to rebut it. If additional evidence be discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury. *Reg. v. Courvoisier*, 9 C. & P. 362. In opening conversations which have passed between the prisoner and a witness, the proper course is for counsel to state only the general effect. *Rex v. Deering*, 5 id. 165. Where a defendant, indicted for a misdemeanor, conducts

(F) *Examination and Cross-Examination of Witnesses.*[1]

his own cause, and reserves the right of addressing the jury, counsel may argue points of law for him, and suggest questions for him to put, but may not cross-examine the witnesses (*Rex v. Parkins*, 1 R. & M. 166; 1 C. & P. 548; *see* 3 Camp. 98; 25 St. Tr. 1021); but where a prisoner is defended by counsel, who address the jury, the party is not entitled also to make a statement (*Reg. v. Rider*, 8 C. & P. 539. *Rex v. Barnes*, 2 M. & Rob. 124. *Reg. v. Boucher*, 8 C. & P. 141); and his counsel cannot state the prisoner's story, nor anything which he is not in a condition to prove. *Reg. v. Beard*, id. 142. In strictness, the counsel may reply, although the evidence called on the part of the prisoner is only to character, but the court would recommend the right to be exercised only under special circumstances (*Rex v. Stannard*, 7 C. & P. 673); and the right to reply will be on the whole case, and not only on the evidence to character (*Rex v. Whiting*, id. 771); and counsel for a prisoner cannot make statements not intended to be proved, without giving a reply to the counsel for the prosecution. *Reg. v. Butcher*, 2 Moo. & R. 228. And where A. was charged with feloniously and carnally knowing and abusing a girl under ten, B. was charged with being present, aiding and abetting. A.'s counsel called no witness. B., who had no counsel, called a witness to prove an *alibi* for A.:—*Held*, that this evidence was in effect evidence for A., and that, in strictness, the counsel for the prosecution had a right to reply on the whole case, but that it was *summum jus*, and ought to be exercised with great forbearance. *Reg. v. Jordan*, 9 C. & P. 118.

[1] Where a witness on the bill is tendered but not examined by the counsel for the prosecution:—*Held*, that he might be cross-examined after being examined for the prisoner. *Rex v. Harris*, 7 C. & P. 581.

If the counsel for the prosecution decline calling a witness, whose name is on the back of the indictment, it is in the discretion of the judge who tries the case whether the witness shall or shall not be called, for the prisoner's counsel to examine him before the prisoner is called on for his defence. If the witness be so called, the judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witness to contradict him (*Rex v. Bodle*, 6 id. 186); nor can the counsel for the prosecution lie by until after cross-examination, and then enter upon a fresh inquiry of the witness as to new facts against the prisoner. *Rex v. Beesley*, 4 id. 220.

If it be moved on the part of the prosecutor in a case of felony to postpone the trial, on the ground of the absence of a material witness, the practice, where such absence can be traced to the acts of the prisoner or his friends, is not to discharge the prisoner from custody, except on very sufficient bail; but where no collusion appears between the absent witness and the prisoner or his friends, the practice is to discharge the prisoner on his own recognisance. *Rex v. Beardmore*, 7 C. & P. 497.

Where, after all the witnesses were ordered out of court, a witness for the prosecution remained in court, the judge would not allow him to be examined. *Rex v. Wylde*, 6 id. 380.

On several indictments of the same party for felony the witness must be re-sworn; after being re-sworn, the evidence in the former case may be read over from the judge's notes, and the witness avouch its truth. *Rex v. Foster*, 7 C. & P. 495.

If a party robbed go within a few hours afterwards to a constable, and mention the name of the party who robbed him, the party robbed may be asked at the trial whether he named any person to the constable, but ought not to be asked what name he mentioned; and the constable may be asked whether, in consequence of the party robbed mentioning a name to him, he went in search of any person, and if so, who the person was. *Rex v. Wink*, 6 C. & P. 397.

On an indictment for larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he, the prisoner, bought them of J. T., if the prosecutor call J. T. he can only ask him as to such matters as go to negative the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft. *Rex v. Stimpson*, 2 C. & P. 415.

A witness for the Crown cannot be asked upon cross-examination whether he did not go before the justice and state so and so, until after his deposition is read, and which is to be taken as part of the evidence of the cross-examination, and if not read the court may direct it to be done, which entitles the counsel for the prosecution to a reply. If witness admits such statement to have been made, the prisoner's counsel may comment on the omission, or its effect upon the other parts of his testimony. If he denies it, the prisoner's counsel may call witnesses to prove that he did make it. But in either case the deposition is the prisoner's evidence, and entitles the prosecutor to the reply. Memorandum, 1 Moo. C. C. 495; 7 C. & P. 676.

The resolutions of the judges as to cross-examining from the depositions are binding on the prisoner's counsel; but it seems that the judge who tries a case may, if he think fit, notwithstanding these resolutions, question a witness as to any discrepancy which appears between his deposition and his evidence on the trial. Whether if he does so, and merely introduces new facts in evidence, the counsel for the prosecution will have the right of reply, *quære?*

If a witness admits that when before the magistrate he was cross-examined by the

(*a*) *Recalling Witness.*[1]

(G) *Of the Verdict.*[2]

prisoner's solicitor, the prisoner's counsel may cross-examine him as to the answers he gave, if it appear to the judge who is trying the case that no cross-examination is returned by the magistrate. *Rex v. Edwards*, 8 C. & P. 26.

The calling of a witness whose name is on the back of the indictment for the other side to cross-examine him is by no means of course; it is discretionary even in felony, but it is a discretion always exercised; and it seems that the same discretion may well be exercised in misdemeanor. *Reg. v. Vincent*, 9 C. & P. 91.

The prosecutor is not bound to call every witness whose name is on the back of the indictment; but he ought to have them in court, that they may be called for the defence if the prisoner chooses. *Reg. v. Woodhead*, 2 C. & Kir. 528. *R. v. Cassidy*, 1 F. & F. 79.

[1] A witness was asked on cross-examination whether he had not become bail for a witness previously examined; he replied, "Yes; and that he believed it was a charge for keeping a gaming-house." In order to prevent any impression against the character of the person so accused, the court, at the suggestion of counsel, allowed such witness to be recalled, and asked whether the charge was, in fact, true or false. *Rex v. Noel*, 6 C. & P. 330.

Where, after the examination of a witness to a fact on behalf of a prisoner, the judge, there being no counsel for the prosecution, calls back and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again if he think it material. *Rex v. Watson*, id. 653.

[2] *The Defendant may be Acquitted of the Felony or Misdemeanor charged, and Convicted of an Attempt to commit the same.*— 14 & 15 Vic. c. 100, s. 9, enacts, "if, on the trial of any person charged with felony or misdemeanor, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

On an Indictment for Robbery, the Defendant may be Acquitted of the Robbery, and Convicted of an Assault with Intent to Rob.— By sect. 10, after reciting that "it is enacted by a certain act, 7 Wm. 4, and 1 Vict. c. 85, intituled, 'An Act to Amend the Laws relating to Offences against the Person,' that on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include any assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of assault against the person indicted, if the evidence shall warrant such finding;" and that great difficulties had arisen in the construction of such enactment, repeals the same, and by s. 11 enacts, that "if, upon the trial of any person upon any indictment for robbery, it shall appear to the jury, upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit an assault with an intent to rob, the defendant shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

Person Tried for Misdemeanor is not entitled to be Acquitted if it appear that the Facts amount to Felony.— By sect. 12, "if, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for misdemeanor."

On an indictment for embezzlement, the defendant may be convicted of larceny, and *vice versâ*. 24 & 25 Vic. c. 96, s. 72. *See* vol. iv. p. 235.

If there be a general verdict of guilty, it is sufficient if one count be good. *Grant v. Astle*, 2 Dougl. 730.

The jury have a right in all cases, whether capital or otherwise, to find a special verdict, by which the facts of the case are put on the record, and the law is submitted to the judges. *See* 1 Bulst. 87; Hawk. b. 2, c. 47, s. 3; Bac. Abr. Verdict, D.; 2 Hale, 302.

No particular words are essential in a special verdict. *Rex v. Borthwick*, 1 Dougl. 211. *See* 1 Stra. 19; 2 Ld. Raym. 1693; 4 Stra. 773; Palm. 545; 4 Co. 42, b; 2 Hale,

XVIII. Of the Judgment.

(A) *By whom and how Passed.*[1]

(B) *When Defendant must be Present.*[2]

(C) *Of Affidavits in Extenuation or Aggravation.*[3]

302. But the facts must be positively stated. *Leyburn v. Derby*, 1 Wils. 56.

A discharge by reason of an imperfect verdict will be no bar to another prosecution for the same felony. 3 P. Wms. 439; Com. Dig. Indictment, 9. Where the verdict is so defective that no judgment can be given upon it, a *venire de novo* in misdemeanor may be awarded (*R. v. Woodfall*, 5 Burr. 266), but it seems doubtful in felonies. 2 Ld. Raym. 1585.

When the special verdict comes on to be argued it is not necessary for the defendant to be present, as on a motion in arrest of judgment; because in that case he is considered as guilty, but in this he is still presumed to be innocent. 2 Stra. 844, 1227; 2 Burn. 931; 1 Salk. 55; 2 Barn. 412.

The jury should take the law from the judge; and therefore, where cases had been cited to the judge on a legal argument, and he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's counsel to them. *Rex v. Parish*, 8 C. & P. 94.

In a case of manslaughter, after the jury were charged, it was ascertained that the surgeon who examined the body was absent. The prisoner's counsel asked that the jury should be discharged: — *Held*, that if the prisoner asked that the jury should be discharged, the judge had authority to order it to be done. *Rex v Stokes*, 6 id. 151.

[1] Where a statute contained the words, that "the offender, by order of the court before whom he shall be convicted, either forfeit, &c.," it was holden that the court, and not the judge at N. P., was to pass the sentence. *Rex v Cock*, 4 M. & S. 71.

The sentence in capital cases is usually given immediately after the conviction; but the court may adjourn to another day, and then give judgment. 6 St. Tr. 833.

Before judgment is pronounced upon the defendant, the crier makes proclamation, commanding "all manner of persons to keep silence, whilst sentence of death is passed upon the prisoner at the bar (or other judgment is given against him), upon pain of imprisonment." *See* Cro. C. c. 482; Dick. Sess. 228; 6 St. Tr. 833. But it is not necessary that this form should appear on the record, and its omission will not be material. 2 Ld. Raym. 1469. It is said to be indispensably necessary that the defendant should be asked by the clerk if he has anything to say why judgment should not be pronounced on him (Com. Dig. Indict. N.; 4 Bl. Com. 375, 370, n. 2; 4 Burr. 2086; 3 Salk. 358; Comb. 144; 3 Mod. 265. *See* Form, 3 Harg. St. Tr. 212; 6 id. 833), but not why the court should not proceed to judgment and *execution* against him. *Brian v. Reg.* 2 H. L. 465.

Where the defendant was found guilty of an assault the court refused to pass sentence, on the ground that an action was pending for the same assault. *Rex v. Mahon*, 1 N. & B. 575. Where the defendant having pleaded is brought up for judgment, the affidavits in aggravation are to be first read, and counsel for the Crown to be heard before that for the defendant; *contra* where the verdict is taken by consent and without evidence. And the rule is not varied where there are several defendants, and some plead guilty and others are convicted on a verdict. *Reg. v. Dignam*, 7 Ad. & E. 593. See *Rex v. Despard*, 2 M. & R. 406.

Judgment may be given in the absence of a defendant who is unable to attend from age and infirmity. *Rex v. Constable*, 7 D. & R. 663. Where parties had been convicted under 7 & 8 Geo. 4, c. 29, but were brought up to receive judgment on a day after passing of 2 & 3 Wm. 4, c. 62: — *Held*, that the sentences could only be founded on the latter statute. *Rex v. Lewis*, 1 Moo. C. C. 372.

Under 11 Geo. 4 and 1 Wm. 4, c. 70, s. 9, the party convicted can only apply to the court to amend the sentence passed below by showing an essential defect therein. *Rex v. Lloyd*, 4 B. & Adol. 135.

Where, on a plea of *autrefois convict*, the verdict was found for the prisoner: — *Held*, that a new trial could not be granted, although unsupported by evidence, and against the opinion of the judge. *Reg. v. Lea*, 2 Moo. C. C. 9.

By the repeal of the statute on which an indictment is framed, though it take place after the finding of the bill (but before plea pleaded), the proceedings fall to the ground, and no judgment can be pronounced. *Reg. v. Denton*, 18 Q. B. 76; Dears. C. C. 3.

[2] No corporal punishment can be pronounced in the defendant's absence (*Rex v. Harris*, 1 Ld. Raym. 267; Lofft. 400); but a pecuniary penalty may be awarded. *Reg. v. Templeman*, 1 Salk. 55. And the reason for the defendant's presence is for the sake of example, and will not be dispensed with. *Rex v. Hann*, 3 Burr. 1786–87. And where a pronounced judgment has been countermanded, execution cannot be afterwards awarded in the defendant's absence. *Rex v. Harris*, 1 Ld. Raym. 482.

[3] It seems any person may make an affidavit in aggravation (*Rex v. Sharpness*, 1 T. R. 228), as by some of several acquitted prisoners. *See* 6 T. R. 619. When these affidavits are read after verdict, the prisoner's, and not the prosecutor's, shall be read first; when after judgment by default, the prosecutor's shall be read first. *Rex v. Bunts*, 2 T. R. 683. The court will not, in general, allow the prisoner time to answer

XIX. Costs and Expenses connected with Indictments.[1]

the prosecutor's affidavit in the absence of facts collateral to the principal transactions, and as to which he could not be prepared. *Rex v. Wilson*, 4 T. R. 487.

An affidavit containing aggravating expressions, communicated to the deponent by a third person, may be read, if such third person refuse to give testimony. *Rex v. Archer*, 2 T. R. 203. So the conduct of the defendant after committal may be taken into consideration, either by way of mitigation or aggravation. *Rex v. Withers*, 3 id. 428.

[1] 1. *As to Costs in cases of Felony.*—By the 7 Geo. 4, c. 64, s. 22, it is enacted, with regard to the payment of the expenses of prosecutions for felony, "that the court before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of the prosecutor, or of any other person who shall appear on recognisance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and the witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred."

2. *With respect to Misdemeanors.*—By stat. 7 Geo. 4, c. 64, s. 23, it is enacted, "that where any prosecutor, or other person, shall appear before any court on recognisance or subpœna to prosecute or give evidence against any other person indicted of any assault with intent to commit felony; of any attempt to commit felony; of any riot; of any misdemeanor; for receiving any stolen property, knowing the same to have been stolen; of any assault upon a peace-officer in the execution of his duty, or upon any person acting in aid of such officer; of any neglect or breach of duty as a peace-officer; of any assault committed in pursuance of any conspiracy to raise the rate of wages; of knowingly and designedly obtaining any property by false pretences; of wilful and indecent exposure of the person; of wilful and corrupt perjury, or of subornation of perjury; every such court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony." To the offences mentioned in this statute are to be added the following misdemeanors: namely, "unlawfully and carnally knowing and abusing any girl being above the age of ten years, and under the age of twelve years; unlawfully taking, or causing to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony." As to these it is enacted, by the 14 & 15 Vic. c. 55, s. 2, that all the provisions of the act 7 Geo. 4, c. 64, as amended by this act, authorising and empowering courts to order payment of costs and expenses, and compensation for trouble and loss of time, in cases of the several misdemeanors enumerated in sect. 23 of the said act, and concerning orders for payment of such costs, expenses, and compensation, and the payment thereof, and all the provisions of any other act for, concerning, or applicable to the payment of such costs, expenses, and compensation, in cases of the said misdemeanors, shall extend and be applicable in the case of any of the misdemeanors therein mentioned. The 23d section of the 7 Geo. 4, c. 64, contained a proviso that the power of ordering payment of expenses of the prosecution in cases of the misdemeanors therein mentioned should not extend to the attendance before the examining magistrate. But by the 1st section of the 14 & 15 Vic. c. 55, it is enacted, that so much of that section "as provides that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate, shall be repealed." Further, by the 20 & 21 Vic. c. 54, "To make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property," sect. 15 directs, that "in every prosecution for any misdemeanor against this act, the court before which any such offence shall be prosecuted may allow the costs of the prosecution in all respects as in cases of felony." By the 7 Wm. 4, and 1 Vic. c. 44, s. 1, the court before whom any prosecutor or witness shall appear under a recognisance or subpœna to prosecute or give evidence against any person upon any charge of having endeavoured to conceal the birth of any child, is authorised, whether any bill or indictment for such charge shall or shall not be actually preferred, to "order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are now by law authorised and empowered to order the same in cases of prosecution for felony." And by 14 & 15 Vic. c. 55, s. 3, it is enacted, "that in every case of assault brought before justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognisance to prosecute and give evidence

at the assizes or sessions of the peace, every such court is hereby authorised and empowered, at its discretion, to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognisance, together with compensation for their trouble and loss of time, in the same manner as courts are authorised and empowered to order the same in cases of felony." See *Reg. v. M'Gavaron*, 3 C. & Kir. 321. Further, by the 14 Vic. c. 11, "For the better Protection of Persons under the Care and Control of others, as Apprentices or Servants, and to enable the Guardians and Overseers of the Poor to institute and conduct Prosecutions in certain cases," it is by sect. 2 enacted, "that the costs and expenses of the prosecution of any such misdemeanor as aforesaid, may be allowed and ordered by the court before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor, under the act 7 Geo. 4, c. 64; or may be allowed and ordered by the court of Queen's Bench, in case the indictment shall have been removed into that court, to be paid by the treasurer of the county, or other officer who would have been liable to pay under the order of the court, in which, but for such removal, the indictment would have been tried." By the 14 & 15 Vic. c. 19, "For the better Prevention of Offences," making it a misdemeanor to be found at night with any dangerous weapon or instrument, with intent to break into any dwelling-house and to commit a felony therein, or to be found in a dwelling-house with such intent; and which also makes it felony to administer chloroform with intent to enable a person to commit felony; and also providing that persons inflicting upon another any grievous bodily harm, shall be guilty of a misdemeanor, and liable to three years' imprisonment; and making the doing maliciously of certain acts with intent to obstruct or upset railway engines, or carriages, &c., a felony, it is by the 14th sect. enacted, that "in all prosecutions for any offence against the provisions of this act, it shall be lawful for the court before which any such offence shall be prosecuted and tried, to allow the expenses of the prosecution in all respects as in cases of felony." And by the act 10 & 11 Vic. c. 82, "For the more speedy Trial and Punishment of Juvenile Offenders," the justices in petty sessions before whom any person shall be prosecuted or tried for any offence cognisable under the act, are empowered at the request of the prosecutor, or of any other person who shall appear on recognisance or summons, to prosecute or give evidence against any person accused of any such offence, to order payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the justices shall seem sufficient to reimburse their expenses, not exceeding in the whole the sum of 40*s*." 10 & 11 Vic. c. 82, s. 14. If no statute empowers the court to order the allowance of the costs of the prosecutor and witnesses in any prosecution for a misdemeanor, the court has no authority to make any such order. However, in a case where the prosecutor and witnesses were bound over to appear against a prisoner on a charge of felony; but at the assizes, by the advice of counsel, instead of an indictment for felony, an indictment for a misdemeanor at common law was preferred, upon which there could be no costs, the judge made an order for the costs of the attendance of the prosecutor and witnesses. *Reg. v. Hanson*, 6 C. & Kir. 912.

3. *Of the Payment by the Treasurer of the County, &c.* — By the stat. 7 Geo. 4, c. 64, s. 24, it is enacted, "that every order for payment to any prosecutor or other person as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor or other person, upon being paid for the same the sum of one shilling for the prosecutor, and sixpence for each other person and no more; and, except in the cases hereinafter provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, who is hereby authorised and required, upon sight of every such order, forthwith to pay to the person therein named, or to any one duly authorised to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

Sect. 25 applies to places that do not contribute to any county rate.

Provision is made by various statutes for the payment of the expenses of prosecutors and witnesses for the prosecution by the borough or county liable thereto, in cases where the prisoner is tried elsewhere. *See* the Municipal Corporation Act, 5 & 6 Wm. 4, c. 7, s. 14.

4. *Scale of Allowance of Costs.* — Formerly the scale of costs was settled by the justices, but now, by the 14 & 15 Vic. c. 55, s. 4, by one of her majesty's principal secretaries of state.

5. *Taxation of Costs.* — The costs of the prosecution, in cases where they are allowed, are taxed by the officer of the court, according to the scale of allowance settled by the Secretary of State. In taxing the costs, he taxes as well those which relate to the proceedings at the assizes or quarter sessions, as those which were incurred in the attendance before the examining magistrate, where such costs are ordered to be paid, the magistrate's certificate of allowance not being conclusive as to the amount, except to the extent that the taxing officer cannot allow more than is mentioned therein. 14 & 15 Vic. c. 55, s. 6.

6. *Remedy for Costs of Prosecution.* — If the treasurer of the borough or county, or other officer who is required by the order of the judge of assize, or of the sessions, to pay the costs of the prosecutor and witnesses, refuse, after such costs have been ascertained, to pay them, an indictment will lie for such neglect of duty. *Rex v. Trea-*

XX. Restitution of Property.[1]

XX. Of the Reservation of a Case for the Court for Crown Cases Reserved. *See* Appeal in Criminal Cases, vol. i. p. 387.

INDORSEMENT of Bills and Notes. *See* vol. ii. p. 440.

of Writ of Summons. *See post*, Summons, Writ of.

INDUCEMENT. *See post*, Pleading.

INDUSTRIAL Schools. *See* 20 & 21 Vic. c. 48.

and Provident Society. *See* also Friendly Society, vol. iv. p. 559.

I. Constitution and Objects of Society, p. 133.

II. Rules of Society, p. 134.

III. Registration, and Effect of, p. 134.

IV. Name of Society must Appear in all Notices, Bills, &c. p. 134.

V. Annual Statement of Accounts, p. 135.

VI. Winding up or Dissolution of Society, p. 135.

I. Constitution and Objects of Society.[2]

surer of Surrey, 1 Chit. 651. Further, a *mandamus* may issue to compel him to obey the order. *Reg. v. Oswestry*, 12 Q. B. 239. *Reg. v. Clark*, 5 id. 887. *Contra*, *Rex v. Jeyes*, 3 Ad. & E. 417. *Rex v. Bristow*, 6 T. R. 168. *Rex v. Treasurer of Surrey*, *supra*. *Rex v. Johnson*, 4 M. & S. 515, in which it was held that a *mandamus* would not lie, on the ground that there was an appropriate remedy by indictment, and further, that the court would not interfere by that process in the case of an inferior officer amenable to others. Marshall on Costs, p. 526. Where an indictment for non-repair of a highway has been removed by *certiorari*, and the judge has certified, under the 5 & 6 Wm. 4, c. 50, s. 98, that the defence was frivolous, and awarded costs to the prosecutor, he may take out a side-bar rule for their taxation, and if they are not paid upon the master's *allocatur*, that is a contempt for which an attachment may issue.

[1] By s. 100, 24 & 25 Vic. c. 96, the owner of stolen property prosecuting thief or receiver to conviction, shall have restitution of his property. Provision as to valuable and negotiable securities not to apply to prosecutions of trustees, bankers, &c. The court refused to order restitution of a bank-note, which had been stolen, and afterwards stopped and cancelled at the Bank of England, it having ceased to be property. *Rex v. Stanton*, 7 C. & P. 431. But where the prisoner was found in possession of a horse, which had been clearly purchased with the proceeds of a bill which he was found guilty of stealing, the court ordered the horse to be delivered to the prosecutor. *Rex v. Powell*, id. 640.

[2] Industrial and provident societies are constituted under and regulated by the 25 & 26 Vic. c. 87, which repeals the previous acts relating to these societies.

By sect. 3 of this statute, any number of persons, not being less than seven, may establish a society under this act for the purposes of carrying on any labour, trade, or handicraft, whether wholesale or retail, except the working of mines and quarries, and except the business of banking, and of applying the profits for any purpose allowed by the Friendly Societies' Acts (*see* vol. iv. p. 562), or otherwise permitted by law.

No member is entitled to claim or hold any interest exceeding the sum of 200*l.* (Sect. 9.)

The provisions of the Friendly Societies' Acts apply to societies registered under this act in the following particulars:—Exemption from stamp-duties and income-tax; settlement of disputes by arbitration or justices; compensation to members unjustly excluded; power of justices or county courts in case of fraud; jurisdiction of the registrar. (Sect. 15.) *See*, as to these matters, vol. iv. p. 560. The provisions of the Friendly Societies' Act, 1854, whereby a member of any society registered thereunder is allowed to nominate any persons to whom his investment in such society shall be paid, shall extend, in the case of societies registered under this act, to allow any member thereof to nominate any persons into whose name his interest in such society at his decease shall be transferred: Provided nevertheless, that any such society may, in lieu of making such transfer, elect to pay any person so nominated the full value of such interest. (Sect. 16.)

The provisions of the Joint-Stock Companies' Acts, as to bills of exchange, and the admissibility of the register of shares in evidence, apply to societies registered under the 25 & 26 Vic. c. 87. (Sect. 19.)

Every person or member having an in-

II. Rules of Society.[1]

III. Registration, and Effect of.[2]

IV. Name of Society must Appear in all Notices, Bills, &c.[3]

terest in the funds, may inspect the books and names of the members at all reasonable hours at the office of the society. (Sect. 22.)

[1] The rules of the society must contain provisions in respect of the following matters (sect. 4):—1st. Object, and name, and place of office of the society, which must in all cases be registered as one of limited liability. 2d. Terms of admission of members. 3d. Mode of holding meetings, and right of voting, and of making or altering rules. 4th. Determination whether the shares shall be transferable; and in case it be determined that the shares shall be transferable, provision for the form of transfer and registration of shares, and for the consent of the committee of management, and confirmation by the general meeting of the society; and in case shares shall not be transferable, provision for paying to members balance due to them on withdrawing from the society. 5th. Provision for the audit of accounts. 6th. Power to invest capital in another society, provided that no such investment be made in any other society not registered under this act, or the Joint Stock Companies' Act, as a society or company with limited liability. 7th. Power and mode of withdrawing from the society, and provisions for the claims of executors, administrators, or assigns of members. 8th. Mode of application of profits. 9th. Appointment of managers and other officers, and their respective powers and remuneration. (Sched.)

A copy of the rules must be delivered to every member on demand, on payment of a sum not exceeding 1*s.* (Sect. 7.)

The rules bind the society and the members to the same extent as if such member had subscribed his name, and affixed his seal thereto, and there were in such rules contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to such rules, subject to the provisions of this act; and all monies payable by any member to the society, in pursuance of such rules, are to be deemed a debt due from such member to the society. (Sect. 14.)

[2] Two copies of the rules must be forwarded to the Registrar of Friendly Societies of England, Scotland, or Ireland, according to the place where the office of the society is situate, and are dealt with by him in the manner provided by the Friendly Societies' Act, 1855. (*See* vol. iv. p. 567.) He thereupon gives his certificate of registration, and such certificate is declared to be conclusive evidence that the society has been duly registered. Thereupon, the members of such society become a body corporate by the name therein described, having a perpetual succession and a common seal, with power to hold lands and buildings with limited liability. 25 & 26 Vic. c. 87, s. 5.

The certificate of registration vests in the society all the property that may at the time be vested in any person for the benefit of the society; and all legal proceedings then pending by or against any such trustee, or other officer, on account of the society, may be prosecuted by or against the society in its registered name, without any abatement. (Sect. 6.)

No society can be registered under a name identical with that by which any other existing society has been registered, or so nearly resembling such name as to be likely to deceive the members or the public, and the word "limited" shall be the last word in the name of every society registered under this act. (Sect. 8.)

The society must have a registered office, to which all communications and notices may be addressed. (Sects. 12, 13.)

[3] By 25 & 26 Vic. c. 87, s. 10, "every society registered under this act shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the society is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such society, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the society."

A penalty, not exceeding 5*l.* for every day the neglect is continued, is incurred by omitting to have the name painted or affixed. (Sect. 11.) And if any officer of such society, or any person on its behalf, uses any seal purporting to be a seal of the society, whereon its name is not so engraven as aforesaid, or issues, or authorises the issue, of any notice, advertisement, or other official publication of such society, or signs, or authorises to be signed, on behalf of such society, any bill of exchange, promissory note, indorsement, cheque, or order for money or goods, or issues, or authorises to be issued, any bill of parcels, invoice, receipt, or letter of credit of the society, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of 50*l.*, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the society. (Sect. 11.)

V. Annual Statement of Accounts.[1]

VI. Winding up or Dissolution of Society.[2]

INFAMOUS Crimes. *See* 24 & 25 Vic. c. 100, ss. 61, 62, 63; Sodomy, Threat to Accuse of, id. c. 96, s. 46. *See post*, Larceny; Threat.

INFANT. *See* Affiliation, vol. i. p. 256; Apprentice, id. p. 394; Bastardy, vol. ii. p. 384; Bankruptcy, id. p. 168; *post*, Outlawry; Parent and Child.

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II. Disability for Offices, p. 136.

III. Of Contracts with Infants, p. 137.

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(*a*) *And an Infant is Liable for Necessaries supplied to his Order, notwithstanding his Allowance is sufficient to enable him to pay Ready Money*, p. 137.

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(D) *Liability of the Parent for Necessaries*, p. 140.

Penalties imposed by the act may be recovered in a summary manner, before two justices, in the manner directed by 11 & 12 Vic. c. 43; 25 & 26 Vic. c. 87, s. 25.

[1] By 25 & 26 Vic. c. 87, s. 24, "a general statement of the funds and effects of any society registered under this act, shall be transmitted to the registrar once in every year, and shall exhibit fully the assets and liabilities of the society, and shall be prepared and made out within such period, and in such form, and shall comprise such particulars, as the registrar shall from time to time require; and the registrar shall have authority to require such evidence as he may think expedient of all matters required to be done, and of all documents required to be transmitted to him under this act; and every member of, and every depositor in, any such society, shall be entitled to receive, on application to the treasurer or secretary of that society, a copy of such statement, without making any payment for the same."

[2] The society may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies; and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding up shall be the county court of the district in which the office of the society is situated. (Sect. 17.)

By sect. 18, "in case of the dissolution of any society, such society shall, nevertheless, be considered as subsisting, and be in all respects subject to the provisions of this act, so long and so far as any matters relating to the same remain unsettled, to the intent that such society may do all things necessary to the winding up of the concerns thereof, and that it may be sued and sue under the provisions of this act, in respect of all matters relating to such society. In the event of the society being wound up, every present and past member of the society is liable to contribute to the assets of the society, to an amount sufficient for payment of the debts and liabilities of the society, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say):—1st. No past member shall be liable to contribute to the assets of the society if he has ceased to be a member for a period of one year, or upwards, prior to the commencement of the winding up. 2d. No past member shall be liable to contribute in respect of any debt or liability of the society contracted after the time at which he ceased to be a member. 3d. No past member shall be liable to contribute to the assets of the society unless it appear to the court that the existing members are unable to satisfy the contributions required to be made by them, in order to satisfy all just demands upon such society. 4th. No contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a past or present member. (Sect. 20.)

Any society registered under the 25 & 26 Vic. c. 87, may be constituted a company under the Companies Act, by conforming to the provisions set forth in such act; and, therefore, the society ceases to retain its registration under this act. (Sect. 21.)

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I. Who is deemed an Infant.[1]

II. Disability for Offices.[2]

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[1] According to the Roman jurists the period of majority was twenty-five years, but by the common law, a man or woman, till the age of twenty-one years, or to be more exact, till the day next preceding the twenty-first anniversary of their birth, are infants.

A person born the 1st of February, 1800, after eleven o'clock at night, is of full age after one o'clock on the morning of the last day of January, 1821. *Anon.* 3 Anne; 1 Salk. 44. *Herbert v. Torball*, Sid. 162; cited *Fitzhugh v. Dennington*, 2 Ld. Raym. 1094; 3 Wils. 274. *See* vol. i. p. 268.

[2] An infant cannot exercise the office of burgess (*Rex v. White*, cited 2 Yelv. N. P. 1068, n.), nor be appointed to the office of the clerks of requests, where it is part of the duty of that office for such clerks to receive the money of the suitors. *Claridge v. Evelyn*, 5 B. & A. 81.

An infant cannot be admitted as public attorney for prosecuting suits at law; but he may be a private representative of such. *See* Co. Litt. 52, 128, a; Cro. Eliz. 637.

It seems that an infant may hold the office of gaoler. *See* Plowd. 379; 9 Rep. 48, 97; 2 Inst. 382; 3 Mod. 222.

An infant cannot sit in the House of Lords, or vote at an election for a member of the lower house, or be elected. 7 & 8 Wm. 3, c. 25, s. 8.

An infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; nor can he take a grant of those offices in possession or reversion (Co. Litt. 3 W.; 1 Roll. Abr. 731; 2 id. 153; March. 41, 43; Cro. Eliz. 636; Cro. Car. 556); not only because by intend-

III. Of Contracts with Infants.

(A) *In general an Infant is not bound by his Contract.*[1]

(B) *Unless it be for Necessaries.*

(*a*) *And an Infant is liable for Necessaries supplied to his Order, notwithstanding his Allowance is sufficient to enable him to pay Ready Money.*

Burghart v. Hall, 4 Mee. & W. 727.

An infant is liable for necessaries supplied to his order, notwithstanding his allowance is sufficient to enable him to pay ready money.

Assumpsit to recover the amount of a tailor's bill, for clothes supplied to the defendant's testator in his lifetime. *Plea*, infancy of the testator. *Replication*, necessaries. On the trial it appeared that the testator was a minor at the time when the goods were supplied; but it was proved that he had an allowance of 500*l.* a-year, besides his pay as a captain in the army. The learned judge was of opinion that if the minor had a sufficient income allowed him to supply him with necessaries suitable to his condition for ready money, he could not contract for necessaries upon credit. A rule for a new trial on the ground of misdirection was made absolute.

Lord Abinger, C. B., delivering judgment: "I am now convinced that I laid down the rule of law too rigorously at the trial. Mr. Erle's able argument has

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ment of law he has not sufficient knowledge, experience, and judgment, to use the office, but also because by law he cannot appoint a deputy.

[1] The general rule is that the contract of an infant, however fair and conducive to his interests it may be, is not binding on him, unless it be for the supply of necessaries to him, or unless he confirm it after he is of the age of twenty-one years. Chit. Contr. 136. Add. on Contracts, 82, 4th ed.

A contract entered into by an infant in the way of trade is not binding upon him, whether it be for goods supplied (*Whywall v. Champion*, 2 Stra. 1083. *See* Cro. Jac. 494; 2 M. & S. 207, 209; 6 Taunt. 120; 2 Esp. 480; 8 Taunt. 35; Bull. N. P. 154), or work and labour performed. *Dalk v. Keighley*, 2 Esp. 480. But according to the general rule, although a trading contract cannot be enforced against an infant, yet he himself may proceed upon it if it contain any stipulation for his benefit. *Warwick v. Bruce*, 2 M. & S. 205; 6 Taunt. 118. *Maddon d. Baker v. White*, 2 T. R. 159.

As an infant is incapacitated from trading, he is exempt from liability to be made a bankrupt as a trader (vol. ii. p. 188); nor is a debt contracted during infancy sufficient to ground an adjudication against a trader on an act of bankruptcy occurring afterwards. Bull. N. P. 38; Cases, K. B. 243; 1 Atk. 146, 197. Nor can an infant be a petitioning creditor for an adjudication of bankruptcy. 3 Ves. jun. 554: Buck, 42: *sed qu.?*

Infancy is a good defence to an action on the warranty of a horse. *Howlett v. Haswell*, 4 Camp. 118. *Grove v. Nevill*, 1 Keb. 778. So where the plaintiff declared that, having agreed to exchange mares with the defendant, he, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c., infancy was held to be a valid bar. *Green v. Greenbank*, 2 Marsh. 485. So if an infant, affirming himself to be of age, borrow money, and give his bond for it, and being sued upon the bond avoid it by alleging his nonage, yet no action lies against him for the deceit. *Johnson v. Pie*, 1 Keb. 905, 913; 1 Lev. 169.

A warrant of attorney or cognovit is absolutely void, and the court will not confirm it, though the infant appear to have given it for the purpose of collusion. *Saunderson v. Marr*, 1 H. Black. 74. And its being joint will not vary the rule. It may be vacated as to the infant only. *Motteux v. St. Aubin*, 2 Black. 1133. Hawkins on Warrants of Attorney, pp. 4, 72. *See* 4 M. & Scott, 719.

As a bond by an infant with a penalty is absolutely void, it can only be confirmed after the debtor has attained his full age, by another deed of as great an efficacy as the bond itself. *Baylis v. Dineley*, 3 M. & S. 477.

An account stated by an infant is no evidence against him after he becomes of age; and showing that he has been supplied with necessaries therein stated makes no difference. *Ingledew v. Douglas*, 2 Stark. 36. *See* vol. i. p. 123.

An infant cannot bind himself by cognovit. *Oliver v. Woodruffe*, 7 Dowl. P. C. 166; 4 Mee. & W. 650. Infancy is not a ground for discharging a forfeited recognisance to appear at the assizes to prosecute a felon. *Ex-parte Williams*, 13 Price, 673. A rent-charge granted by an infant is not void, but only voidable. *Hudson v. Jones*, 3 Mod. 310, n. An exchange of land made by an infant is voidable. Co. Litt. 516. So a surrender by an infant is only voidable. *Zouch v. Parsons*, 3 Burr. 1806.

The lord of a manor may maintain an action for the fine due upon the admittance of an infant copyholder when he comes of age. *Evelyn v. Chichester*, 3 Burr. 1717.

satisfied me that a minor is capable by law of entering into a contract, not merely for necessaries for ready money, but into any reasonable contract for necessaries, although he may have an income. I told the jury that he could not, under such circumstances, contract but for ready money. In that direction I certainly went farther than any case has carried the rule. On this ground of misdirection, therefore, there must at all events be a new trial."

Rule absolute.

(C) *What are Necessaries.*

Peters v. Fleming, 6 Mee. & W. 42.

What are necessaries depends upon the station in life, and is a question for the jury.[1]

To a declaration in debt for goods sold and delivered, for work done and materials provided, and for money due on an account stated, the defendant pleaded *nunquam indebitatus*, and a plea of infancy. The plaintiff joined issue on the first plea, and to the second replied, "that the goods were, at the time of the sale and delivery thereof, necessaries suitable to the then degree, estate, and condition of the defendant."

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[1] An infant may bind himself, according to Coke, for his meat, drink, apparel, medical advice, proper instruction, and other necessaries. This limited capacity of contracting is conferred upon an infant for his benefit, and to enable him to procure credit for such things as are suited to his degree and station. The term "necessaries," as here introduced by the learned commentator, is a relative one. Whether an infant is liable or not, upon any particular agreement for necessaries, must be determined by his age, fortune, condition, and rank in society. His capacity to contract is not confined to such things as are merely essential to his existence, nor does it extend beyond such bounds as are suited to his pecuniary circumstances. Thus a distinction is in all cases to be made, in considering whether articles are necessaries or not, between the son of a nobleman and a gentleman, or one in a more humble sphere; and also in point of age and education, as between a person under age, at school, college, or in one of the inns of court. "Miserable, indeed," says *Lord Mansfield*, "must the condition of minors be, excluded from the society and commerce of the world, deprived of necessaries, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others if they were bound by no act. The law, therefore, at the same time that it protects their imbecility from injury through their own imprudence, enables them to do binding acts for their own benefit, and without prejudice to themselves, for the benefit of others."

The question as to what things are, and what things are not necessaries suitable for an infant who is living away from the parental roof, and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant under any circumstances, and respecting which no valid contract can be entered into. Race-horses and racing-jackets, for example, are not necessaries, nor expensive diamonds, nor extravagantly luxurious dinners, choice wines and rare fruits, nor costly equipages. *Brooker v. Scott*, 11 Mee. & W. 67. *Wharton v. Mackenzie*, 5 Q. B. 606. Riding in gigs and on horseback has been held not to be necessary for an infant. *Harrison v. Fane*, 1 Scott, N. R. 287; 1 Man. & G. 550. But if the infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, then it will be considered necessary, and the infant will be bound to pay for it: *per Coleridge, J.*, 5 Q. B. 613.

"It must be considered as settled, by the case of *Burghart v. Hall* (*supra* in text), that the question is whether the articles furnished are properly necessary and suitable to the station, degree, and condition of the defendant. It is perfectly clear that, from the earliest time down to the present, the word 'necessaries' was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is:" *per Parke, B.*, *Peters v. Fleming*, *supra* in text.

The infant's clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend on his position in society. *Per Alderson, B.*, 13 Mee. & W. 258.

When the infant is known to be living away from home, and the goods ordered by him are not delivered at the residence of the parent, the tradesman ought to make inquiry into the general habits and mode of life of the infant, and his probable means on coming of age, before he supplies him with expensive articles or any large quantities of things. *Dalton v. Gib*, 5 Bing. N. C. 198.

The court held, 1st, that necessaries are such as are absolutely requisite for bare subsistence — articles which are purely ornamental, and not useful, are not in any case necessaries ; and, 2dly, whenever any article may be necessary, it is for the jury, under all the circumstances, to judge of the quality and degree of ornament, and to say whether it is such as a reasonable person, of the age and station of the infant, would require for real use.

Brayshawe v. Eaton, id. 231. *Peters v. Fleming*, *supra* in text.

What are necessaries, therefore, depends upon the station in life of the party, and is a question for the jury. *Peters v. Fleming*, id.

Where the question is on the issue of the goods furnished to an infant being necessaries, the quantity is as much for the consideration of the jury as the quality ; and with that view, they may look at the supplies by other tradesmen; and the plaintiff would not be entitled to recover for what has been supplied from any quarter, beyond what is suitable to the infant's estate and degree. *Burghart v. Angerstein*, 6 C. & P. 690.

Where a father sufficiently supplies the defendant, his son, a minor, with clothes: — *Held*, that the question was, whether the articles of clothing supplied by the plaintiff were necessaries. If a tradesman trusts an infant, he does it at his peril, if it turn out that he has been properly supplied. *Story v. Pery*, 4 C. & P. 526. A., a minor, had held a commission in the army, but sold it, by reason of not having sufficient fortune to continue to hold it. His father was a beneficed clergyman, who paid various sums for him during his minority, and gave him a further sum of 1500*l.* when he attained the age of twenty-one years: — *Held*, that a stanhope was not necessary for him while a minor, as not being suitable to his estate and degree. *Charters v. Bayntun*, 7 C. & P. 52. Where the debt was for grocery goods to stock his shop, but out of which his family were supplied: — *Held*, that, *pro tanto*, as necessaries, he was liable to be sued. *Turberville v. Whitehouse*, 12 Price, 692.

In *Low v. Griffith*, 1 Scott, 458, the defendant, an infant, having served an apprenticeship to a barber, took a house, consisting of five rooms; in one he lived, in another he carried on his business, and underlet the others. The jury, having found that a house of such a description, regard being had to his station and circumstances, was not a necessary dwelling for him, the court refused to disturb a verdict for the defendant.

To enable a party, however, to recover as for necessaries, he need not have ascertained the defendant's circumstances. *Brayshawe v. Eaton*, 5 Bing. N. S. 231; 7 Scott, 183. And if the mother be present when the order is given, an inquiry as to her sanctioning the purchase is not requisite. *Dalton v. Gib*, 5 Bing. 199.

Liveries ordered by a captain in the army for his servant have been considered necessaries; but in the same case the defendant was held not liable for cockades furnished at his request to the soldiers of his company. *Hands v. Slaney*, 8 T. R. 578.

Regimentals supplied to a minor, a member of a volunteer corps, may be recovered for as necessaries. *Coates v. Wilson*, 5 Esp. 152.

But a chronometer was not admitted into the rank of necessaries for a lieutenant in the navy, where he was not in commission at the time it was supplied. *Pecolles v. Ramsay*, Holt, N. P. 77.

If an infant be married, he is liable for necessaries furnished to his wife and children, but articles furnished for her in order for the marriage are not regarded as necessaries. *Turner v. Trisby*, 1 Stra. 168 ; Bull. N. P. 155. See *Paris v. Stroud & Wife*, Barnes, 95.

An infant is in no case liable when he lives under the roof of his parent, who provides everything which in his judgment appears to be proper. *Borrensdale v. Greville*, 1 Selw. N. P. 127. *Deale v. Leave. Bainbridge v. Pickering*, 2 Black. 1325. *Cook v. Deanton*, 3 C. & P. 114. And with respect to the parent, although the relation in which he has placed his child may *primâ facie* appear to justify his being credited for necessaries, yet, when he allows his son a reasonable sum for his expenses, he is not liable for necessaries ordered by him. *Cronby v. Gill*, 2 Esp. Rep. 471. *See post*, Parent & Child ; and *Baker v. Keen*, 2 Stark. 501, 2d. edit. 20.

And it is incumbent on a tradesman, before he may trust an infant with what may appear necessaries, to inquire whether he is provided by his friends. *Cook v. Denton*, *supra*. In an action for goods sold to an infant, the issue "being necessaries," if any part of the articles proved to have been furnished to the defendant fall within the description of necessaries, the evidence ought to be left to the jury. *Maddox v. Miller*, 1 M. & S. 738.

The question of necessaries is in all cases to be governed by the real, not the ostensible, circumstances of the infant. *Ford v. Fothergill*, Peake, 229; 1 Esp. 211. Under the term "necessaries," money advanced to liberate persons from final or mesne process is recoverable. *Clarke v. Leslie*, 5 Esp. 28.

When the cause of action accrues in Scotland, and infancy is pleaded, the defendant must show that infancy is a legal defence to the demand by the law of that country. *Male v. Roberts*, 3 Esp. 163.

It seems that a person under age is liable for money paid or expended for him in the purchase of necessaries. *Ellis v. Ellis*, 12 Mod. 197 ; 1 Ld. Raym. 344. *See* 1 Plowd. 558; 5 Esp. 28 ; 4 C. & P. 104. But he is not liable for money lent, although laid out in the purchase of necessaries. *Pro-*

(D) *Liability of the Parent for Necessaries.*[1]

(E) *A Contract unfavourable to the Interests of the Infant is Void as against him.*

REG. v. LORD, 12 Q. B. 757.

A contract unfavourable to the interest of the infant is void as against him.[2]

The question arose on conviction of a servant for unlawfully absenting himself from his master's employment.

Lord Denman, C.J., delivering the considered judgment of the court. — "Among many objections, one appears to us clearly fatal. He was an infant at the time of entering into the agreement which authorises the master to stop his

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bart v. Knouth, 2 Esp. 472. *Earle v. Peate*, 1 Salk. 279. *See* 10 Mod. 67; id. 279; 2 Esp. 42, n.

But although an infant is not liable at law for money lent, even where he afterwards applies it to pay for necessaries, yet in a court of equity the lender will be entitled to stand in the place of the creditor for necessaries, and recover there against the infant as the creditor might have recovered at law. *See* 1 P. Wms. 558, 482; 1 Ves. 249. Where A. & B. tutors dative appointed by a Scotch court as guardians of an infant, executed for and on his behalf a tack or agreement, *inter partes*, for a lease, whereby a salmon fishery in Scotland was demised to C. for four years, at a certain rent, covenanted to be paid to the infant: — *Held*, that he might maintain an action of debt in his own name upon the agreement, to recover arrears of rent, though he was no party to the agreement, nor proved to be of full age at the time the action was brought. *Carnegie v. Waugh*, 2 D. & R. 277.

An infant is liable on a contract for instruction suitable to his rank and station in life, either to the party by whom it was immediately furnished, or to one by whom it was provided for him. *See* Palmer, 528. Indeed, it has been laid down by text-writers that an infant may bind himself by a contract to pay for instruction in a trade or business (1 Wooddeson, 402; 1 Powell, 34, 35; 1 Com. on Contr. 155); but this doctrine has been objected to, and perhaps it is not to be considered as settled law. See *Trueman v. Hurst*, 1 T. R. 40. It is clear that no action is maintainable against an infant on the covenant to serve contained in an indenture of apprenticeship. *Gilbert v. Fletcher*, Cro. Car. 179; Co. Litt. 172, a, in marg.; 1 Kel. Rep. 466. This point was decided in Croke Charles's Reports, where it was laid down by the court, that neither at common law nor by the statute 5 Eliz. is any covenant or obligation of an infant for his apprenticeship binding upon him. If he misbehaves himself, said the court, the master may correct him in his service, or complain to a justice of the peace, to have him punished according to the statute; but no remedy lies against an infant upon such covenant, and, therefore, it was adjudged for the defendant. Cro. Car. 179; S. C. cited Chitty, Apprenticeship, 66. By the custom of London, indeed, an infant may bind himself in an indenture of apprenticeship, so as to be subject to an action against him, even in the courts of Westminster, but not independently of special custom. *Barton v. Palmer*, 2 Bulst. 192. *See* vol. i. p. 394, n. [1].

If the jury find that the things were necessaries and of reasonable price, it shall be presumed they had evidence for what they thus find, and they need not find particularly what the necessaries were, nor the price of each. Also, if the plaintiff declares for other things, as well as necessaries, or alleges too high a price for those that are necessary, the jury may consider of those things that were really necessaries, and of their intrinsic value, proportioning the damages accordingly. Poph. 157; Palm. 361; Golds. 68; Godb. 219; 1 Leon. 114.

An agreement with an infant workman, which binds him to serve during a certain term, but leaves the master free to stop his work and his wages whenever he chooses, is not beneficial to the infant, and is consequently wholly void. *Reg. v. Ford*, 12 Q.B. 765.

If an infant widower gives directions for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow, who has given an order to an undertaker for the burial of a deceased husband, although he may have died in insolvent circumstances. *Chapple v. Cooper*, 13 Mee. & W. 259. Add. on Cont. 85, 4th ed.

[1] No one is bound to pay another for maintaining his children, whether legitimate or illegitimate, except he has entered into some contract to do so. *Scadborne v. Maddy*, 9 C. & P. 497. It has been doubted whether a father deserting his infant child is liable in *assumpsit* to a party who supplies the child with necessaries, no further proof of contract being given. But it is clear that no such action can be maintained, if the father had reasonable ground to suppose that the child was provided for. *Urmston v. Newcomen*, 4 Ad. & E. 899. 6 Nev. & M. 482.

To render the parent liable he must have authorised the child to incur the debt (*Mortimore v. Wright*, 6 Mee. & W. 482), or contracted to pay. *Andrews v. Garrett*, 6 C. B. 262. *Moon v. Towers*, 8 id. 611.

If a father sees his son wear a suit of clothes, it is a question for the jury if he sanctioned the order. *Law v. Wilkins*, 1 Nev. & P. 697; 6 Ad. & E. 718.

[2] An infant apprentice was held bound

wages when the steam-engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit, but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant. It is inequitable and wholly void."

IV. Of the Nature of the Contracts of an Infant, with reference to their being Void or Voidable, and by whom Contract may be Avoided.[1]

(A) *The Indulgence which the Law allows Infants.*

Smith v. Bowin, 1 Mod. 25; 1 Vent. 51; 2 Keb. 581.

Action upon a promise. The plaintiff declares that the defendant, in consideration that the plaintiff would suffer him to take away so much of the plaintiff's grass which the defendant had cut down, promised to pay him so much money for it, and also to pay him six pounds, which he owed him for a debt. After verdict for the plaintiff, Williams moved, in arrest of judgment, that the plaintiff was an infant, and he not being bound by agreement, that the defendant ought not to be bound by either.

The indulgence which the law allows infants, to secure them from the fraud and impositions of others, can only be intended for their benefit, and is not to be taken advantage of by persons of riper years.[2]

Kelynge, C. J. "If an infant let you a house, shall he not have an action against you for the rent?"

Twisden, J. "I have known an action upon the case brought by an infant upon a promise to pay so much money, in consideration that he would permit the defendant to enjoy such a house: it was long insisted upon that this was not a good consideration, because it is reciprocal, for the infant might avoid his promise if an action were grounded upon it against him; but it was adjudged to be a good consideration, and that the action was maintainable."

The court, in the principal case, gave judgment for the plaintiff, *nisi*, &c.

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to serve the widow and executrix of a tradesman to whom he had been bound, and by whom the business of his deceased master was carried on; the indenture of apprenticeship containing a covenant to that effect, which being a reasonable covenant, was binding on the infant. *Cooper v. Simmons*, 7 H. & N. 707.

[1] The feoffment of an infant, if he make livery in person, is in all cases only voidable. Co. Litt. 380; Dy. 104; 2 Roll. Abr. 572; 4 Rep. 125; Sid. 42.

A grant to an infant vests the freehold in him until he disagrees thereto. Shep. Touch. 70. *Thompson v. Leach*, 2 Vent. 203. Hence his continuing in possession after full age is an actual confirmation of a purchase or a grant. Co. Litt. 2, b. So, if an infant takes a lease for years, and after attaining his majority, continues the occupation of the land, this makes the lease good and unvoidable, and the lessee chargeable for breaches of covenant committed anterior to his coming of age (10 Jac. 320; Godb. 120; 2 Bulst. 69); and to produce this effect, the slightest acknowledgment suffices (4 Leon. 4) as an acceptance of rent. *Smith v. Low*, 1 Atk. 489; Dol. 64.

[2] An infant purchaser of real estate, who has taken possession, becomes liable to all the obligations attached to the estate, to pay rent in the case of a lease rendering rent, and to pay a fine due on admission in the case of a copyhold to which the infant has been admitted, unless he has elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.

An infant who acquires railway shares is in the same situation as an infant acquiring real estate, or any other permanent interest. If the infant repudiates the shares during his infancy, or as soon as he comes of age, he is not liable for no payment of calls made during his infancy; but if there has been no such waiver or repudiation, and he continues to hold the shares after he becomes of age, he is liable for calls made on those shares during infancy, without any act of ratification on his part; and a plea of infancy at the time the calls were made is bad. *North-Western Railway Co. v. M'Michael*, 5 Ex. 123. *Birkenhead, Lanc., and Cheshire Railway Co. v. Pilchey*, id. *Newry and Enniskillen Railway Co. v. Coombs*, 3 id. 565. *Dublin and Wicklow Railway Co. v. Black*, 8 id. 181.

In the case of a lease, the principle was stated by *Parke, B.*, in *North-Western Railway Co. v. M'Michael*, 5 Ex. 127, to be this: —"That as the estate vests, as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and revests it in the party from whom the infant purchased; if made within age, sus-

(*a*) *Time and Mode of avoiding Voidable Act.*[1]

pends it only, because such disagreement may be again recalled when the infant attains his majority. But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one is an answer, the estate still being vested in the infant? . . . . We think the more reasonable view of the case is that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed; at all events, unless he still be a minor."

The indulgence which the law allows infants, to secure them from the fraud and impositions of others, can only be intended for their benefit, and is not to be taken advantage of by persons of riper years. *Smith v. Bowin*, *supra* in text.

Therefore, in all cases in which the privilege of infancy can be set up, as in the instance of a trading contract (2 M. & S. 205; S. C. 6 Taunt. 118), of a marriage contract (2 Stra. 938; 4 Taunt. 469), an agreement for supplying the infant with necessaries, and teaching him to sing and dance (1 Sid. 446; 2 Keb. 623; S. C. Sid. 41; Keb. 1; S. C. Bac. Abr. Infancy, I, 4), whether there has been any part execution of the contract, or payment of money by the infant or not (2 M. & S. 205, 209, 210); although the infant is protected from liability, yet he himself is entitled to treat the contract as binding on the party with whom he may have contracted. For the same reason, when an infant slave in the West Indies executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant, and B. covenanted to do certain things on his part, after which the servant came to England with his master; in an action against A., a third party, who had seduced the man from B.'s service, A. was not permitted to allege that the contract was void, as being made by an infant and a slave; and, therefore, that the declaration, which stated him to have been retained as a servant for a term of years, was not proved; for the court held that the effect of such a contract might be the manumission of the slave, and, consequently, for his own benefit; and that at most it was only voidable by the infant himself. 2 H. Black. 511.

So, where several parties join in a security, the infancy of one of them cannot be taken advantage of by any of the others. Thus, if an annuity be granted by two persons jointly and severally, one of whom is an infant, the covenant is not void as to both, but the other party may be sued alone. 4 Taunt. 10. And so, where a negotiable security is given by two parties, and one of them is an infant, the other party should be proceeded against solely. (Id. 468.)

On a promise to an infant to do such an act in consideration that the infant promised to pay such a sum, *assumpsit* was held to be lie by the infant, though the money was not paid. *Forester's case*, 1 Sid. 41; 1 Keb. 1.

So, if a man of full age and a female, a minor, promise to intermarry, an action lies against him for breach of the contract. *Holt v. Ward*, 2 Stra. 937. So the same rules apply in covenant. *Farneham v. Atkins*, 1 Sid. 446; 2 Keb. 623.

If a father make to a son under age an absolute gift of an article of dress or ornament, *e.g.* a watch, he cannot afterwards, without the son's consent, reclaim the gift. *Smith v. Smith*, 7 C. & P. 401. An infant who paid a deposit with a view to a partnership, may, on his coming of age, repudiate the contract, and recover back the money so paid. *Corpe v. Overton*, 10 Bing. 252; 3 M. & Scott, 738.

For the same reasons, it seems agreed as a general rule (*Whittingham's case*, 8 Rep. 42, b), that none but the infant himself, his representatives, or privies in blood, can avoid a voidable conveyance made by the infant. 1 Roll. Abr. 755; Bridg. 75; 1 Roll. Rep. 301; Cro. Eliz. 739; Palm. 123; Allen, 75. And if such infant tenant in tail has no sons, but only daughters, his brother, being special heir, *per formam doni* made to his father, may avoid the feoffment, because he is privy in blood, and has the land only by descent. 8 Rep. 43. But this privilege of avoidance, attached to the infant and his privies in blood, is only coextensive with the infant's estate; therefore, if an infant be tenant in tail, and makes a feoffment in fee, and dies without issue, his collateral heir cannot enter to avoid this feoffment: for although by his feoffment he gave fee-simple, yet when he died without issue, nothing descended to the heir in respect of which he could enter. And privies in estate shall not take advantage of the act of an infant; therefore, if donee in tail, within age, make a feoffment in fee, and die without issue, the donor shall not enter (Palmer, 254; 8 Rep. 43); because there was privity between them only in estate, and no right of entry accrued to the donor by the death of the donee. If an infant seised in the right of his wife make a feoffment and die, his heir cannot enter, because no right descends to him; but inasmuch as the baron, if he had lived, might have entered in right of his wife only, and not in respect of any right which he himself had, the wife (even before the 32 Hen. 8, c. 28) might in such case have entered in her own right. 8 Rep. 43; Litt. s. 634. But if the *feme*, being only tenant in tail, the baron within age, had made a gift in tail to another, by which the baron gained a new reversion in fee, and died, the wife might enter, or the heir of the baron, who had a new reversion descended to him. But if the heir entered, as it could only be to defeat the tail given by the infant, his estate vanished, and by operation of law the *feme* was immediately seised of her old estate. (Id.) An infant may be bound by a private statute. *Shrewsbury v. Scott*, 29 L.J.C.P. 34.

[1] If goods are delivered to a carrier by

V. Ratification after Coming of Age.

(A) *Must be in Writing, signed by the Party to be Charged.*

Promise must be in writing, signed by the party to be charged.[1]

By 9 Geo. 4, c. 14, s. 5, it is enacted, "that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith."

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the vendor, addressed to the purchaser while the latter is under twenty-one, but they do not reach him till he has attained that age, infancy is a good defence to an action brought against him for the price of the goods (*Griffin v. Langfield*, 3 Camp. 254); but not for wages accruing due after majority, on a hiring under age. *Thomas v. Waldo*, 1 F. & F. 173.

It seems doubtful if an infant enter into an agreement with an adult to take a lease of a house, and the former alone pay the premium to the lessor, he can, on failure of consideration, recover it back in an action brought in his own name, without joining such adult. *Quære*, whether four months after an infant becomes of age is a reasonable time for him to avoid a lease entered into during his minority. *Holmes v. Blogg*, 2 Moore, 552; 1 id. 406. Where an infant held himself out to the world as being in partnership with J. S., and continued to act as such till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one:—*Held*, that it was his duty to give notice of his disaffirmance of the partnership on his arriving at age. *Goode v. Harrison*, 5 B. & A. 147.

[1] Where, after coming of age, he chooses to waive his privilege, the subsequent acknowledgments will operate upon the preceding consideration. *Taylor v. Croker*, 4 Esp. 187. Hence, a promise by a party after attaining his full age to pay a bill of exchange given during his minority, is operative. *Stevens v. Jackson*, 4 Camp. 164. But the promise must be express (*Thrupp v. Fueldes*, 2 Esp. 628), and voluntarily made (*Harmer v. Killing*, 5 id. 102), and not obtained by fraud (2 Atk. 34); and must be in writing, and signed by him. 9 Geo. 4, c. 14, s. 5, *supra* in text.

Payment of part of the money is not a sufficient acknowledgment to make the infant liable for the remainder. *Hitchcock v. Tyson*, 2 Esp. 482, n. But a conditional promise in writing, and signed, suffices. *Cole v. Saxby*, 3 id. 159. And if a person, after he has attained his full age, promise to pay a demand for goods supplied to him during his infancy, even although they were not necessaries, the promise is binding. *Southerton v. Whitlock*, 1 Stra. 690: *per Lord Mansfield*, in M. T. 1765; 3 Burr. 1801.

Mr. Justice Ashurst, commenting upon this rule, said (in *Cockshott v. Bennett*, 2 T. R. 766): "A security given by an infant, which is only voidable, may be revived by a promise after he comes of age. In such a case he is bound in equity and conscience to discharge the debt, although the law will not compel him to do so; but he may waive the privilege of infancy which the law gives him to secure him against the impositions of designing persons."

Any written declaration which recognises the existence of the promise as binding is a ratification of it. *Harris v. Wall*, 1 Ex. 130; 16 L. J. Ex. 270. A date is not necessary to the validity of the written instrument, nor need it be stated on the face of the writing that the debt was contracted during the infancy of the promisor, nor need the name of the creditor, or of the party to whom the promise is made, be expressed therein, or the amount of the debt. These particulars may be established by oral evidence. *Hartley v. Wharton*, 11 Ad. & E. 934.

A letter written by a wife in her husband's name, acknowledging the existence of a debt contracted by him during his infancy, and promising to pay the amount, will not bind the husband, although he may have expressly authorised his wife to write the letter and sign his name to it; for the statute requires that the writing should be signed by the debtor. *Hyde v. Johnson*, 2 Bing. N. C. 776; 3 Scott, 296.

The ratification when made in writing, according to the statute, relates back, and gives effect to the original claim, and fixes the defendant with an obligation arising out of the old contract. *Williams v. Moore*, 11 Mee. & W. 263. *Gibbs v. Merrell*, 3 Taunt. 307.

If an infant, having had dealings with an adult, meets and settles accounts with him during his infancy in the ordinary way, and a balance is struck, and on attaining his age of twenty-one years he confirms the settlement and signs a written promise or agreement to pay such balance, he will be liable for the amount thereof. *Williams v. Moor*, 11 Mee. & W. 264. But all statements with infants, made between them and their trustees or guardians, will be narrowly watched by the Court of Chancery, and if any undue influence is used to obtain admissions, or acknowledgments, or ratification of undertakings and engagements entered into during infancy, the Court of Chancery will interfere and afford protection against proceeding at common law. *Allyrey v. Allfrey*, 11 Jur. 981. *Maitland v. Irving*, 16 L. J. Ch. 95. —— *v. Backhouse*, 12 Jur. 45.

Where a single bill (that is, a bond without a penalty) has been given for necessaries, and

VI. Of the Liability of an Infant for Torts.[1]

VII. Liability for Criminal Acts.

(A) *Misdemeanors.*[2]

after the debtor has come of age he promises to pay the amount, then, as the obligation is valid, no action can be founded on the subsequent promise, but it must be brought on the deed, which is a higher security than a mere simple contract. Bull. N. P. 155. But where a bond with a penalty has been given during infancy, the instrument can only be ratified by an act of equal solemnity after the debtor has attained his full age. *Baylis v. Dineley*, 3 M. & S. 477.

It appears, however, to have been decided, that where a party enters into a bond during infancy, and after he has attained his full age promises payment, an action is maintainable on this promise, on the ground, as was alleged, that the bond was not void, but voidable; and the defendant could not plead *non est factum*, or *nil debit;* that if, after he had arrived at full age, he had accepted a defeasance of the bond, it would have been binding upon him, and that the debt was due in conscience. Cro. Eliz. 126, 127, 700; Dyer, 272, a. in marg.; Roll. Abr. 18, b. 50; 4 Leon. 5. So that the bond with a penalty does not merge a pre-existing valid contract. Bull. N. P. 182; *see* Noy. Rep. 85; 3 Burr. 1805; 5 Rep. 119, a. From the last words, however, an inference may be drawn, that in the case before the court it appeared that the bond was given for a valid consideration, that the promise was rather to be regarded as a confirmation of the debt for which the bond was given than of the bond itself, and that, at all events, the action should be founded on the new promise, and not on the bond. If a lessee of premises be an infant, he may affirm the lease by continuing in possession after he has attained his full age. 1 Roll. Abr. 731, 45, b; *Ketsey's case*, Cro. Jac. 320; 2 Bulst. 69; S. C. 3 Burr. 1719; Co. Litt. 2 b; 8 Taunt. 37. And so also, if an infant demise lands, reserving rent, the lease will be conclusively affirmed by acceptance of rent after the age of privilege has ceased. *Good v. Harrison*, 5 B. & A. 147; and 8 Taunt. 37. And it has been held, that if an infant be a partner with another, and during his infancy represents himself as such partner, and upon his attaining twenty-one dissolves the partnership, he must give notice of such dissolution, or he will be responsible for the subsequent contracts of his copartner to persons ignorant of the dissolution. 2 H. Black. 515.

If there is a proviso in a lease giving the son of the lessee power to take the house when he comes of age, he must make his election within a reasonable time on coming of age. *Doe d. Bromfield v. Smith*, 2 T. R. 436.

[1] An infant is liable for tortious acts, as assault, battery, trespass, &c. actually committed by him. 2 Inst. 328; Noy. 129; 8 T.R. 336. Add. on Torts, 731; Hill on Torts, 98.

Detinue is maintainable against an infant for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return. *Mills v. Graham*, 1 N. R. 140. And money had and received lies against an infant to recover money embezzled by him. *Burton v. Eastman*, Peake, 223.

Although an infant is liable for torts, the plaintiff cannot in general, by changing his form of action to tort, charge an infant for breach of contract, as by suing in case for negligent or immoderate use of a horse (*Jennings v. Randall*, 8 T. R. 335); or by bringing trover by goods delivered on a contract. *Johnson v. Pie*, 1 Lev. 169; 1 Keb. 905; id. 913; 1 Sid. 258. And an infant is not responsible for a false and fraudulent representation that he was of age, whereby the defendant was induced to lend him a sum of money. *Price v. Hewett*, 8 Ex. 146. *Liverpool &c. v. Fairhurst*, 9 id. 429; 23 L. J. Ex. 163. Add. on Torts, 651–661.

Contributory negligence does not disentitle an infant to recover for an injury sustained (1 F. & F. 359); but the negligence of a person under whose care the child is, may. *Warte v. North-Eastern Railway Co.* 28 L. J. Q. B. 258. *See* 7 C. B. 287.

[2] The full age of man or woman by the law of England being twenty-one years (Litt. 104, 258), a person under that age is exempted from punishment in some cases of misdemeanors and offences that are not capital (1 Hale, 20); but the nature of the offence will make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one (4 Bl. Com. 23; 1 Hale, 20; Co. Litt. 246, b; 2 Inst. 703); and if an infant perjure himself in point of age or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c. (3 Bac. Abr. 503; Sid. 253); but if the offence charged by the indictment be a mere non-feasance (unless it be of such a thing as the party be bound to by reason of tenure or the like, as to repair a bridge, &c.), there, in some cases, he shall be privileged by his nonage, if under twenty-one, though above fourteen years, because laches in such a case shall not be imputed to him. 1 Hale, 20; 3 Bac. Abr. 591. *See* Arch. C. P. Ev. 2317, 15th ed.

It is said that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be imprisoned (1 Hale, 21), and the law seems to be that though an infant, at the age of eighteen years, or even fourteen, by his own acts, may be guilty of a forcible entry, and may be fined for the same; yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion, and it is not particularly mentioned in the statute against

(B) *Felonies.*[1]

VIII. Of Actions by and against Infants.

(A) *Actions by Infants.*

(*a*) *He must sue by* Prochein Amy.[2]

forcible entries that he shall be committed for such fine. 4 Bac. Abr. 591; Dalt. 302; Co. Litt. 357; and *see* 1 Hawk. P. C. c. 64, s. 25. But an infant cannot be guilty of a forcible entry or disseisin by barely commanding another to commit it; but an actual entry of an infant into another's freehold gains the possession, and makes him a disseisor. 4 Bac. Abr. 591; Co. Litt. 357; 1 Hawk. P. C. c. 61, s. 35.

[1] With regard to felonies, the law is more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion, though the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. 4 Bl. Com. 23. But within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear. For, *ex presumptione juris*, such an infant cannot have discretion; and against this presumption no averment shall be admitted. 1 Hale, 27, 28; 1 Hawk. c. 111, n. 1; 4 Bl. Com. 23.

The general presumption of law, in the absence of evidence to the contrary, is that a child between the age of seven and fourteen has not a guilty knowledge. *R. v. Owen*, 4 C. & P. 236; 4 Arch. J. P. 208.

On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society, for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age. Dr. & Stu. c. 26; Co. Litt. 25, 79, 171, 247; Dalt. 476, 505; 1 Hale, 25; 3 Bac. Abr. 581. But during the interval between fourteen years and seven an infant shall be *primâ facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction; but if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. 1 Hale, 25, 27; 4 Bl. Com. 23; 1 Hale, 17, 18, 19. Thus it is said that an infant of eight years old may be guilty of murder, and shall be hanged for it. Dalt. Inst. c. 147. And when an infant between eight and nine years was indicted and found guilty of burning two barns, and it appeared upon examination he had malice, revenge, craft, and cunning, he was sentenced to be hanged, and was executed accordingly. *Dean's case*, MS. Report, 1 Hale, 25, n. u.

An infant of the age of nine years, having killed an infant of the like age, confessed the felony, and upon examination it was found that he hid the blood and the body; the judges held that he ought to be hanged, but they respited the execution that he might get a pardon. 1 Hale, 27. Another infant of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged, upon the ground that it appeared by his hiding that he could discern between good and evil, and *malitia supplet ætatem. Spigurnal's case*, 1 Hale, 26; Fitz. Rep. Corone, 118. And a girl of thirteen has been burnt for killing her mistress. *Alice de Waldborough's case*, 1 Hale, 26.

In the case of rape, the law presumes that an infant under the age of fourteen years is unable to commit the crime, and therefore it seems he cannot be guilty of it; but this is upon the ground of impotency, rather than the want of discretion, for he may be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous intent. 1 Hale, 630.

An act making a new felony extends not to an infant under the age of discretion, namely, fourteen years old. 1 Hale, 706. *Stud's case*, Plowd. Com. 465, a; 4 Arch. J. P. 208. And general statutes that give corporal punishment are not to extend to infants; and therefore, if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the Statute of Merton, c. 6, be general in that case. 3 Bac. Abr. 502. But this must be understood where the corporal punishment is, as it were, but collateral to the offence, and not the direct intention of the proceeding. In many cases of this kind the infant under the age of twenty-one shall be spared, though possibly the punishment be enacted by parliament. 3 Bac. Abr. 591; 1 Hale, 21. But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others. And this appears by several acts of parliament, as by 1 Jac. 1, c. 2, of felony for marrying two wives, in which there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years, so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty.

[2] An infant cannot prosecute an action, either in person or by attorney (F. N. B. 27; 2 Inst. 261, 390; Co. Litt. 13, 5, b; Cro. Car.

(1) *In what cases* Prochein Amy *may be required to give Security for Costs.*[1]

86; Hutt. 92; Jones, 177; Cro. Jac. 161, 641; Bridg. 74; Palmer, 296); but advantage must be taken by plea in abatement of the infant's suing by attorney, or by application to a judge, or the court; for since the 21 Jac. 1, c. 13, s. 2, and 4 Anne, c. 16, s. 2, it is not error after judgment, either on verdict or by default. 2 Saund. 213, n. 5. If he sued in person perhaps it would be error. But if an infant and man of full age are made executors, they may bring an action as executors; and the infant may sue by attorney, without making any *prochein amy*, because they sue in the right of the testator, and not in their own right, and therefore he that is of full age may appoint an attorney for him that is within age. *See* 1 Roll. Abr. 283; Cro. Eliz. 278; 2 Saund. 212; 1 Mod. 47, 72, 296; Vent. 102; 1 Sid. 449; and *see* Carth. 124.

An infant cannot sue as an informer on a penal statute. *Anon.* Sayer, 51.

The admission of the *prochein amy* (first introduced by stat. Westminster. *See* 2 Stra. 709) or guardian may be either special to prosecute or defend a particular action, or all actions, &c. *Archer v. Frowde*, 1 Stra. 304. A special admission to prosecute or defend shall not be deemed an authority in any but the particular action. Reg. Gen. H.T. (Pr.) 1853, r. 5. And the plaintiff's attorney, if required, must give notice to the defendant's attorney of the place of abode of the *prochein amy*. *Tomlin v. Brooks*, 1 Wils. 246. And in the old form of ejectment, if the plaintiff were an infant, the defendant, after pleading, might move to stay proceedings until a guardian was appointed for the infant, in order to answer for costs. *Thrustout v. Percivall*, Barnes, 183; *see* 2 Stra. 694, 932. *Throgmorton v. Miller*, id. 932. *Doe d. Roberts v. Roberts*, 6 Dowl. 556. *Anon.* Cowp. 128.

An infant only a few months old, unable to write or make a mark, may be admitted to sue, in a court of common law, by her father or *prochein amy*, on a petition signed for her by the latter. *Eades v. Booth*, 8 Q. B. 718.

If there is a legal guardian, he is generally appointed; but if he cannot act, then any other person, with his consent, may be named. *Claridge v. Crawford*, 1 D. & R. 13.

No authority from the infant to the guardian to sue is necessary, though the infant be on the very eve of majority; but if there were fraud the court might interfere. *Morgan v. Thorne*, 7 Mee. & W. 400; 9 Dowl. 228.

The appointment is generally made before the writ of summons is issued, and is obtained by the person who is to act as guardian or *prochein amy* going with the infant before a judge at chambers, who will grant an order for admission. Or, if the *prochein amy* cannot attend, the order of admission or rule may be obtained from a judge at chambers, on production of a petition to the court in the name of the infant, with a consent to act, signed at the foot thereof by the *prochein amy*, and an affidavit verifying the signatures. A copy of the appointment should be served upon the opposite party.

As the *prochein amy* is appointed by, and is an officer of the court, if the infant wishes to remove him he must apply to the court for that purpose, and an entry of the change should be made on the record. *Davis v. Locket*, 4 Taunt. 765. *Morgan v. Thorne*, 7 Mee. & W. 400. But on the plaintiff coming of age he may, it seems, remove the *prochein amy* of his own authority, and appear thereafter by his own attorney. Bac. Abr. Infant, K 2.

A notice of action signed by a *prochein amy* is sufficient, though his name be not on record. *De Gondouin v. Lewis*, 10 Ad. & E. 117; 2 Per. & D. 283.

A father requires no authority from his son to sue as *prochein amy*. *Morgan v. Thorne*, 9 Dowl. P. C. 228; 7 Mee. & W. 400.

When an infant has brought an action by his next friend, and has recovered damages, which have been received by the attorney, the money is the money of the infant, who may sue the attorney for it. *Collins v. Brook*, 4 H. & N. 276.

[1] If the *prochein amy* be other than the father or natural guardian of the infant, the court will, in some instances, if it appear that he is a pauper or uncertificated bankrupt, require him to give security for costs, or it will appoint a new *prochein amy* or guardian of sufficient ability. *Man v. Berthern*, 4 M. & P. 214. *Yarworth v. Mitchell*, 2 D. & R. 423. *Watson v. Frazer*, 8 Mee. & W. 660. And see *Hayes v. Carr*, 3 Man. & G. 852.

"I by no means," said *Parke, B.*, "wish to lay down as a general rule that it is any objection to a *prochein amy* that he is poor; but in this case there has been a sort of imposition practised on the court in procuring the appointment of an improper person. The father is the person who is naturally entitled to take care of the infant, but instead of him, a person is brought forward who is incapable of holding any property whatever. If that fact had been represented to the court, they would not have made the appointment." *Watson v. Frazer*, *supra*. And if the father suing as *prochein amy* is in low circumstances, and incompetent to discharge such costs as he may be eventually liable to, the court may, in its discretion, vacate the appointment if it appear that there is any responsible person connected with the plaintiff who may be *prochein amy*, or that due diligence has not been used to procure such a person, reserving leave to the plaintiff to apply to substitute another *prochein amy*, or to re-appoint the father. *Duckett v. Satchwell*, 12 Mee. & W. 779.

(*b*) *Form of Declaration.*[1]

(*c*) *Evidence.*[2]

(*d*) *Costs.*[3]

IX. Actions against Infants.[4]

[1] The declaration ought to commence in the following form:—

A. B. by P. F., who is admitted by the court of our Lady the Qeeen, before the Queen herself [*or* by the justices, *or* by the barons] here as the next friend of the said A. B., who is an infant under the age of twenty-one years, to prosecute for the said A. B. in this behalf, complains, &c.

A copy of the order of admission, or rule of court, is annexed to and delivered with the declaration. The fact of the *prochein amy* being appointed by the court must be alleged in the declaration, as above. *Bird v. Pegg*, 5 B. & Ald. 418. *See* 1 Lev. 224.

[2] In *assumpsit*, by an infant suing by his *prochein amy*:— *Held*, that the declarations of the latter before the action brought were clearly inadmissible evidence for the defendant; but the plaintiff not having objected in time, they could not, after he had taken the chance of their turning to his advantage, be excluded. *Webb v. Smith*, 1 R. & M. 106.

In deciding the question whether goods supplied are necessaries:— *Held*, that evidence to show that, at the time of sale, the defendant's father had furnished him with goods of the same kind, suitable to his condition, was admissible. *Burkhardt v. Angerstein*, 1 M. & Rob. 458.

[3] If the defendant be entitled to costs, he may proceed for them by attachment against the *prochein amy* or guardian. *Slaughter v. Talbot*, Barnes, 128; 1 Stra. 548. *James v. Hatfield*, id. 547.

Where a rule had been made against an infant plaintiff for the payment of certain costs, which was disobeyed, the court made absolute a rule calling on the *prochein amy* to show cause why an attachment should not issue for them against him. *Evans v. Davis*, 1 C. & J. 460.

The demand of costs must be made personally of the *prochein amy*, and after personal service the rule for an attachment is absolute in the first instance. *Newton v. the London, Brighton, and South-Coast Railway Co.* 7 D. & L. 328.

To make absolute a rule for non-payment of costs against a *prochein amy* under the 1 & 2 Vic. c. 110, s. 18, the same proceedings are requisite as in the case of an ordinary attachment for non-payment of costs. *Abrahams v. Taunton*, 1 id. 319.

It appears that execution cannot regularly issue against the infant plaintiff himself for costs.

In an early case it was laid down, that if an infant bring trespass by guardian, and be afterwards nonsuited, he shall render no costs. *Grave v. Grave*, Cro. Eliz. 32. See *Turner v. Turner*, 1 Stra. 708. And although the correctness of this position has been questioned, there does not seem to be any case in which the contrary has ever been held. Where, indeed, the infant sued by attorney and was nonsuited, the court held that he was liable to be taken in execution for the costs of the nonsuit, for it was his own act; and if there was error in the award of costs, he might take advantage of it by writ of error. *Hamlin v. Hamlin*, Bulst. 189. The latter of these reasons would not now afford any answer to an application to discharge an infant taken in execution, since error cannot be brought in respect of costs; but the same relief might be obtained by application to the court to amend the record. Reg. Gen. (Pl.) T. T. 1853, r. 22. It is, however, to be observed that in *Hamlin v. Hamlin*, *supra*, there was no *prochein amy* against whom the defendant might resort for his costs. *Dow v. Clark*, 2 Dowl. 302. *Finley v. Jowle*, 12 East, 247. And the reason upon which the irresponsibility of the infant is in part founded, namely, that the *prochein amy* may have brought a groundless action without his consent, did not therefore apply. But it must be observed that in *Gardiner v. Holt*, 2 Stra. 1217, there was a *prochein amy*, and the court refused to discharge the infant plaintiff taken in execution for costs. Referring to these cases, *Patteson, J.*, in a recent case (*Newton v. London, Brighton, and South-Coast Railway Co.* 7 D. & L. 331), thus expressed himself:—"With respect to the liability of an infant plaintiff who sues by his next friend, and against whom a verdict has passed for the costs of the action, the cases cited only show that where he has been taken into execution for them, the courts have declined to interfere to discharge him, saying they left him to his writ of error; but it has never been held that he, and not the *prochein amy*, was the party liable for them. On the contrary, those cases tend to show that he ought not to have been the party proceeded against, but that the *prochein amy* was the party liable." But, although it would seem that the infant is not liable for the costs awarded to the defendant by the final judgment of the court, he has been held to be liable for the costs of making a judge's order a rule of court, which step had been rendered necessary by his disobedience to it, by virtue of the rule of court making such costs payable by the "party against whom the order is made."

In *Proudfoot v. Porle*, 3 D. & L. 524, application was made to set aside an award, on the ground that the arbitrator had exceeded his authority in ordering an infant plaintiff to pay the costs of the reference and award; but the court refused to disturb the award.

[4] An infant who is about to abscond from the country may, it seems, be held to bail,

(A) *Must Defend by Guardian.*[1]
(B) *Plea of Infancy.*[2]
(A) *Costs.*[3]

as in other cases. *Madox v. Eden*, 1 B. & P. 480.

If one of several joint contractors was an infant at the time of the making of the contract, and has not since the attainment of his majority, and before the commencement of the action, ratified the contract by some writing, with his signature affixed, he ought not to be made a defendant with his co-contractors. *Jaffrey v. Frebain*, 5 Esp. 47. *Boyle v. Webster*, 17 Q. B. 950; 21 L. J. Q. B. 202.

[1] An infant can appear and defend by guardian only, and not in person, or by attorney. Co. Litt. 135, b; 2 Inst. 261; 2 Stra. 784. If he appear by attorney, and judgment be given against him, it is error (1 Roll. Abr. 287, pl. 1, 2; 747, pl. 13; Cro. Eliz. 569; Moor, 460; 2 Leon. 189; 8 Co. 58, b; 9 id. 30, b; W. Jones, 423); and the same where several defendants appear by attorney, and one of them is an infant (Cro. Jac. 289, 303; 1 Roll. Abr. 776, pl. 9; Alleyn, 74; 1 Lev. 294; 1 Ld. Raym. 600), even although they be sued as executors. 2 Stra. 783. If the defendant appear by attorney, and the plaintiff happen to know that he is an infant, the court, upon application, will order the appearance to be set aside, and that the defendant appear by guardian. 7 Taunt. 488; Barnes, 418; 2 Wils. 50. And if the application be made promptly, the court will make the infant pay the costs occasioned by his appearing by attorney, and oblige him otherwise to put the plaintiff in the same situation as if he had pleaded regularly in the first instance. 3 Bing. 609. The application, however, it seems, may be made at any time before judgment. *See* 2 Wils. 50; Barnes, 413.

A guardian is appointed in the same manner as the guardian or *prochein amy* in the case of an infant plaintiff (*see ante*, p. 146), the petition stating that he has a good defence, and naming a guardian to be assigned to him to defend the suit. If the defendant neglect to enter an appearance, or enter it otherwise than by guardian, the plaintiff may, we have seen, apply at chambers to set aside the appearance, if necessary, and for a summons calling on him to appear by guardian within a given time, otherwise the plaintiff may be at liberty to proceed as in other cases. 2 Saund. 117, f. *Leech v. Clabburn*, 2 L. M. & P. 614. *Hindmarsh v. Chandler*, 7 Taunt. 488. *Gladmen v. Bateman*, Barnes, 418. *Beven v. Cheshire*, 3 Dowl. 70. *Payet v. Thompson*, 3 Bing. 609.

If the plaintiff have been guilty of delay in making this application, he will not get the costs of the application, at least, unless he previously requested the defendant to name a guardian, and the latter refused. *Shipman v. Stevens*, 2 Wils. 50.

If the defendant appear otherwise than by guardian, and judgment be given against him in that character, he may bring error; though, if the judgment was in his favour, the plaintiff cannot do so on that ground. *Bird v. Pegg*, 5 B. & Ald. 418. *Stephens v. Lowndes*, 3 D. & L. 207. *See* Till. Ent. 555; 2 Ld. Raym. 1476; 1 Wils. 85.

If an infant assigns by attorney, for error *coram nobis*, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error; still, the court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven v. Cheshire*, 3 Dowl. 70.

[2] Infancy must be specially pleaded in bar. Reg. Gen. (Pl.) T. T. 1853, r. 8. The plaintiff may reply, either that the defendant was of age, or that the goods, &c. were necessaries, or that he confirmed the contract when he came of age. If there be several defendants, the party who is a minor must plead his infancy separately. When plaintiff is an infant, unless he be co-plaintiff with others as executor, the infancy must be pleaded in abatement if he declare by attorney; and infancy must be pleaded in abatement in an action upon a specialty, when the defendant is sued as heir on the obligation of his ancestors. Where several parties are liable on a contract, if one of them be an infant, he should not be included in the action; and if the misjoinder should be pleaded in abatement, the plaintiff may reply the infancy. *See* 4 Taunt. 468, 470; 3 id. 307; 14 East, 214; 3 Esp. 76.

Infancy may be pleaded together with other pleas, as of course, without leave of the court or a judge. 15 & 16 Vic. c. 76, s. 84. It is an issuable plea. *Delafield v. Tanner*, 5 Taunt. 856; 1 Marsh. 391. A plea of infancy to an action for railway calls should allege that the infant repudiated the contract within a reasonable time after he became of full age. *Dublin and Wicklow Railway Co. v. Black*, 8 Ex. 181. See *Leeds, &c. Railway Co. v. Fearnley*, 4 id. 26.

If infancy be specially pleaded, and the plaintiff in his replication either deny the infancy or reply that the defendant ratified the promises after he came of age, it will be incumbent on the defendant to prove the time of his birth. *Borthwick v. Carruthers*, 1 T. R. 648.

After defendant has established his nonage, when the contract was made, the plaintiff, upon a replication of ratification after age, must prove an express agreement to pay after the defendant attained his full age, and before the commencement of the action. *Thornton v. Illingworth*, 2 B. & C. 824; 1 D. & R.

[3] An infant defendant is liable to costs in the same manner as any other defendant, notwithstanding a guardian may have been appointed. *Anderson v. Warde*, Dyer, 104. *Gardiner v. Holt*, 2 Stra. 1217. There is no

X. Relative to an Infant en Ventre sa Mère.[1]

INFORMATION, Criminal. *See* Indictments, *ante*, p. 105.

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III. Informations relating to the Revenue. *See post*, Revenue.
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V. „ before Justices. *See* Conviction, vol. iii. p. 216 ; *post*, Justice of the Peace.

I. By the Attorney-General.

(A) *In what Cases it lies: its Form, and how Filed.*[2]

authority that the guardian is liable for them, and it seems that he is not. 2 Chit. Arch. 1094.

[1] The civil law for the benefit of the infant, reputes a child in its mother's womb in the same condition as if born, and therefore the child *en ventre sa mère* may be appointed executor, or may take a legacy. If there be two or more at a birth, they shall be joint executors, or joint legatees of the things bequeathed. Godolph. Orph. Leg. 102. And as by our law a child *en ventre sa mère* is capable of taking, the mother may detain charters on its behalf; a bill may be filed on its behalf; a court of equity will grant an injunction in its favour to stay waste (2 Vern. 710); and the destruction of such child is murder. 3 Inst. 50; 1 Ves. 85.

A devise to a child when he shall be born is good as an executory devise, and the freehold descends to the heir during the interval. *Snowe v. Cuttler*, Lev. 1135; Sid. 153. So a devise of land for life, remainder to a posthumous child, is a good contingent remainder. *Reeve v. Long*, Salk. 228; Carth. 309. And a copyhold may be surrendered to its use. 2 Bulst. 273; Moore, 637. A posthumous child is within a provision in marriage articles for such children of the marriage as should be living at the death of the father or mother, and shall take under the Statute of Distributions. *See* 1 Ves. 85. So where a devise "to all and every children of J. C. at 21" (1 B. & C. 530); but *see* 3 id. 352. A bastard *en ventre sa mère* cannot take under a bequest to all the natural children of J. S.; for the *status* of bastardy begins with the birth. *See* 1 P. Wms. 529.

But where A. devises the surplus of his estate to his children and grandchildren, a grandchild *en ventre sa mère* at testator's death shall not take. *Secus*, had it been to the children and grandchildren living at his death. 1 P. Wms. 342. *Northery v. Strange*, Pr. in Ch. 470; Gilb. E. 9; Rep. 136; 1 P. Wms. 246. *Beale v. Beale*, 2 Bro. Cha. Ba. 320. *Clarke v. Blake*, 2 Bro. C. C. 321. See *Pierson v. Garnett*, id. 47. *Cooper v. Forbes*, id. 63. *Freemantle v. Freemantle*, 1 Cox, 248. *Mogg v. Mogg*, 1 Mer. 654.

[2] An information *ex officio* is a formal written suggestion of an offence committed, filed by the Queen's Attorney-General in the court of Queen's Bench, without the intervention of a grand jury.

(B) *Of Quashing and Demurring.*[1]
(C) „ *the Trial.*[2]
(D) „ *the Judgment.*[3]

It lies for misdemeanors only, and not for treasons, felonies, (Com. Dig. Information, A.; 1 Show, 107; 5 Mod. 459), or misprision of treason (2 Hawk. c. 26, s. 3); for where any capital offence is charged, or an offence so highly penal as misprision of treason, the law requires that the accusation should be sanctioned by the finding of the grand jury before the defendant be put to answer it. The usual objects of information *ex officio* are properly such public misdemeanors as peculiarly tend to disturb or endanger the queen's government, or to molest or affront her in the regular discharge of her royal functions (4 Bl. Com. 304); such, for instance, as seditious or blasphemous libels or words, seditious riots not amounting to high treason, libels upon the queen's ministers, the judges, or other high officers, reflecting upon their conduct in the execution of their special duties, obstructing such officers in the execution of their duties, obstructing the queen's officers in the collection, &c. of the revenue, against officers themselves for bribery, or for other corrupt or oppressive conduct and the like.

In point of form, all the requisites of an indictment must be observed, and the circumstances of the offences stated, with the same accuracy and precision.

Where the indictment would conclude with the words "against the peace of our said lady the queen, her crown and dignity," the information proceeds further, "whereupon the said attorney-general of our said lady the queen, who for our said lady the queen in this behalf prosecutes, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said C. D. (the defendant) in this behalf, to make him answer to our said lady the queen, touching and concerning the premises aforesaid," &c. And the whole is then subscribed by the signature of the attorney-general, and filed in the Crown Office. *See* Arch. C. Pl. 97, 15th ed.

The provisions of the 14 & 15 Vic. c. 100, dispensing to some extent with the particularity required at common law, and giving to the courts power to make amendments in indictments, apply also to informations. *See* 14 & 15 Vic. c. 100, s. 30. Instead of repeating these provisions here the reader is referred to Indictments, *ante*, p. 150, where he will find the subject treated at length.

This information is filed in the Crown Office, without any leave previously obtained of the court for that purpose.

If the office of attorney-general be vacant, the information may be filed by the solicitor-general. *Rex v. Wilkes*, 4 Burr. 2527.

[1] The court will not quash an information, the defendant must demur. *Rex v. Gregory*, 1 Salk. 372. And it will not do so even at the instance of the attorney-general, because he may enter a *nolle prosequi*. *Rex v. Stratton*, 1 Dougl. 239. On demurrer the information may be amended. *Rex v. Holland*, 4 T. R. 457. *See* Indictments, *ante*, p. 105.

The attorney-general is entitled as matter of right to amend the information on payment of costs. *Attorney-General v. Ray*, 11 Mee. & W. 464; 12 L. J. Ex. 352.

[2] The attorney-general having filed the information, brings it on to trial at what time he thinks proper. In general, the trial of the defendant is on the Nisi Prius side of the court of Queen's Bench, and is conducted in the same way as an indictment for a misdemeanor at the assizes. He usually chooses to try before a special jury, a practice which has been objected to, as too unfavourable to the subject when the influence of the Crown is opposed to a single individual, and state policy is in question. On the trial, the attorney-general has the right of reply, even though the defendant calls no witnesses. He cannot himself be called as a witness to be examined as to his motives for commencing the prosecution.

The defendant cannot carry down the trial by proviso, with the consent of the attorney-general. *Rex v. M'Leod*, 2 East, 202.

The attorney-general may, if he pleases, have a trial at bar. *Rex v. Johnson*, 1 Stra. 644.

The defendant is entitled to a copy of the information free of expense. 60 Geo. 3, and 1 Geo. 4, c. 4, s. 8.

[3] The prisoner, if convicted, and actually in court at the time, may be committed in the interval between verdict and judgment if the attorney-general moves the court to that effect; but he may be admitted to bail, and if he be absent, it is more usual to permit him to remain at large on his recognisance till brought up to receive sentence. Judgment is not pronounced until moved for by the attorney-general, who may, if he thinks fit, exercise a virtual prerogative of pardon, by entering a *nolle prosequi*, or declining to bring up the party convicted; but if he delays to the inconvenience of the defendant, he may voluntarily appear and demand judgment to be passed against him. When brought up to receive sentence, the attorney-general moves the judgment of the court on the defendant, who then either personally or by his counsel addresses the court in mitigation of punishment, and files affidavits to the same purpose. At this time the sentence is not always pronounced, but the party convicted is sent to some of the queen's prisons on the motion of the attorney-general, for a few days, while the court deliberate on the facts before them, and resolve on the judgment. At the end of this time he is again brought into court, and sentence is passed upon him.

II. By Private Individuals.

(A) *What, against Whom it lies, and When it will be Granted.*[1]

[1] An information by the master of the Crown Office is a formal written suggestion of an offence committed, filed in the court of Queen's Bench, at the instance of an individual, with the leave of the court, without the intervention of a grand jury.

One joint information cannot issue against several defendants, where separate rules have been obtained against each. *Rex v. Heydon*, 3 Burr. 1270. The court, in granting an information, take into consideration:—1st. The merits of the person applying; 2d. The time of the application; 3d. the circumstances; and, lastly, the consequences of granting the motion. *Rex v. Robinson*, 1 Black. 541. The court, in general, will not grant it in the absence of evil motives. *Rex v. Sainsbury*, 4 T. R. 451. Or if the applicant has suppressed or misrepresented a fact. *Rex v. Wroughton*, 3 Burr. 1683 Or, for exercising a legal right under an erroneous impression. *Rex v. Parkyns*, 3 B. & A. 668. And if the circumstances admit of two interpretations, the court will look to that which is innocent. *Rex v. Watson*, 2 T. R. 206. And the court will not grant such an information if the prosecution be for the benefit of the Crown. *Rex v. Phillips*, 3 Burr. 1564.

An information lies for a conspiracy to remove an unmarried female apprentice for the purpose of prostitution. *Rex v. Delaval*, 3 Burr. 1434; 1 Black. 410. So for offences against God and religion. *Rex v. Curl*, 2 Stra. 789. Or for disturbing a Dissenting congregation. *Rex v. Wroughton*, 3 Burr. 1683. Or attempting to bribe a privy councillor to procure an office. *Rex v. Vaughan*, 4 id. 2494. Or for a libel upon a public body of men. *Rex v. Williams*, 5 B. & A. 595. Or for the publishing comments on evidence given before a coroner's jury with malicious motives. *Rex v. Fleet*, 1 id. 379. Or for endeavouring to procure the appointment of overseer, with a view to deprive others. *Rex v. Waddington*, 1 East, 154. Or for making a woman drunk for the purpose of procuring a favourable will. *Rex v. Wright*, 2 Burr. 1099. Or for bringing a party into ridicule and contempt. *Rex v. Kinnersley*, 1 Bl. Rep. 294. So, an information lies for offences against public justice, as for perjury. *Rex v. James*, 1 Show. 397. Extortions, embracery, rescuing persons in custody under legal process, or escaping from imprisonment upon a prosecution for a contempt; and it may also be obtained for offences against public police, as the spreading false news, nuisances, neglecting to repair highways, obstructing navigable rivers, keeping great quantities of gunpowder, so as to endanger the neighbourhood; against the captain of a man-of-war, for refusing to permit the coroner to come on board his vessel to take an inquest; against an overseer, for forcibly removing a woman far advanced in pregnancy from one parish to another, in order to avoid the expense arising from the birth of her child; and for altering a rate after it has been made and allowed. This course may also be taken against a person for refusing to take upon himself the office of sheriff, as the vacancy of that situation is an obstacle to public justice. So for distributing handbills to influence the minds of the jury. *Rex v. Joliffe*, 4 T. R. 285. And it also lies for offences against the public peace; as impressing a captain maliciously, as if he were a common seaman (*Rex v. Webb*, 1 Black. 19); conspiring to accuse a man of a crime by pretended communications with a ghost. *Rex v. Parsons*, id. 392. But it does not lie for collecting brief-money, and converting it to defendant's own use. *Rex v. St. Botolph*, id. 443. Nor against a minister charged with perjury on a simoniacal admission to his living. *Rex v. Lewis*, 1 Stra. 70. Nor against a privileged person for refusing the office of sheriff. *Rex v. Woodrow*, 2 T. R. 731. Nor against an overseer for altering a rate after allowance, if by consent of the justices, and criminal motives do not appear. *Rex v. Barratt*, 2 Dougl. 465. So, it will not lie against a corporation for a misapplication of corporate funds. *Rex v. Watson*, 2 T. R. 199. Nor for obtaining money contrary to the 6 Geo. 1, c. 18. *Rex v. Dodd*, 9 East, 516. Nor for gaming. *Rex v. Peach*, 1 Burr. 548. Nor against a husband for seizing his wife contrary to articles of the peace. *Rex v. Vane*, 1 Bl. Rep. 18. And though formerly it lay against an overseer for procuring the marriage of a pauper (*Rex v. Tarrant*, 4 Burr. 2106), yet the court have long come to a resolution to refuse them, and leave the applicant to seek a remedy by indictment. Cald. 246, 247, n. a; 2 Nolan, 262.

A criminal information lies against ministerial officers for any act of oppression, unless it proceeds from ignorance or mistake. *Rex v. Friar*, 1 Chit. Rep. 702; but a rule will not be granted against justices who wrongly or improperly reject bail, unless it manifestly appears to the court, by conclusive and satisfactory evidence, that they were influenced by partial and corrupt motives. *Reg. v. Badger*, 4 Q. B. 468; 6 Jur. 994.

The court refused to grant a rule to show cause why a criminal information should not be granted against overseers for endeavouring to induce paupers fraudulently to remove to another parish, the ordinary remedy being by indictment. *Reg. v. Jennings*, 2 D. & L. 741; 14 L. J. Q. B. 488.

An information was granted against the inhabitants of a parish for non-repair of a road, where it was deposed that a bill of indictment had been preferred at the assizes, but thrown out by the grand jury; that two

(B) *Of the Application for.*[1]

of the grand jurors were proprietors of land in the parish; that one of them, who had acted on behalf of the parish at an earlier stage of the dispute, had stated to the foreman that the road was useless, and that both had taken an active part in opposing the finding of the indictment; such depositions being contradicted only by general statements, that the two had taken no undue or active part in opposing the finding. *R. v. Upton St. Leonards*, 10 Q. B. 827; 16 L. J. Q. B. 264.

A merely abusive letter addressed to a private person is not sufficient foundation for a criminal information. *Ex-parte Dale*, 2 W. R. 534; 23 L. T. 179.

A criminal information will not be granted for unwritten words, imputing to a justice malversation in his office, if the words were not spoken at a time when the justice was acting magisterially, nor tended to a breach of the peace. *Ex-parte the Duke of Marlborough*, 5 Q. B. 955.

Misconduct in his office may render a magistrate amenable to a criminal information, though he be not actuated by motives of pecuniary interest or personal malice: as, if he give way to passion, so as clearly to interfere with the due administration of justice; but a mere display of ill humour, or an error of judgment, such as the omission to administer an oath, or to give a caution to a dying man before taking his examination, would not induce the court to interfere. *R. v. Barton*, 4 Cox, C. C. 353.

Giving a party in charge for an assault which is abandoned, does not preclude the party from moving for a criminal information. *Reg. v. Gwilt*, 11 Ad. & E. 587; 8 Dowl. 476. But in *Ex-parte* ——, *one, &c.* (4 Ad. & E. 576, n.), the court refused a rule for a criminal information for an assault, upon its appearing that the applicant had taken out a warrant against the other party; though the applicant offered that it should be part of the rule that he should abandon the proceedings on the warrant.

A party who has sent a challenge cannot apply for a criminal information because he has received one. *Rex v. Larrier*, 7 Ad. & E. 277. To ground a criminal information a breach of peace must be contemplated. *Ex-parte Chapman*, 4 id. 773. And where the public interest is concerned, a rule for a criminal information will be granted upon the testimony of a *particeps criminis*. *Rex v. Steward*, 1 B. & Adol. 12.

Upon a motion for a criminal information, it appeared that the applicant was an attorney and an officer of the court, and the person against whom the application was made was a magistrate, and that the latter had assaulted the former in revenge, it was asserted, for his having conducted some proceedings against him on behalf of a client before justices for a previous assault; the court refused to interpose its extraordinary protection to the applicant, but left him to his remedy by indictment or action at law. *Reg. v. Arrowsmith*, 2 Dowl. N. S. 704.

If a party who has been libelled puts himself in communication with the libellor, for the purpose of retorting upon or obtaining redress from him, the court will not grant a criminal information. *Ex-parte Beauclerk*, 7 Jur. 373), for, in order to maintain an application for a criminal information, the party applying must leave himself wholly in the hands of the court, and in no way whatever make libellous attacks on the other side. *Reg. v. Nottingham Journal (Proprietors of)*, 9 Dowl. 1042. *Reg. v. Lawson*, 1 Q. B. 486; 1 Gale & D. 15. So the application will be refused if the applicant has previously resorted to another remedy with a view to the punishment of the offender. *Reg. v. Marshall*, 4 E. & B. 475; 19 Jur. 676.

Where a charge was made by members of the committee of a hospital against the architect, of having given an improper certificate, and which was entered on the minutes, the architect applied for a criminal information; but upon its appearing that he had known, six years before, of the charge, and two years of the fact of its having been entered on the minutes, the application was refused on the ground of delay. *Ex-parte Hopper*, 2 W. R. 517; 23 L. T. 164.

[1] The motion against a justice must be made within the second term after the act or neglect committed. 13 East, 270; id. 272, n. This rule applies in strictness only to the case of magistrates; but it should be the object of the prosecutor in every case to bring forward his accusation as early as possible, because delay may induce the court to refuse his application. Thus, where a party had been aware of the facts upon which the application for a criminal information would be founded early in Easter term, and did not make the application till the last day but three of Trinity term, the court refused a rule *nisi* for a criminal information. *Reg. v. Harris*, 8 Jur. 516; 13 L. J. M. C. 162. But no notice of his motion is necessary.

Before the stat. 4 & 5 Wm. & M. c. 18, it was in the power of any individual to file an information, without disclosing to the court the grounds on which it was exhibited. But as, by that enactment, no proceeding of this kind can be allowed without leave of the court, that permission is only to be obtained upon affidavits, stating the circumstances on which the applicant seeks to proceed.

A criminal information for misconduct in office may be moved for against a magistrate in the second term after the alleged misconduct, though an assize has intervened, the motion being made early enough to allow of cause being shown the same term. *R. v. Saunders*, 10 Q. B. 484.

The pendency of an action by the prosecutor of a criminal information for libel against another person for publishing a libel involving substantially the same charges as

(C) *Of the Affidavit in Answer.*[1]

that upon which the information is founded, is no ground for postponing the argument upon the rule for the information. *R. v. Willmer*, 15 Q. B. 50.

The affidavits should not be entitled (*Rex v. Harrison*, 6 T. R. 60) until the rule to show cause is granted; when they *may*, and, after it is made absolute, *must* be entitled. *Rex v. Cole*, id. 642.

The affidavit must not only disclose the offence, but show that the applicant's conduct has been just and honorable. *Rex v. Miles*, Dougl. 284, 287. And where only circumstances of suspicion are stated, the deponent must add his belief that the accused's motives are corrupt. *Rex v. Williamson*, 3 B. & A. 582.

To this rule there seems, however, to be some exceptions, which rest on their own circumstances, and do not affect the general principle. Thus, where in a libel against a peer the defendant accused him of treasonable words spoken in parliament, and where a man has been libelled generally, as a thief, or accused of any other charge expressed in general language, he will not be called on to swear the negative, as if particular facts had been alleged against him. But the substance of the affidavits should be very full and explicit, and contain all matters necessary to criminate the defendant, and justify the party applying, as it is the general rule not to allow any supplementary matter to be afterwards sworn, either to supply what is defective or explain what is obscure. It is not essential that the affidavit should have been taken originally for this purpose. *Rex v. Joliffe*, 4 T. R. 285. And if witnesses are under the control of the party accused, secondary evidence may be allowed. *Rex v. Archer*, 2 id. 203, n. Thus, copies of letters have been received. *Rex v. Chappel*, 1 Burr. 402.

Where several have been guilty of a joint offence, there cannot be a *joint* information on separate and distinct rules. *Rex v. Heydon*, 3 Burr. 1270.

If there appears *primâ facie*, upon the inspection of the *ex-parte* statements in the affidavits of the prosecutor, reason to call on the other party for an answer, the motion is granted. On this the rule is drawn up by the clerk of the rules in the Crown Office. A copy of the rule should be served, which service need not be personal. *Rex v. Badouin*, 2 Stra. 1044.

Where the affidavits in support of an application against a party for writing letters provoking a breach of the peace, stated the belief of the deponents that the letters were in the handwriting of the party, not from their own knowledge of his writing, but from the information of other persons, the court refused a rule to show cause, on the ground that such evidence would not warrant a grand jury in finding a true bill. *Ex-parte Williams*, 5 Jur. 1133.

On motion for a criminal information the applicant should be prepared with proper affidavits in the first instance. *Rex v. Francis*, 4 Nev. & M. 251; 2 Ad. & E. 49.

After the application has been refused upon affidavits, another application cannot be made upon additional affidavits. *Rex v. Smithson*, 1 Nev. & M. 775; 4 B. & Adol. 861.

The affidavit must show in what county it is sworn. *Rex v. Cockshaw*, 2 Nev. & M. 378.

An action may be brought for the publication of the same libel for which a rule *nisi* for a criminal information has been obtained and discharged. *Wakley v. Cook*, 16 Mee. & W. 822.

[1] If the defendant is conscious of his innocence of the charge alleged against him, he should take care to deny it in the most express and comprehensive terms, and not confine himself to a mere contradiction of the evidence stated by his accuser. Thus where, on a motion for an information for publishing a libel, the only affidavit produced was that of a man who asserted that the defendant had confessed to him the publication of the matter charged as offensive, the affidavit of the defendant that no such confession was made will not induce the court to discharge the rule: but he should have denied the fact of publication itself, on which the charge was founded.

Where the accusation cannot be positively denied, the affidavit should state the purity of the accused's sentiments. *Rex v. Davie*, Dougl. 588.

An affidavit made by the prosecutor's wife may be read on behalf of the defendant. *Rex v. Wright*, 1 Sess. Ca. 243.

Whether these affidavits should be entitled or not seems doubtful. *Whitehead v. Firth*, 12 East, 166, 167. But it is more proper that they should be entitled, as by obtaining the rule there is a cause in court to which they relate.

An application by the defendant for further time, like the motion in chief, is made upon affidavits stating the facts upon which the application is founded. If the grounds there laid appear satisfactory, the court will make a rule enlarging the time, but will, by the same rule, impose terms.

If no cause be shown on the part of the defendant, the court, on the production of the affidavit of service of a copy of the rule, will make the rule absolute, if they think the cause is one proper to be tried in the way desired by the accuser; but it more frequently happens that cause is shown on behalf of the defendant, either in person, or more frequently by his counsel; he addresses the court on the subject-matter of his own affidavit, or the deficiency of the prosecutors' case, and submits to the court that the proceedings ought to be withdrawn. The counsel for the opposite party are then heard in reply.

(D) *Costs of the Rule.*[1]

(E) *Recognisance to Prosecute.*[2]

(F) *Form of Information.*[3]

(G) *Appearance, Pleading, and Trial.*[4]

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[1] Where the defendant has been culpable, but with mitigating circumstances, the court will, on discharging the rule, order him to pay costs. *Rex v. Morgan*, Dougl. 314. *Rex v. Young*, 1 Burr. 556. But where the defendant's motives are not criminal, and the prosecutor's conduct has not been honourable, each party will be left to pay his own costs. *Rex v. Fielding*, 2 Burr. 721. And where the party accused has been charged merely from the officiousness of the prosecutor, the latter will be compelled to pay the costs; and if the attorney joins in such a proceeding, the court will order him to pay a moiety. *Rex v. Fielding*, 2 Burr. 654.

[2] The 4 & 5 Wm. & M. c. 18, recites that divers malicious and contentious persons had more of late than in times past procured to be exhibited and prosecuted informations in their majesties' courts of King's Bench in Westminster, against persons in all the counties in England for trespasses, batteries, and other misdemeanors, and after the parties so informed against had appeared to such informations and pleaded to issue, the informers had very seldom proceeded any farther, whereby the persons so informed against had been put to great charges in their defence; and although at the trial of such informations verdicts had been given for them, or a *nolle prosequi* entered against them, they had no remedy for obtaining costs against such informers; enacts, "that the clerk of the crown in the said court of King's Bench for the time being shall not, without express order to be given by the said court, in open court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon, before he shall have taken, or shall have delivered to him, a recognisance from the person or persons procuring such information, to be exhibited with the place of his, her, or their abode, title or profession, to be entered to the person or persons against whom such information is or are to be exhibited, in the penalty of 20*l.*, that he, she, or they will effectually prosecute such information or informations, and abide by and observe such orders as the said court shall direct; which recognisance the said clerk of the crown, and also every justice of the peace of any county, city, franchise, or town corporate (where the cause of any such information shall arise) are hereby empowered to take; after the taking whereof by the said clerk of the crown, or the receipt thereof from any justice of the peace, the said clerk of the crown shall make an entry thereof upon the record, and shall file a memorandum thereof in some public place in his office, that all persons may resort thereto without fee, and in case any person or persons against whom any information or informations for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto and plead to issue, and that the prosecutor or prosecutors of such information or informations shall not, at his and their own proper costs and charges, within one whole year next after issue joined thereon, procure the same to be tried, or if upon such trial a verdict pass for the defendant or defendants, or in case the said informer or informers procure a *nolle prosequi* to be entered, then, in any of the said cases, the said court of King's Bench is hereby authorised to award to the said defendant or defendants his, her, or their costs, unless the judge before whom such information shall be tried shall, at the trial of such information, in open court, certify upon record that there was a reasonable cause for exhibiting such information; and in case the said informer or informers shall not, within three months next after the said costs taxed and demand made thereof, pay to the said defendant or defendants the said costs, then the said defendant or defendants shall have the benefit of the said recognisance to compel them thereunto."

This statute does not extend to informations exhibited by the attorney-general *ex-officio*. (Sect. 6.)

[3] The same certainty and precision is required in an information as in an indictment, and the rules in this respect applicable to the one are equally so to the other; the reader is therefore referred to Indictments, *ante*, p. 105.

An information, being the mere assertion of the officer who files it, may be amended at any time before the trial. 4 Burr. 2527, 2568; 2 Stra. 871; 1 id. 185; 4 T. R. 457. Amendment, vol. i. p. 340; Indictments, *ante*, p. 105.

In the absence of leave from the court, the party, by applying for an information, waives his right of action; and if an action be pending, proceedings will be stayed. *Rex v. Sparrow*, 2 T. R. 198.

[4] After filing the information, process is then issued to compel the defendant to appear. But if this be issued before the requisite security to prosecute is taken, it will be set aside on motion; for the object of 4 & 5 Wm. & M. c. 18, was, that the master of the Crown Office should file no information without leave, and issue no process on it without recognisance. R. T. Hardw. 248. When, therefore, this previous step has been taken, the practice of the Crown Office is to issue a subpœna, which the prosecutor's clerk in court makes out and engrosses, and a copy is served on the defendant, who has four days allowed him to make his appear-

(H) *Of the Costs.*[1]

ance, from the day of the return. At the expiration of this time, if the defendant does not appear, an affidavit is made of the service of the subpœna, and a *capias* awarded. This, however, is only the case where the information is granted against a private individual, for when a corporation aggregate are thus prosecuted, a *distringas* is the only course which can be adopted. If the latter process be issued into a foreign country, there must be fifteen days between the teste and the return. 1 Salk. 374.

An infant appears by clerk in court. *Reg. v. Tanner*, 2 Ld. Raym. 1284.

If no appearance be entered, in case the defendant is in custody, the prosecutor shall cause a copy of the information to be delivered to the party himself, or to the keeper or turnkey of the gaol in which he is confined, together with a notice that if an appearance, and either a plea or demurrer, be not entered on his behalf within eight days, he shall proceed to enter them for him; and if this has no effect, he may go before any judge and proceed to trial.

On the entry of the appearance, the defendant is entitled to an office copy of the information; at the same time the prosecutor enters two four-day rules to plead; and when they are expired, a motion is made by counsel for a peremptory rule, which in London and Middlesex is two days, and in other counties ten. 6 T. R. 594; Hand. Prac. 9. But if the party accused be not in custody, and has duly appeared, he is entitled to an imparlance, of course (1 Salk. 367; Com. Dig. Information, D. 5), till the term ensuing. 2 Salk. 514; Com. Dig. Information, D. 5. Where, on the other hand, he is in prison, or comes in on a *cepi corpus*, outlawry, or attachment, he must plead immediately, because he has been guilty of a contempt, and no further time can be allowed him.

To a criminal information the defendant may plead in person. *Attorney-General v. Carpenter*, 1 C. & J. 409; 1 Tyr. 351.

The pleadings being complete, the prosecutor makes up the issue with notice of trial, and the solicitors of both parties take office copies of the proceedings. Hand. Prac. 9.

The time of proceeding is the same as in proceedings on an indictment in the Queen's Bench. Com. Dig. Information, D. 7.

The court will not quash an information on the motion of the defendant (*Rex v. Nixon*, 1 Stra. 185), unless a want of jurisdiction appear. *Rex v. Williams*, 1 Burr. 385. But if there is an information for perjury on the trial of an information for conspiracy, the court, if they think fit, may, on the consent of all parties, arrest the judgment on the latter, and quash the proceedings on the former. 2 Stra. 1072.

If, after notice of trial, the prosecutor does not countermand it in time, the defendant is entitled to costs. *Rex v. Heydon*, 3 Burr. 1304. And by the 4 & 5 Wm. & M. c. 18, if the prosecutor neglect, for a year after issue joined, to bring the cause to trial, the court may award the defendant costs. (Sect. 1.)

Where an action is pending for an assault, the court will not pass judgment. *Rex v. O'Gorman Mahon*, 4 Ad. & E. 576.

After rule discharged, applicant may bring an action for the same grievance. *Wakley v. Cook*, 16 Mee. & W. 822.

[1] In case the verdict pass on the trial for the defendant, or a *nolle prosequi* be entered, the defendant is entitled to his costs, "unless the judge before whom such information shall be tried shall, at the trial of such information in open court, certify that there was a reasonable cause for exhibiting such information." 4 & 5 Wm. & M. c. 18.

It has been held upon the construction of these words, that where an information is tried at bar, the defendant can have no costs within this statute, for the words are most naturally to be understood of a trial at *nisi prius;* and it would be absurd to suppose that the statute intended that the justices of the Queen's Bench, at a trial before themselves, should make a certificate to themselves. Besides, the amount of the recognisance prescribed by the act is only 20*l.*, which would be insufficient to answer bar costs. *Reg. v. Clerk*, 7 Mod. 47; Hull. L. of C. 587. So, if there be several defendants in an information for a misdemeanor, and any one of them be found guilty, those who are acquitted are not entitled to costs by this statute, although the judge may not have certified a reasonable cause for exhibiting the information; because, previous to the 8 & 9 Wm. 3, c. 10, no defendant in a civil action in such-like case could recover any costs, and the act of 4 & 5 Wm. & M. c. 18, cannot be intended to give defendants in informations any other right to costs than such as they before possessed in civil actions. *Reg. v. Danvers*, 1 Salk. 194; Hull. L. of C. 588. But where the defendant in an information is acquitted, and the judge does not certify at the trial a reasonable cause for exhibiting the information, the court of Queen's Bench have no discretionary power to grant or refuse costs, but are bound by the statute in such case to award them; and that, whether the acquittal were upon the merits or contrary to the direction of the judge, and against evidence, or only from a slip in point of form, and however notorious the offence might be. *Rex v. Woodfall*, 2 Stra. 1131; Hawk. P. C. 6. And the act intends that the certificate of a reasonable cause, in order to deprive the defendant of costs upon an acquittal, shall be entered on the *postea*. Hull. L. of C. 388; Comb. 345. The costs, however, to which a defendant is entitled upon an acquittal, are limited to 20*l.*, the extent of the recognisance entered into by the prosecutor; and the court has no authority to award more than that sum. *Rex*

INFORMER. *See post,* Qui Tam Action.

INFRINGEMENT. *See* Copyright, vol. iii. p. 245; *post,* Patent.

INHERITANCE. *See* Estate, vol. iv. p 268; Fee-Simple, id. p. 440.

INJUNCTION under the Common-Law Procedure Act, 1854.

I. Injunction Claimed in Writ of Summons, p. 156.

(A) *A Plaintiff is entitled to claim a Writ of Injunction against the Continuance or Repetition of a Breach of Contract, or other Injury,* p. 156.

(B) *Of the Writ of Summons,* p. 156.

(*a*) *Form of Indorsement,* p. 156.

(C) *Proceedings in Action,* p. 157.

II. Claim of Injunction after Action, p. 157.

(A) *After Commencement of the Action, Application may be made to restrain the Defendant from repeating or continuing the Breach of Contract or Wrongful Act,* p. 157.

I. Injunction Claimed in Writ of Summons.

(A) *A Plaintiff is entitled to claim a Writ of Injunction, &c.*

A plaintiff is entitled to claim a writ of injunction against the continuation or repetition of a breach of contract or other injury.

By 17 & 18 Vic. c. 125 (Common-Law Procedure Act, 1854), sect. 7, "in all cases of breach of contract, or other injury, where the party injured is entitled to maintain, and has brought an action, he may in like case and manner, as hereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also, in the same action, institute a claim for damages or other redress."

(B) *Of the Writ of Summons.*

(*a*) *Form of Indorsement.*[1]

By sect. 80, "the writ of summons in such action shall be in the same form as the writ of summons in any personal action; but on every such writ and

v. Filewood, 2 T. R. 145. *Rex v. Brook*, id. 197. *Reg. v. Savile*, 18 Q. B. 703.

By the 6 & 7 Vic. c. 96, s. 8, "in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried."

Under the same statute, a defendant who obtains a verdict on a criminal information is entitled to his costs, notwithstanding that the judge who tries the case certifies that there was reasonable and probable cause for the information. *R. v. Latimer*, 20 L. J. Q. B. 129; 15 Jur. 314. But he is entitled in such case only to the costs subsequent in the filing of the information. *R. v. Cavendish*, 12 Ir. Law R. 230.

For the table of fees in the Crown Office upon informations, *see* vol. iii. p. 528.

[1] *Form of Indorsement.*

The plaintiff intends to claim a writ of injunction to restrain the defendant from [*here state concisely for what the writ of injunction is required; as for example, thus:* "Felling or cutting down any timber or trees standing,

copy thereof there shall be indorsed a notice that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction."

(C) *Proceedings in Action.*

Proceedings in action.

By sect. 81, "the proceedings in such action shall be the same as in the proceedings to obtain a *mandamus* under the provisions hereinbefore contained; and in such action, judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience, such writ of injunction may be enforced by attachment by the court, or when such courts shall not be sitting, by a judge."

II. Claim of Injunction after Action.

(A) *After the Commencement of the Action, Application may be made to restrain the Defendant from repeating or continuing the Breach of Contract or Wrongful Act.*

After the commencement of the action application may be made to restrain the defendant from repeating or continuing the breach of contract or wrongful act.[1]

17 & 18 Vic. c. 125, s. 82. "It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex-parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right, and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and in case of disobedience, such writ may be enforced by attachment by the court, or when such court shall not be sitting, by a judge: Provided always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order."

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growing, or being in or upon the lands and premises at in the county of and from committing any further or other waste or spoil in or upon the said land and premises"]: And take notice, that in default of the defendant's entering an appearance as within commanded, the plaintiff may, besides proceeding to judgment for damages and costs, apply for and obtain such writ.

This form is prescribed by R. M. V. 1854.

[1] The court refused to grant more than a rule *nisi* in the first instance for an injunction against a defendant in an action for infringing a patent. *Gittins v. Symes*, 24 L. J. C. P. 48.

The application should be made without delay. *Flavell v. Harrison*, 22 L. J. Ch. 866. *Anwyl v. Owens*, id. 995. It may be made at any time after the commencement of the action, whether before or after judgment. Sect. 82, *supra*.

The Common-Law Commissioners, in their third report, say, "The practice of courts of equity, by way of injunction, extends not only to the protection of equitable rights, but of those also for the violation of which an action lies at common law. A court of equity will, by injunction, restrain waste in all cases; it will also restrain in cases of irremediable mischief, that is, such mischief as cannot, when committed, be adequately compensated by damages. Equity has, in that respect, gradually enlarged a jurisdiction which it originally assumed by analogy to the case of waste, and the instances in which it now gives this species of relief where common-law rights are invaded may be classed as follows:—1. Waste. 2. Trespass and torts in certain particular cases where, if the defendant were suffered to proceed in the commission of the injury, there would be no adequate remedy at law: the principal of these are, trespass by the defendant's working from his own mine into the plaintiff's, infractions of copyrights or patent rights, destruction of deeds or chattels belonging to the plaintiff, and having a peculiar value, not to be estimated in money (in which latter case, the court enforces restoration also). 3d. Breach of contract, where there is a contract to abstain from doing a specific thing; and the damage sustained by its violation cannot be precisely or conveniently estimated in damages. Thus, if a lessee covenant to spend all his hay upon the farm, or if a person covenant not to carry on a certain trade within a certain district, a court of equity will restrain such person from removing the hay or carrying on the trade. There seems to be no reason

INJUNCTION under Railways and Canals Traffic Act, 1854. *See* Carrier, vol. iii. p. 41.

INJURIES. *See post,* Torts.

INN and Innkeeper. *See* also Alehouse, vol. i. p. 276.

I. What is an Inn, p. 158.

II. Of the Obligation of the Innkeeper to receive Travellers, p. 159.

III. Of his Responsibility for the Goods of his Guests, p. 159.

(A) *The Innkeeper is not absolved from Responsibility by reason of the Luggage being placed in a particular Room at the request of the Guest,* p. 159.

(B) *And he is Liable, as for a Breach of Duty, unless the Negligence of the Guest occasion the loss in such a way that the loss would not have happened if the Guest had used the ordinary care that a prudent Man may be reasonably expected to have taken under the circumstances,* p. 160.

IV. Of his Right of Lien, p. 161.

V. Hours of Opening on Sundays. *See* vol. i. p. 281; and *Harris v. Jenns,* 9 C. B. 152; 30 L. J. M. C. 183. *Taylor v. Humphreys,* 30 L. J. M. C. 242. *Tennent v. Cumberland,* 1 El. & E. 401. *Reg. v. Whiteley,* 3 H. & N. 143; 27 L. J. M. C. 217. *Atkinson v. Sellers,* L. J. M. C. 217; 28 id. 12.

I. What is an Inn.[1]

why a court of law should not exercise the same jurisdiction, and restrain violations of legal rights, in all cases in which an injunction now issues from courts of equity."

When the primary object of an agreement is to secure the performance of it, equity will interfere by injunction, although there is a penalty attached to its non-performance. *French v. Macale,* 2 Dr. & Stu. 274. *Lumley v. Wagner,* 21 L. J. Ch. 898. Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction specifically to perform affirmative covenants. But in such cases the court will decline to interfere where the jurisdiction cannot be beneficially exercised, or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot specifically perform. *Lumley v. Wagner, supra.*

The plaintiff cannot claim a writ of injunction to restrain the defendant from practising a profession within a particular locality, contrary to his covenant, in an action to recover a sum specified in the same deed, and which, according to the stipulation, was payable as liquidated damages, for the defendant has a right to practise upon paying the damages. *Carnes v. Nesbitt,* 30 L. J. Ex. 348; 9 W. R. 811.

An injunction may be granted prohibitory in form, but mandatory in effect, as to restrain a party from continuing a nuisance (*Earl of Mexborough v. Bower,* 7 Beav. 127. *Hills v. Crole,* 1 De Gex, M. & G. 628. *Blakemore v. Glamorganshire Canal Co.* 1 Mylne & K. 154. *Warden of Dover v. South-Eastern Railway Co.* 21 L. J. Ch. 886); or from maintaining flood-gates, &c., so as to prevent water flowing in regular quantities to the plaintiff's land. *Robinson v. Lord Byron,* 1 Bro. C. C. 538. Equity will restrain a person from so using the trade, mark of another manufacturer, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied. *Farina v. Silverlock,* 6 De Gex, M. & G. 214. See *Prowett v. Mortimer,* 2 Jur. N. S. 414. *See* further, as to the jurisdiction in this respect of Courts of Equity, and the rules according to which it is exercised, Fonbl. Eq.; Spence Eq. Jur.; Daniel's Ch. Pr.; Drewry on Injunction.

[1] An inn is a house for reception and entertainment of guests, who pay for the same,

II. Of the Obligation of the Innkeeper to receive Travellers.[1]

III. Of his Responsibility for the Goods of his Guests.

(A) *The Innkeeper is not absolved from Responsibility, &c.*

Richmond v. Smith, 8 B. & C. 9; 2 M. & R. 235.

The innkeeper is not absolved from responsibility by reason of the luggage being placed in a particular room at the request of the guest.

The servant of an innkeeper was about to remove the luggage of a guest to his bed-room, and the guest desired that a carpet-bag (part of his luggage) should be left in the room of the inn, called the Commercial Room, which was done accordingly, and the bag was afterwards stolen from that room. The Lord Chief Baron was of opinion that the defendant, to relieve himself from liability, should have objected to the bag remaining in the Commercial Room, and have given the plaintiff notice that if he persisted in having it to remain it must be at his own risk; and that a notice from an innkeeper to discharge himself from his liability at common law should be as distinct as that which was required from a carrier. The jury having found a verdict for the plaintiff, on motion for a new trial, on the ground of misdirection,—

Per Cur. We are of opinion there was no misdirection. The innkeeper is *primâ facie* liable; if the guest refused to let the things be under the innkeeper's care, the risk will be his own. But in this case he did not do so; he desired the bag to be left in the Commercial Room, and neither the innkeeper nor his servant objected to this.

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as an hotel in London, where beds and provisions are furnished only, without stabling, &c. *Thompson v. Lacy*, 3 B. & A. 283. The true definition is, a house where the traveller is furnished with everything which he has occasion for whilst on his way. (Id.) It is not necessary that the party should put up a sign. Story on Bailments, s. 475. *Calye's case*, 8 Rep. 32. But where a man takes in guests under a contract, stipulating for price, and refuses when he pleases, he is not an innkeeper (*Parkhurst v. Foster*, 1 Salk. 387; 1 Ld. Raym. 479. *Calye's case*, *supra*. 1 Bell's Com. 469); nor a person who keeps a mere coffee-house. *Doe v. Laming*, 4 Camp. 77.

An inn is distinguished from an alehouse, in this — the former existed long before and independently of any excise or other statute laws, which have entirely controlled and regulated the latter, ever since the time of Magna Charta. The one has at all times been erected without a license of the king, not being considered a franchise, but an independent trade, instituted for the convenience of passengers and wayfaring persons; whereas the other is always established by a license, to be granted in the discretion of the justices at a general meeting, is confined to a particular place, and continues only for a limited period. Since the excise laws have been extended to so many articles of entertainment, these occupations have, in modern times, been generally united; and it seems to be agreed that innkeepers are now to have a license, and be bound by the same recognisance for keeping order as alehouse-keepers, and their conduct is equally subject to be inquired into by the justices. They are also liable to be indicted and fined for harbouring thieves, suffering disorders, charging exorbitantly, or keeping their inn in an unfit situation, or in opposition to another ancient inn. Still, however, every inn is not necessarily an alehouse, nor every alehouse an inn. An inn cannot use a common selling of ale without being subject to the duties and control of the excise laws, and coming thereby more immediately under the cognisance of the justices; and if an alehouse entertains all travellers indiscriminately for gain, it is also within the common-law liability of an inn. *See* Alehouse, vol. i. p. 276.

[1] An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and it is not necessary for the guest to tender the price of his entertainment, if his objection is not on that ground; and it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist on knowing those particulars: but if the guest come to the inn drunk, or behave in an indecent or improper manner, the innkeeper is not bound to receive him. *Rex v. Ivens*, 7 C. & P. 213. He is bound to admit all persons who apply peaceably to be received as guests. 1 C. &. Kir. 404.

An indictment for refusing to admit a guest will be bad if it does not state that he was a traveller. *Rex v. Luellin*, 12 Mod. 445; but *see* 3 B. & A. 283. Although an innkeeper is bound to receive and find lodging-rooms for his guests, he is not compellable to furnish rooms to exhibit their wares in (*Burgess v. Clements*, 4 M. & S. 306); nor is he bound to provide for his guest the precise room the guest may choose to select. The extent of his obligation is to find reasonable and proper accommodation: if he tenders such accommodation, and the guest refuses it, he may require him to quit the inn and seek for accommodation and lodging elsewhere. *Fell v. Knight*, 8 Mee. & W. 276. See *Burgess v. Clements*, 4 M. & S. 306.

(B) *And he is Liable as for a Breach of Duty, &c.*

CASHILL v. WRIGHT, 6 E. & B. 891.

The innkeeper is liable as for breach of duty, unless the negligence of the guest occasion the loss, in such a way that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.[1]

In this case the plaintiff brought his action to recover damages for the loss of a watch and some sovereigns, supposed to have been stolen from his bedroom in the defendant's inn, where he was a guest. The defendant set up certain acts of the plaintiff, alleged to have been negligent, and to have occasioned or contributed to the loss. At the trial before the learned Recorder of Manchester, the jury were directed that the defence failed, unless they thought that the plaintiff had been guilty of gross negligence. A rule for a new trial having been obtained on the ground of misdirection, the court, after argument, took time to consider, and their judgment was delivered by —

Erle, J. "Two questions were raised before us. It was said first by the plaintiff's counsel, that the particular acts imputed to the plaintiff were of such a nature as not to amount to negligence, and that the learned Recorder should have directed the jury that there was no evidence of any negligence. If we were satisfied that there was no evidence to go to the jury of any negligence on the part of the plaintiff, we should be authorised in discharging the rule for a new trial on that ground. But we cannot say that there was not some evidence on which the opinion of the jury ought to have been taken. The other question was, as to the alleged misdirection in the direction to the jury, that there must

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[1] An innkeeper is chargeable on the custom or common law of the realm for the loss of the goods of a traveller who was his guest. And the liability is the same for money as for goods. *Rent v. Shuckard*, 2 B. & Ad. 803.

It is not necessary, in order to create liability for the loss, that the innkeeper should have been, by himself or his servants, guilty of any positive negligence. It is true the expression in the forms in tort is, that the loss was *pro defectu* of the innkeeper; but the cases show there is defect in the innkeeper wherever there is a loss, not arising from the plaintiff's negligence, the act of God, or the queen's enemies. *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131. *Contra*, *Dawson v. Chamney*, 5 Q. B. 168; 7 Jur. 1037; 13 L. J. Q. B. 33.

Such an action is sustainable against the executors of the innkeeper. (Id.)

In all cases the loss will be ascribed to the host's neglect where the cause of loss is unknown, unless the guest exonerate the innkeeper from his liability; as where he takes charge of the goods himself, and the innkeeper stipulates that he will not be responsible, to which the traveller consents. Thus, in *Burgess v. Clements*, 4 M. & S. 306, 1 Stark. 251, n., where the guest used a room in the inn for the purpose of showing his goods, the court said: "There is no doubt that the innkeeper is liable for goods coming to his custody, unless there is some special circumstance to take him out of that liability. It seems to us that the plaintiff, accepting the key of the room, superseded the liability of the landlord to take care of his goods. The plaintiff applied for a room, not as a room of custody, but for the purpose of exhibiting his goods in the character of a dealer in jewellery, and articles of that kind. The landlady might refuse such a room, or she might prescribe the terms upon which she would let him have it; here he accepted the room upon the terms. She says, 'This is a particular room; there is the key of that room: you must lock that room.' He accepted those terms, and therefore he relieved her from responsibility. But if he had said, 'This shall not discharge your liability, look you still to that,' the defendant would have replied, 'Then you shall not have the room.' The defendant had a right to refuse the room for the purpose in question, or to concede it upon any terms she chose. We think she did so upon the terms of the plaintiff taking the custody of his goods into his own hands with the key of the room, and that he accepted the key on those terms. We hold, under such circumstances, that the owner of the inn is not liable; for if we were to hold otherwise, it would be to make the innkeeper liable for the default of the plaintiff. He did not make a communication to the defendant when he left the room, that her responsibility might revive. It appears to us, therefore, that this verdict ought not to be disturbed." *See* also *Farnworth v. Packwood*, 1 Stark. 249. But notice by an innkeeper that, if particular precautions are not observed, he will not hold himself responsible, will not, *per se*, relieve from or limit his liability. *Morgan v. Ravey*, *supra*.

Negligence on the part of the guest conducing to the loss will excuse the innkeeper. *Armistead v. Wilde*, 17 Q. B. 261; 20 L. J. Q. B. 524. *Cashill v. Wright*, *supra* in text.

The innkeeper is responsible for goods left in the commercial or public room of the inn: there may, however, be circumstances as to the nature and value of the property, the position of the room, or other things

be gross negligence to maintain the defence. It does not appear that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning of gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable, but the legal meaning of gross negligence is, greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*. We think that the rule of law resulting from all the authorities is, that in a case like the present the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. We think, therefore, that the direction in the present case cannot be supported, and that the rule for a new trial must be made absolute."

IV. Of his Right of Lien.[1]

which may make such conduct in the guest's negligence conducing to the loss, and so rebut the landlord's *primâ facie* liability. There is no rule of law to make it so. It may in one case be gross negligence to leave property in the public room; in another it may be gross negligence to remove it thence to the guest's bed-room; each case must depend on its own circumstances. *Per Lord Campbell C. J.: Armistead v. White*, 17 Q. B. 261; 20 L. J. Q. B. 524.

If an innkeeper place his customer's carriage on the highway, he is answerable for the loss thereof. *Jones v. Tyler*, 3 Nev. & M. 576. And an innkeeper is not absolved from liability for the luggage of a guest because he put it into a particular room at the request of the latter. *Richmond v. Smith*, 8 B. & C. 9; 2 M. & R. 235, *supra* in text.

As soon as an innkeeper receives a person into his house he becomes a guest, and his liability continues as long as he derives benefit from such visitor or his property. *York v. Grindstone*, 1 Salk. 388; 2 Ld. Raym. 866. But if the goods be not those from which he can derive a profit, he is only liable for ordinary neglect. In *Gelly v. Clerk* (Cro. Jac. 188), plaintiff came to an inn with a hamper of hats, and went away, leaving them there two days, and in his absence they were stolen. Adjudged that he should not have an action against the innkeeper, because, at the time of stealing, he was not his guest, and the defendant had no benefit by keeping the hamper; therefore he shall not be charged for the loss of it in his absence: but it had been otherwise if the guest had returned the same night (Moore, 877). And if the host had promised to keep them safely, he might have been answerable upon such special promise.

If an innkeeper refuse to take charge of a traveller's goods on the ground that his inn is full, he is nevertheless liable while the owner remains as a guest. In *Bennett v. Millor*, 5 T. R. 273, the plaintiff's servant came to the inn and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week; that proposal was rejected: then he sat down in the inn as a guest, with the goods behind him, and during that time the goods were taken away. But, although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest. It was said by the court to be clear, that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be in the inn, that is sufficient to charge him. In *Calye's case* it is said, although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away, or stolen, the innkeeper shall be charged; and therewith agrees 42 Edw. 3, c. 11, a.

If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the innkeeper is clothed only with the ordinary duties and responsibilities of a bailee: for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep. *Smith v. Dearlove*, 6 C. B. 132. *Gelley v. Clerk*, Cro. Jac. 188.

[1] An innkeeper has not only a right to sue for his charges (*Thompson v. Lacy*, 3 B. & A. 283), but he has a lien on the goods of his guests. Id. 287. Therefore, he may detain a horse for his meat, but he cannot sell him (*Jones v. Thurloe*, 8 Mod. 172; 2 Stra. 557); except within the city of London. Id. 1 Stra. 556. And he loses the lien by giving credit afterwards to the owner. If a man lie in an inn one night, the innkeeper may detain

INNS of Court.[1] *See* Barrister, vol. ii. p. 373.

INOCULATION. *See post,* Vaccination.

INQUEST. *See* Coroner, vol. iii. p. 255.

INQUIRY, Writ of.

I. What it is, and When it Lies, p. 163.

II. Of the Notice of Inquiry, p. 164.

III. „ Proceedings at the Inquisition, p. 164.

his horses until he is paid for the expenses; but if he give him credit, and let him depart without payment, then he has waived the benefit of the custom by his own consent to the departure, and shall never afterwards detain the horse for that expense. *Jones v. Thurloe*, 8 Mod. 173.

A trainer of race-horses went to an inn with a horse, and remained the night; on the following day his helper came with another horse. From that period they remained at the inn with the horses, and put both horses in training; occasionally going away with the horses to races and returning. The innkeeper, however, previous to each departure, ascertained where they were going. It was held that the innkeeper had a lien on the horses for his charges, he having received them as the horses of a guest, and not at livery. *Allen v. Smith*, 10 W. R. 646; 6 L. T. (N. S.) 459.

In trespass for taking carriage-horses, which the plaintiff had hired of the defendant to take him away from the defendant's inn, the defendant pleaded that the plaintiff refused to pay his bill for entertainment, and that the defendant did so to prevent the removal of the plaintiff's carriage. To this plea the plaintiff replied that he had "tendered" the defendant 45*l.*; and the defendant denying the tender, it was proved that the plaintiff put down the money and offered it, if the defendant "would take it in full of the bill:"—*Held*, that this was not a valid tender, and that this evidence did not support the replication:—*Held* also, that on these pleadings the jury are not to consider the reasonableness of the defendant's bill. *Gordon v. Cox*, 7 C. & P. 172.

An innkeeper has a lien on the goods of his guest, not only for the amount of his bill, but for money lent, if advanced upon an agreement that they should be a security; and as the 24 Geo. 2, c. 40, s. 12 (prohibiting recovering for spirits in less quantities than 20*s.*) does not apply to the case of spirits supplied to a guest in an inn (*Procter v. Nicholson*, 7 C. & P. 67), he may have a lien for them. But an innkeeper has no lien on a horse placed in his stable for the amount of its keep, unless it is placed there by a guest. If a person is stopped with a horse under suspicious circumstances, and the horse be placed at any inn by the police, the innkeeper has no lien on the horse for its keep; he is liable to be sued in trover by the owners of the horse. *Binns v. Pigot*, 9 C. & P. 208. *Smith v. Dearlove*, *infra*.

If a horse or a carriage is put in the stables of the inn by the guest, the innkeeper has a lien on the horse for its keep, and on the carriage for its standing-room, whether the horse or the carriage be the property of the guest or of some third party, from whom it has been fraudulently taken or stolen, unless the innkeeper knew at the time he received the guest that he was not the true owner of the horse or the carriage. *York v. Greenaugh*, 2 Raym. 866. *Skipwith v.* ——, 1 Bulst. 170. *Johnson v. Hill*, 3 Stark. 172. *Turrell v. Crawley*, 13 Q. B. 197; 18 L. J. Q. B. 155. *Snead v. Watkins*, 1 C. B. (N. S.) 267; 26 L. J. C. P. 57.

The innkeeper has no right to take a parcel or other property out of the hands of the guest (*per Lord Abinger: Sunbolf v. Alford*, 3 Mee. & W. 253); nor detain his person, or take off his clothes, to secure payment (id. 248. *See* 2 Camp. 631); nor can he retain any goods not received by him in his character of innkeeper, and not brought to the inn by a person who is received and lodged in the inn as a guest. *Smith v. Dearlove*, 6 C. B. 132; 17 L. J. C. P. 219.

The principle on which an innkeeper's lien depends is, that he is bound to receive travellers, and the goods they bring with them to the inn. A piano hired by a professional pianist, while staying at an inn, and which the innkeeper knew to be hired, was held not subject to his lien for the bill of the guest. *Broadwood v. Granara*, 10 Ex. 417; 24 L. J. Ex. 1. But it extends to goods brought to the inn by a guest, though they belong to a third party, provided they be such as persons ordinarily travel with. *Snead v. Watkins*, 26 L. J. C. P. 26.

[1] The legal estate in chambers in New Inn passes by surrender. *Doe d. Warry v. Miller*, 1 T. R. 393.

On a bond given to the society of Lincoln's Inn, on the obligor being called to the bar he is liable for absent commons. *Rosslyn v. Jodrell*, 4 Camp. 303; 1 Stark. 147. In debt upon such bond, non-payment may be assigned for breach, without an actual demand. *Levinz v. Randolph*, 1 Ld. Raym. 595.

IV. Return of Inquisition, p. 165.
V. Signing Judgment, p. 165.
VI. Setting aside Inquisition, p. 166.
VII. Costs, p. 166.
VIII. Of the Reference of Damages to the Master in Lieu of, p. 167.
IX. On Bonds within 8 & 9 Wm. 3, c. 11. *See* Bonds, vol. ii. p. 523.

I. What it is, and When it Lies.[1]

[1] A writ of inquiry of damages is a judicial writ, issuing out of the court in which the action is brought, and directed to the sheriff of the county where the venue is laid (2 Lil. P. R. 721), setting forth the proceedings which have been had in the cause; "and that the plaintiff ought to recover his damages by occasion of the premises: but because it is unknown what damages he has sustained by occasion thereof, the sheriff is commanded, that by the oath of twelve honest and lawful men of his county he diligently inquire the same, and return the inquisition into court."

The amount of the damages sustained by the plaintiff is ascertained, either by reference to the master (15 & 16 Vic. c. 76, s. 92), or by writ of inquiry. In general, a writ of inquiry is awarded; but this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages, with the assent of the plaintiff (2 Saund. 107, n. 2; 2 Wils. 372, 374; 3 id. 61; 2 Dougl. 316; 25 Geo. 3, c. 81; H. Black. 252, 529, 542; 4 D. & E. 275; 7 id. 446, 447; 4 Taunt. 148, 149; 1 Chit. 621, n.); or direct them to be assessed by the proper officer. And it was accordingly the practice, in actions upon bills of exchange and promissory notes, or other actions in which the amount of damages is substantially a matter of calculation, instead of executing a writ of inquiry, to apply to the court, or to a judge (2 Smith, R. 46, 47), on an affidavit of the nature of the action, &c., for a rule or summons to show cause why it should not be referred to the master, to see what is due for principal and interest, and to tax the plaintiff his costs, and why final judgment should not be signed for that sum, without executing a writ of inquiry, upon which the court or judge made an absolute rule or order (1 Chit. Rep. 469) on an affidavit of service, unless good cause were shown to the contrary. 4 D. & E. 275; 1 H. Black. 252, 529, 541; 2 B. & P. 55. And *now* by statute 15 & 16 Vic. c. 76, s. 94, where it appears to the court or judge that the amount of damages is substantially a matter of calculation, it is not necessary to issue a writ of inquiry, but the court or judge may direct that the amount, for which final judgment is to be signed, shall be ascertained by one of the masters of the court. *See* sections, *post*, p. 167.

After judgment by default in *assumpsit* on a foreign judgment, a writ of inquiry has been executed. *Meesin v. Lord Massareene*, 4 T. R. 493.]

In covenant for the payment of a liquidated sum, a writ of inquiry is not essential. *Thelluson v. Fletcher*, Douglas, 316.

Before the abolition of the distinction as to actions of debt, no writ of inquiry was allowed in debt (*Taylor v. Capper*, 14 East, 442) as on a bail-bond. *Moody v. Pheasant*, 2 B. & P. 446. In debt on bond in an inferior court the defendant may, it is said, by by custom pray a writ of inquiry after a *cognovit actionem* (*Brightman v. Parker*, 1 Mod. 96); so in debt for foreign money there may be a writ of inquiry (*Arden v. Connell*, 5 B. & A. 885; 1 D. & R. 529); so after judgment by default in debt for not setting out tithes (id.); or, in debt for use and occupation. (Id.)

Where no damages are given on trying a traverse of the return to a *mandamus*, the omission cannot be supplied by a writ of inquiry. *Kynaston v. Shrewsbury*, 2 Stra. 1052. But where the matter omitted to be inquired by the principal jury does not go to the point in issue, or necessary consequence thereof, but is merely collateral, as the four usual inquiries on a *quare impedit* (10 Co. 18), there such matter may be supplied by a writ of inquiry, without any damage to the party; because, if the same had been inquired of by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an attaint would not lie. Carth. 362. See *Phillips v. Jones*, 19 L. J. Q. B. 374.

In trespass or replevin against overseers acting *virtute officii*, the omission to assess treble damages under the 43 Eliz. s. 2, may be supplied by writ of inquiry, to obtain which it must be suggested on the roll that they acted by virtue of their office. *Valentine v. Fawcett*, Ca. Temp. Hard. 2 Stra. 1021; Sayer. Rep. 214.

The Queen's Bench, in an action for libel, directed a writ of inquiry, where the jury found for the plaintiff on the general issue, and two special pleas, without assessing damages, and for the defendant on the other plea; but the Exchequer Chamber in error reversed the judgment. *Clement v. Lewis*, 3 B. & B. 297; 2 B. & A. 702.

Where a plaintiff has obtained a judgment *non obstante veredicto*, he may execute a writ

II. Of the Notice of Inquiry.[1]

III. „ Proceedings at the Inquisition.[2]

of inquiry without leave of the court. *Shephard v. Halls*, 2 Dowl. 453.

In tort, separate writs of inquiry against joint defendants is irregular. *Mitchell v. Millbank*, 6 T. R. 199.

The plaintiff's attorney may be compelled to file the inquisition and subsequent proceedings. *Townsend v. Burns*, 1 C. & M. 177; 3 Tyr. 104; 1 Dowl. 629.

The writ is tested on the day on which it is issued, and it may be made returnable on any day certain in term or vacation. See *Collett v. Curling*, 5 D. & L. 605.

[1] A notice of inquiry must be in writing, and is served in the same way as a notice of trial. *See post*, Notice of Trial. Notice must be given ten days before, and short notice four days. Countermand of notice may be given four days or two days respectively before the day appointed; and so as to continuance of notice. The notice specifies some day and hour at which the inquiry is to take place, which day is before the day fixed for the return.

By Reg. Gen. H. T. 1853, r. 34, "notice of trial or inquiry, and of continuation of trial or inquiry, may be given either in town or country, unless otherwise ordered by the court or a judge." "Short notice of inquiry" is, in all cases, taken to mean four days. Id. r. 35. Notice of inquiry may be continued to any sittings in or after term, on giving a notice of continuance four days before the time mentioned in the notice of inquiry, unless short notice of inquiry has been given, in which case two days' previous notice is sufficient, unless otherwise ordered by the court, or a judge, or by consent.

By id. r. 40, it is ordered, that "in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar, or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer."

The hour expressed in the notice of inquiry does not bind the party to whom addressed to that precise time. *Williams v. Frith*, Dougl. 198.

If the day of the week as well as the month is stated in a notice of inquiry, and the former is mistaken, it is immaterial, unless the defendant was thereby misled. *Batten v. Harrison*, 3 B. & P. 1. As where the notice was for Wednesday, the 11th June, when Wednesday fell on the 10th. *Elden v. Haig*, 1 Chit. Rep. 11. When a writ of inquiry is to be executed before a judge, the notice should be for the sittings or assizes generally (*Waite v. Smales*, Barnes, 135), but otherwise it should express the time and place of executing it. *Almond v. Squire*, Sayer, 181; Barnes, 297. It may be executed at any time, even on the day it is returnable (*Dyke v. Blakston*, 2 Ld. Raym. 1449), if it be not a Sunday. *Hoyle v. Cornwallis*, 1 Stra. 387. It must be certain as to time (*Ison v. Fowen*, 2 id. 1142), and not therefore "between the hours of ten and eleven and two." *Robinson v. Phillips*, Barnes, 296; Prac. Reg. 445. But a notice for eleven is good, if the writ be executed before twelve. *Last v. Denny*, Barnes, 302; Prac. Reg. 445. The preferable mode is to state that the writ will be executed between two certain hours. *Arnold v. Squire*, Sayer, 111. *Robinson v. Phillips*, *supra*. The notice must be certain as to place. *Squire v. Almond*, Barnes, 297. If counsel are to be employed notice must be given to the opposite party; otherwise the execution will be postponed (*Elliott v. Noklin*, 5 Prac. 641), which may be done by the sheriff after it is entered upon. *Markham v. Middleton*, 2 Stra. 1259.

By 3 & 4 Wm. 4, c. 42, s. 22, the court or a judge may, in a local action, order the inquiry to be executed in another county than that in which the venue is laid, and for that purpose may order a suggestion to be entered on the record, that the inquiry may be more conveniently executed in the other county.

[2] A writ of inquiry cannot be executed before two under-sheriffs, for the sheriff has only a right to appoint one. *Denny v. Trapnell*, 2 Wils. 378. Under special circumstances, by leave of the court, this writ may be executed before the chief justice (*Coleman v. Mawby*, 2 Stra. 853), or judge of assize, as an assistant to the sheriff. *Anon.* 12 Mod. 610.

The amount of the demand is the only point to be settled. *De Gaillon v. L'Aigle*, 1 B. & P. 368. And where it arises out of a collateral engagement, losses for not indemnifying cannot be taken into consideration. *Carruthers v. Graham*, 14 East, 578. Suffering judgment by default is an admission of the cause of action on a writ of inquiry, the contract cannot be repudiated. *East India Co. v. Glover*, 1 Stra. 612. Therefore, in an action on a bill or note, it need not be

IV. Return of Inquisition.[1]

V. Signing Judgment.[2]

proved, though it must be produced. *Beevis v. Lindsell*, 2 id. 1149. *Billers v. Bowles*, Barnes, 233. So in an action on a policy of insurance, proving the defendant's subscription, without showing his interest, suffices. *Thellisen v. Fletcher*, Dougl. 315. And in an action for use and occupation the plaintiff need not show it is his own house. *Dans v. Holachy*, 1 Chit. Rep. 644, 645. So, after judgment for the plaintiff, on demurrer to the replication, a lease mentioned in the conditions of a bond set out by the defendant upon oyer need not be proved. *Collins v. Rybot*, 1 Esp. 157. But it is not sufficient, after demurrer to a declaration in the usual form, to put in a bond having a condition similar to that mentioned in the suggestion, without identifying the bond produced. *Hodgkinson v. Marsden*, 2 Camp. 121. And in an action for goods sold, the plaintiff must prove the quantity and value. *Hodder v. Saunders*, 2 Show. 86.

An under-sheriff cannot discharge a party arrested while attending the execution of a writ of inquiry, but the court will on motion. *Walters v. Rees and Executors*, 4 Moore, 34.

In an action for mesne profits the plaintiff should prove the length of time the defendant has been in possession. *Ive v. Scott*, 9 Dowl. 993.

The defendant is precluded from proving any matter which might have been pleaded as a defence (*Speck v. Phillips*, 5 Mee. & W. 279; 7 Dowl. 470), as for fraud in the contract (*Eadem v. Lutman*, 1 Stra. 612), the want of consideration (*Shepherd v. Charter*, 4 T. R. 275), or of stamp (*Watson v. Glover*, 12 L. J. C. P. 184), payment (*Lane v. Mullins*, 2 Q. B. 254; 1 Dowl. N. S. 562), or set off (*Carruthers v. Graham*, 14 East, 578). Where, however, the declaration is general, the defendant may sometimes be at liberty to prove facts, the effect of which must be rebutted by the plaintiff; as, that all the work done was not done at defendant's request (*Williams v. Cooper*, 3 Dowl. 204); that the house in use and occupation was not occupied for the whole time by the defendant. *Davis v. Holship*, 2 Chit. 644. *See* also *King v. Beak*, 8 Dowl. 735. *Cooper v. Blick*, 2 Q. B. 915. *Banbury Union v. Robinson*, 1 Dav. & M. 42.

Where, upon a writ of inquiry in an action for work, &c., the under-sheriff refused to allow the defendant to ask on cross-examination whether part had been done on his retainer:—*Held*, that he was entitled to put the question; the judgment by default admits something to be due, but disputes the amount. *Williams v. Cooper*, 3 Dowl. P. C. 204.

Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the court will direct the sheriff to summon a jury to be taken from the special-jury book. *Price v. Williams*, 5 Dowl. 160.

Reg. Gen. (Pr.) H. T. 1853, r. 46. "There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose."

Upon a writ of inquiry, after judgment by default or on demurrer, evidence contradicting the facts stated in the declaration was held inadmissible, although it would have been admissible on the general issue. *Stevens v. Pell*, 2 Dowl. 629; 2 C. & M. 421. Minutes of what passed before the under-sheriff are not admissible unless verified by affidavit. *Lothbury v. Brown*, 10 Moore, 136.

Formerly, no interest was allowable on writs of inquiry. *Pinock v. Willett*, Barnes, 228. But now the sheriff's jury ought to allow interest in those cases where courts of law do. —— *v. Edmunds*, 6 Taunt. 346. *Milsen v. Hayward*, 9 Price, 134.

If the plaintiff does not proceed according to the notice, the defendant is entitled to his costs. *Shadford v. Hauston*, 1 Stra. 317. *Sutton v. Bryan*, 2 id. 728.

A writ of inquiry may be executed by more than twelve jurors. *Cheston v. Crawley*, 7 Mod. 450.

Where, on the execution of a writ of inquiry, the parties agreed to withdraw the case from the jury, and to submit it to the master under a judge's order, the master sits as an arbitrator appointed by the parties, and the court will not interfere with his finding as to the facts. *Fisher v. Pyne*, 1 M. & G. 265.

The court will not, at the instance of the sheriff, stay the execution of a writ of inquiry on a judgment by default, in an action for a libel, on the ground that the House of Commons has voted the libel to be a privileged publication, and that all persons concerned in bringing any action in respect of such publication are guilty of a breach of the privileges of that house. *Stockdale v. Hansard*, 8 Dowl. 148.

[1] When the trial is over, the sheriff indorses his return on the writ, which is delivered out to the party four days afterwards with the inquisition, which is engrossed on parchment, and signed and sealed in the name of the sheriff and jurors.

Where a sheriff neglects to return a writ of inquiry within due time, the court will, by rule, compel him to do so. *Stockdale v. Hansard*, 8 Dowl. 297.

[2] If there is no stay of judgment and execution, and no rule for a new inquiry, &c. has been moved for, "judgment may be signed at the expiration of four days from the return of a writ of inquiry." Reg. Gen. H. T. 1853, r. 55.

And by 1 Wm. 4, c. 7, s. 1, on the expiration of the rule for judgment, execution may be issued forthwith, unless the sheriff or

VI. Setting aside Inquisition.[1]

VII. Costs.[2]

other officer before whom the writ was executed shall certify on such writ that judgment ought not to be signed till defendant shall have had an opportunity to apply to the court to set aside the execution of such writ, or one of the judges shall order the judgment to be stayed until a day named in such order: Provided always, that in case the signing of judgment on such writ shall be postponed by reason of such certificate or order, or by the choice of the plaintiff or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record as of the day of the return of such writ, unless the court shall otherwise direct. The defendant may compel the plaintiff to file the inquisition, to enable the former to arrest or vacate judgment. 2 Dowl. 629.

[1] As in the case of verdicts at *nisi prius*, the defendant may, within four days after the return day of the writ, move to set aside the execution of the writ, or arrest judgment, and grant a new writ of inquiry; and the sheriff or officer may stay execution for that purpose, or prevent judgment being signed. If, however, the execution be not set aside, the judgment is entered up as of the return day. 1 & 2 Wm. 4, c. 7, s. 1. *Angel v. Ihler*, 5 Mee. & W. 600.

The motion to set aside the inquisition may be either at the instance of the plaintiff (*Mitchell v. Millbank*, 6 T. R. 199) or the defendant, as for want of due notice (*Squire v. Almond*, Prac. Reg. 446-47); or on the ground that the jury were objectionable (*Stainton v. Beadle*, 4 T. R. 473), as that they were returned by the plaintiff's attorney. *Bayliss v. Lucas*, Cowp. 112. So, where the damages are excessive (*Benson v. Frederick*, 3 Burr. 1845, b; 3 Wils. 63: but *see* 11 East, 23; 1 Chit. Rep. 729; 5 Price, 641); or too small (*Markham v. Middleton*, 2 Stra. 1259; 2 Salk. 647); or that the plaintiff has been taken by surprise (*Hall v. Stone*, 1 Stra. 515); or that the jury mistook the law (*Woodford v. Eades*, id. 425), as where the sheriff admits evidence he ought to have refused. *Elliott v. Micklen*, 5 Price, 641. So it will be set aside if the jury find no damages. *Burgess v. Nightingale*, Barnes, 230.

Where the damages were excessive, the court imposed the terms before they granted the rule to show cause of bringing part of the money into court. *Williams v. Reeves*, 1 Chit. Rep. 729.

It is no ground for setting aside the inquisition that the writ was returnable on a return day, instead of a day certain. *Elmes v. Tomlinson*, Barnes, 230. On motion for setting aside an inquisition on the ground of the improper admission of evidence, the court will consider themselves bound by the sheriff's minutes (verified by affidavit) of the evidence which had been offered. *Elliott v. Micklen, supra.*

Under special circumstances, a new inquisition will be allowed (*Bean v. Elton*, 2 Stra. 1077), as where the jury find no damages; but it seems the first writ ought to be previously returned. *Buntrey v. Teasdaile*, Barnes, 231. *Semble, contra, Yarmouth v. Russel*, 2 Ld. Raym. 1142.

The writ of inquiry may be amended in substance (*Hughes v. Alveaz*, 1 Stra. 684) or form. *Johnson v. Toulmin*, 4 East, 173.

A writ of inquiry is only conclusive as regards those demands which are entered into; and, therefore, where any certain claim is not submitted to the jury, the plaintiff may resort to it in another action. *Anon.* 1 Chit. Rep. 645, n. As where, on a writ of inquiry in an action on a bill and for goods sold, the plaintiff gave no evidence in support of the count for the goods, it was holden that he might afterwards sue for the goods sold. *Seddon v. Tutop*, 6 T. R. 607.

Irregularities in a writ of inquiry may be waived by appearance (*Bullock v. Barrow*, Dougl. 797, n), and delay. *Viner v. Clark*, 1 Anst. 175. And the want of a writ of inquiry is aided by the Statute of Jeofails. *Mallory v. Jennings*, 2 Stra. 878.

After judgment by default, and writ of inquiry executed, the court, upon application, ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand: —*Held*, notwithstanding, that he was not bound to pay the plaintiff the costs of the inquiry. *Porter v. Cooper*, 3 Dowl. P. C. 662.

Where, on the execution of a writ of inquiry, in an action for slander, the jury are incorrectly informed by the under-sheriff that any amount of damages will carry costs, and they find for less than 40s., that is no ground for a new writ of inquiry, or for increasing the amount of the verdict. *Grater v. Collard*, 6 id. 503.

The application to set aside the inquisition and have a new inquiry, is looked upon as on the same footing as an application for a new trial.

If a misdirection by the sheriff is relied upon, the court can hear from counsel in the cause a statement as to what passed at the trial. *Jones v. Lewis*, 9 id. 145.

[2] Where, between a first and second inquiry, the latter being granted for rejection of evidence, the defendant pays the debt, he is not liable for the costs of the first inquiry. *Porter v. Cooper*, 2 C., M. & R. 232; 3 Dowl. 662.

The costs of the day for not proceeding to execute a writ of inquiry may be obtained by a side-bar rule, on the usual affidavit. Reg. Gen. H. T. 1853, r. 39.

Although the directions to taxing-masters of 1853, with reference to taxation on the

VIII. Of the Reference of Damages to Master.[1]

IX. Writs of Inquiry on Bonds within 8 & 9 Wm. 3. c. 11. *See* Bonds, vol. ii. p. 523.

INQUISITIONS under the Lands Clauses Consolidation Act. *See post*, Lands Clauses Consolidation Act.

INSANITY. *See* Lunacy.

INSOLVENCY. *See* Bankruptcy, vol. ii. p. 141; *post*, Stoppage *in transitu*; Vendor and Purchaser.

INSPECTION and DISCOVERY.

I. Inspection, p. 168.

(A) *Under the Statute* 14 & 15 *Vic. c.* 99, p. 168.

(*a*) *Inspection may be ordered of Documents relating to the Action in the Custody of the Opposite Party*, p. 168.

(B) *At Common Law*, p. 170.

(C) *Order or Rule for*, p. 171.

(D) *Costs of*, p. 171.

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higher or lower scale, do not expressly include the case of a writ of inquiry, it is the practice to tax such costs on the principle laid down by them, and to tax the costs upon the lower scale, where the sum assessed upon the writ of inquiry does not exceed 20*l.*, provided the amount was liquidated; for if it was unliquidated, then the costs will be taxed on the higher scale. *Hooppeel v. Leigh*, 5 Dowl. 40. *Croft v. Miller*, 3 Bing. N. C. 975. *See* vol. iii. p. 312.

[1] By 15 & 16 Vic. c. 76, s. 90, the rule to compute is abolished. And by sect. 94, "in actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the court; and the attendance of witnesses, and the production of documents before such master, may be compelled by subpœna, in the same manner as before a jury upon a writ of inquiry; and it shall be lawful for such master to adjourn the inquiry from time to time, as occasion may require; and the master shall indorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order, with such indorsement, to the plaintiff; and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry."

The application, in ordinary cases, is made to a judge at chambers for a summons *nisi*, and after it is served, and the order made, the plaintiff's attorney obtains an appointment with the master, which is served on the defendant's attorney (*Amlot v. Evans*, 7 Mee. & W. 462; 9 Dowl. 219. *Carter v. Southall*, 3 Mee. & W. 128. *Ettison v. Wood*, 21 L. J. Q. B. 317), and the parties then attend with their witnesses; and on the same occasion the master taxes the costs. If the application be opposed, the defendant must do so by seeking to set aside the judgment, for which purpose he may ask to have the rule enlarged, for he cannot show as cause the irregularity of the judgment. *Luxford v. Groombridge*, 2 Dowl. N. S. 332. *Kelly v. Villebois*, 8 Dowl. 136. *Middleton v. Woods*, 6 Mee. & W. 136; 8 Dowl. 170. Nor is it cause that a bill in equity has been filed against the plaintiff. *Berthen v. Street*, 8 T. R. 326.

Where a rule to set aside judgment has been granted with a stay of proceedings, the rule or order for a reference cannot be made absolute. *Anderson v. Southern*, 9 Dowl. 994. *Trego v. Tatham*, 2 Scott, N. R. 537; 9 Dowl. 379.

Where several defendants have allowed judgment to pass against them by default, at different times, one reference only should be applied for, and that after the last judgment is signed. *Field v. Pooley*, 3 Man. & G. 756; 5 Scott, N. R. 524.

By Reg. Gen. (Pr.) H. T. 1853, r. 171, "on a reference to the master to ascertain the amount for which final judgment is to be signed, the master's certificate shall be filed in the office when judgment is signed."

II. Discovery, p. 171.

(A) *The Opposite Party may be compelled to Disclose on Affidavit what Documents relating to the Suit are in his Custody*, p. 171.

(B) *Of the Affidavits in Support of the Application*, p. 173.

(C) „ *in Answer*, p. 173.

III. Inspection of Real or Personal Property, p. 174.

I. Inspection.

(A) *Under the Statute.*

(*a*) *Inspection may be ordered of Documents relating to the Action in the Custody of the Opposite Party.*

Inspection may be ordered of documents relating to the action in the custody of the opposite party.[1]

14 & 15 Vic. c. 99, s. 6. "Whenever any action, or other legal proceedings, shall hereafter be pending in any of the superior courts at Westminster [and courts at Lancaster and Durham], such court, and each of the judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party, relating to such action or other legal proceeding, and if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which, previous to the passing of this act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity, at the instance of the party so making the application as aforesaid, to the said court or a judge."

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[1] The right of inspection exists only where the applicant can show some title to the subject-matter of the discovery; in other words, that he has such an interest in the subject-matter to which the discovery is attached as can be vindicated before a judicial tribunal. Stor. Eq. Jur. 1490. The applicant must not only show a title, but that the discovery he seeks is relevant and material to his case (id. 1493), and to the real point in dispute between the parties (Wigr. Desc. 17), and has not been already admitted by the opponent's pleading. (Id. 189.) The application is essentially limited to a discovery of such material facts as relate to his own case, and does not extend to a discovery of the manner in which the opponent's case is to be established, or of evidence which relates exclusively to the opponent's case. (Id. 261.) The right of the applicant to discovery extends, however, to the whole of his own case (*Attorney-General v. Corporation of London*, 12 Beav. 8; 2 Hall & T. 1), even though such case is negative, and consists substantially in defeating a claim of the opponent. *Smith v. Duke of Beaufort*, 1 Hare, 507. And he is entitled to discovery even to repel the defence which he expects will be set up against him. *Attorney-General v. Corporation of London*, 2 Hall & T. 7. *See* Pollock on Inspection, &c.

If the discovery is necessary to establish the plaintiff's cause, it is no objection to his application that the same discovery may be evidence of the defendant's case also (*Burnel v. Nicholson*, 1 Mylne. & K. 680. *Bolton v. Corporation of Liverpool*, id. 9. *Smith v. Duke of Beaufort*, 1 Hare, 520. *Attorney-General v. Lambe*, 3 You. & C. 162. *Freeman v. Ferlie*, 3 Meriv. 29. *Riccard v. Inclosure Commissioners*, 4 E. & B. 329); or even may be fatal to the defendant's case (*Flight v. Robinson*, 8 Beav. 34), or otherwise injurious to defendant's personal interests. *Beresford v. Driver*, 14 Beav. 187.

The possession of the document may be that of an agent, provided he hold the document as such agent. *Palmer v. Wright*, 10 Beav. 234. If the document is pledged for an advance of money, the court will not grant inspection (*Liddell v. Norton*, 13 L. J. Ch. 169), unless the party is able to pay the amount, and remove the lien. *Ex-parte Shaw*, Jac. 272. *Rodrick v. Gandell*, 10 Beav. 270. Nor will an inspection be ordered if a party not before the court has a joint possession, and an interest distinct from the debt (*Taylor v. Rundell*, Cr. & Phil. 111. *Morrell v. Wotten*, 13 Beav. 1050. *Penny v. Cook*, 1 Drew, 474. *Glynn v. Caulfield*, 3 Mac. & G. 463); or if the agent holds for others as well as the party (*Lopez v. Deacon*, 6 Beav. 254); or if the party has possession only with others, his partners, who are not before the court. *Reid v. Langlois*, 1 Mac. & G. 627.

Under the above section, the judge ordering the inspection has the same power of ordering the removal of obstructions, with a view to inspection, as that which was exercised by courts of equity, as ancillary to their jurisdiction of ordering inspection. *Bennett v. Griffiths*, 30 L. J. Q. B. 98; 7 Jur. N. S. 284.

The director of an incorporated company, party to an action, may be called upon to show cause why he should not forthwith give inspection of deeds or other documents of which discovery has been granted to the opposite party, and if he shows no sufficient cause, an order may be made upon him for such inspection, and he may be liable to an attachment for disobeying it. *Lacharme v. Quartz-Rock Mining Co.* 10 Ex. 565; 6 L. T. (N. S.) 502.

An inspection will not be granted where the object of it is to ascertain what case will be made out by the opposite party, or by what evidence he will support his case. *Shadwell v. Shadwell*, 28 L. J. C. P. 315; 23 Jur. 1410.

So, an inspection will not be allowed if it appears that the object of the application is to assist the plaintiff in a different action against another defendant. *Temperley v. Willett*, 25 L. J. Q. B. 259; 20 Jur. 519.

The plaintiff in an action on a guarantee is entitled to inspect the letter containing the guarantee. *Bluck v. Gompertz*, 7 Ex. 67. So it may be granted in an action for a libel. 27 L. J. Ex. 150.

In ejectment for land let on lease by plaintiff to A., who had assigned the lease to the defendant, it was alleged that defendant, who had freehold land adjoining, had obliterated the boundaries; it was held that the plaintiff, who had no counterpart, was entitled to inspection of the lease, and also to inspection of the assignment, but not of the conveyance of the freehold, for this would not prove any part of his title. *Doe v. Langford*, 21 L. J. Q. B. 217.

In an action by an architect for commission alleged to be due to him for superintending the erection of certain buildings for the defendant, the latter, on an affidavit alleging that the work was never done, or if done, was charged for exorbitantly, and that it was done on the credit of another, obtained inspection of the plaintiff's books to see what entries were there made, and what charges. *Hunt v. Hewill*, 7 Ex. 236.

In an action against the keeper of a lunatic asylum for alleged neglect and improper treatment of the plaintiff, the plaintiff obtained inspection of the books kept by the defendant. *Hill v. Philp*, 7 Ex. 232.

Where the plaintiff sued as executor, and the defendant pleaded *ne unques* executor, and applied for a stay of proceedings till inspection of probate was granted, the court stayed proceedings till the plaintiff should give notice to defendant of having taken out probate. *Webb v. Adkins*, 14 C. B. 401.

In an action of dower, the plaintiff is not entitled to inspect the title-deeds of the defendant, out of which it is suggested her claim to dower arises, if the defendant purchased the property without notice that it was subject to dower; for, according to the principle applied by courts of equity, when it is once established that a person is a purchaser for value without notice, a court of equity will give no assistance against him, but the right must be enforced at law; and courts of law, in granting inspection, act according to the rules of courts of equity in giving discovery. *Gomm v. Parrott*, C. B. 5 W. R. 882.

Where the question between plaintiff and defendant was whether certain leakage of the defendant's ship was caused by unseaworthiness, or by injuries which occurred in the lading of the vessel, the court made absolute a rule for inspection of certain surveys of the ship taken at a foreign port, and of the shipwright's bill for repairs done to the ship. *Daniel v. Bond*, 9 W. R. 313; 3 L. T. (N. S.) 700, C. P.

In an action by a railway superintendent for improper dismissal, the court granted him an inspection of all minutes and entries in the company's books having reference to his employment (*Hill v. Great-Western Railway Co.* 10 C. B. (N. S.) 148); but not of private minutes of the directors. 28 L. J. Q. B. 67.

Where, by the indorsement on the writ of summons, it appears that the action is brought to recover principal and interest on a mortgage-deed, the court will not, except under special circumstances, order the plaintiff, before declaration, to allow the defendant inspection of the deed, for *non constat* that the plaintiff will declare at all, or, if so, on the deed. *Jones v. Hargreaves*, 29 L. J. Ex. 368.

In *detinue* for title-deeds, the defendants pleaded that the deeds were deposited as a security, by way of equitable mortgage, to secure the re-payment of money advanced by their testator, and that the money remained unpaid; and in answer to interrogatories put to them by plaintiff, defendants admitted that they were in possession of a memorandum that the deeds should remain in possession of the person advancing the money, till it was repaid. It was held that the plaintiff was entitled to an inspection of the memorandum, and also to have particulars of the lien or mortgage relied upon by the defendants. *Owen v. Nickson*, 30 L. J. Q. B. 125; 7 Jur. N. S. 497.

An application by defendant, in an action for breach of promise of marriage, to inspect letters written by him to plaintiff, upon an affidavit that the promise, if any, was made in the letters, was refused. *Hamer v. Sowerby*, 3 L. T. (N. S.) 700.

The court refused an inspection of documents after trial, proposed with a view of discovering whether there were grounds on which to move for a new trial. *Pratt v. Goswell*, id. 669.

It has been held that, under 14 & 15 Vic. c. 99, s. 6, the legislature did not give the courts of common law powers to compel a discovery by a bill or analogous proceeding. "The only power given is to allow not a

(B) *At Common Law.*[1]

discovery, but an inspection by one litigant party of the documents in the custody, or under the control, of the opposite litigant party, with certain restrictions or limitations. Firstly, there must be a suit or other proceeding pending; secondly, the documents must relate to such action, suit, or other proceeding; and thirdly, the cases in which inspection is to be granted must be such as those where inspection could be obtained by filing a bill for discovery, or other proceeding, in a court of equity, at the instance of the same party. *Hunt v. Hewitt*, 7 Ex. 236; 21 L. J. Ex. 210.

"In order," said *Pollock, C. B. (Hunt v. Hewitt, supra,* "to accomplish the object of obtaining such inspection of documents (under 14 & 15 Vic. c. 99), as there is no power to obtain a bill of discovery or any analogous mode of proceeding in courts of common law, the old mode of obtaining inspection ought to be adapted to it. It has been usual for the courts, in the exercise of their equitable jurisdiction, to grant such inspection: first, as a substitute for oyer, which at common law applied to some instruments only, and by usage the power of inspection was, with certain conditions, extended to all; secondly, upon the equitable principle, that a *cestui que trust* had a right to oblige his trustee to give an inspection, the courts of law always compelled it where they could consider the party as holding the documents under an express or implied trust for the applicant. In the former case an affidavit, generally speaking, was unnecessary; in the latter it was required, unless the facts were admitted in the statement of the applicant's attorney, a course usually adopted at chambers to save expense. The old mode of obtaining inspections ought to be adopted under the new act of parliament, with such alterations as the nature of the case requires. Under the recent act of parliament, where an inspection is litigated an affidavit will, no doubt, be necessary as to all the disputed facts; and if all are disputed, the affidavit ought to state a sufficient case in all respects to entitle the party to inspect, as would have been necessary to obtain an inspection which the court had before, and still has the power to grant at common law. The affidavit ought, therefore, not only to show that an action or other proceeding is pending, but also to state not a mere suggestion, but circumstances sufficient to satisfy the court or judge that there are in the possession or under the control of the opposite party certain documents, and that those relate to such actions or other legal proceedings. A *primâ facie* case calling for an answer must at least be laid in this respect, as it must in the old proceedings, to obtain inspection of documents held by a trustee. Further, the affidavit must show that the applicant would, by a bill of discovery or other proceeding, be able to obtain a discovery and inspection of those documents. Under the last head we must follow the rules established in courts of equity, within which every plaintiff must bring himself in order to obtain an inspection by bill of discovery; and therefore, if the facts be disputed, the affidavit ought to state all that a plaintiff in equity must state, in order to entitle himself to a discovery and inspection."

[1] Independently of the statute, the courts have jurisdiction by the common law to order an inspection of documents, where the person holds the document as agent or trustee of the party seeking inspection, or where the applicant was a party to a written contract, of which only one part was executed or one copy exists, or where one part has been lost or destroyed. *Blogg v. Kent*, 6 Bing. 614. *Devenage v. Bouverie*, 8 id. 1. *Street v. Brown*, 6 Taunt. 302. *Bluck v. Gompertz*, 7 Ex. 67. *Doe d. Avery v. Langford*, 1 Bail, C. C. 37; 21 L. J. Q. B. 217. *Webb v. Atkins*, 23 L. J. C. P. 96. *Powell v. Bradbury*, 4 C. B. 541. And generally where an action is brought on an instrument, the court has power at common law to order an inspection of it. *Doe d. Child v. Roe*, 1 E. & B. 285: *per Lord Campbell, C. J.*

Application may be made at chambers for the production by the opposite party of a document in his possession, in which the applicant is interested, for the purpose of having it stamped. *Hall v. Bainbridge*, 3 D. & L. 92. *Neale v. Swind*, 2 C. & J. 278. *See post*, Stamps.

Where party to an action in his pleadings relies on a deed in his possession, the court may, by virtue of its jurisdiction at common law, make a rule absolute for inspection of the deed by the opposite party. *Penarth, &c. Railway Co. v. Cardiff Waterworks Co.* 29 L. J. C. P. 230. The courts have long exercised a power, independent of the statute 14 & 15 Vic. c. 99, s. 6, to grant inspection of agreements in which one party to a suit seeks to charge or defend himself from the other, who has executed the instrument, when there is only one copy of it, on the ground that the party who has the possession of it holds it in the character of trustee for the other party. See *Blogg v. Kent*, 8 L. J. C. P. 229; 6 Bing. 614: *per Tindal, C. J. Bluck v. Gompertz*, 7 Ex. 67; 21 L. J. Ex. 25: *per Parke, B.* But neither at common law nor by the statute has a plaintiff in a suit any right to an inspection, which is sought not in order to support his own case, but in order to see whether and by what means a defence can be made out against him: therefore the plaintiff will fail in his application, unless his affidavit make out a proper *primâ facie* case that the defendant is in possession of an ascertained document or documents, which he holds as trustee, so as to enable the plaintiff to call for an inspection of it. *Shadwell v. Shadwell*, 28 L. J. C. P. 315.

The court will grant a mandamus to inspect documents of a corporation to a mem-

(C) *Order or Rule for.*[1]

(D) *Costs of.*[2]

II. Discovery.

(A) *The Opposite Party may be compelled to Disclose on Affidavit what Documents relating to the Suit are in his Custody.*

The opposite party may be compelled to disclose on affidavit what documents relating to the suit are in his custody.

By 17 & 18 Vic. c. 125, s. 50, "upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party to his belief that any document to the production of which he is entitled for the purpose of discovery, or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the court or judge may make such further order thereon as shall be just." [3]

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ber of the corporation, although no suit or other legal proceeding be pending, provided such inspection be necessary with respect to some specific dispute or controversy, in which the applicant is interested, and is confined to what is necessary for the proposed object. *Reg. v. Sadlers' Co.* 31 L. J. Q. B. 62.

Where the declaration is upon an agreement, which must be in writing, to save the operation of the Statute of Frauds, and the defendant shows by his affidavit that the agreement is embodied in certain letters written by him to the plaintiff, and which are in the plaintiff's possession, and of which he has no copies, and that it is necessary for the purpose of his pleading that he should inspect the letters, he is entitled to inspection at common law. *Price v. Harrison*, 8 C. B. (N. S.) 617; 29 L. J. C. P. 335.

[1] The order or rule should state a convenient place where the document may be inspected, and the office of the opponent's attorney is generally the best place (*Rogers v. Turner*, 21 L. J. Ex. 8), unless the documents are in use for the purposes of the party's business, in which case the court will order them to be produced at the place of business. *Crane v. Cooper*, 4 Mylne & C. 263. *Gardener v. Dangerfield*, 5 Beav. 389.

[2] It has been laid down by the Court of Exchequer that the costs of an inspection under the 14 & 15 Vic. c. 99, s. 6, should always be paid by the party seeking the inspection, such costs being in general very trifling indeed. And at the same time they ordered that the costs of the rule for the inspection should be costs in the cause. *Hill v. Philp*, 7 Ex. 232. In *Smith v. the Great Western Railway Co.* 6 E. & B. 405, the plaintiff applied for and obtained an order to interrogate an officer of the defendants' upon the point whether they infringed his patent by the use of a patent wheel, and interrogated him accordingly. The plaintiff obtained a second order for the production of a wheel referred to by the officer in his answer to the first interrogatories. The court said that they saw no circumstances in the case entitling the plaintiff to the costs of these proceedings, if they had then to determine the question according to their discretion. These applications are considered not as of an interlocutory nature, but as collateral to the suit. The question of costs, therefore, depends entirely on the order itself. If the order be silent as to costs, and the party obtaining it succeed in the action, he is not entitled to the costs of the discovery as costs in the cause. *Smith v. the Great Western Railway Co. supra.* But it appears to be reasonable that if the party against whom it is obtained succeeds, and nothing is said about costs in the order, that he should be entitled, on taxation, to have the costs to which he has been put by the discovery allowed to him, as an expense unnecessarily occasioned by the other side. Marshall on Costs, p. 60.

[3] Under the 14 & 15 Vic. c. 99, it was necessary that the applicant should himself allege the existence of the documents, and describe their nature, before the court would allow an inspection. *Rayner v. Alhusen*, 2 L. M. & P. 605. *Galsworthy v. Norman*, id. 70. *Hunt v. Hewitt*, 7 Ex. 236. The 50th sect. of the 17 & 18 Vic. c. 105, enables the party to ascertain what documents are in the possession of his opponent material to his own case, upon an affidavit of his belief that such documents are in his custody.

The object of the applicant may be to obtain simple discovery, *i. e.* merely to know whether such and such documents are in existence; or it may be to obtain discovery and inspection; or, if the document is al-

ready known to exist, to obtain inspection, *i. e.* to ascertain the contents of the document. The court may compel simple discovery, and yet may refuse to compel inspection; for the party, while bound to state whether such and such documents are in his possession, may be privileged from producing them on various grounds. Where the word "discovery" is used in the sense excluding inspection, it is called simple discovery.

Some statutes have expressly enacted that discovery shall be made if required; as the Gaming Act, 9 Anne, c. 14, s. 2, and the Stock-Jobbing Act, 7 Geo. 2, c. 8, s. 2. See *Williams v. Trye*, 23 L. J. Ch. 860.

As the courts of law grant discovery and inspection only in those cases in which courts of equity would grant it, a short investigation of the principles, according to which these courts act, will properly preface a consideration of the cases decided under the statute. *See* Pollock on Discovery, p. 7.

Either party to an action can obtain simple discovery, only where the applicant seeks to discover some facts material to the question in dispute (Wigr. Desc. 17), and which relate to his own case, or the case on which his opponent relies; and he may even obtain discovery of the mode in which the opponent means to support his case, provided this does not involve the evidence of the title under which the opponent claims. Redesd. Pl. 9, 100; Wigr. Desc. 15. *Attorney-General v. Corporation of London*, 12 Beav. 8; 2 Hall & T. 1. In other words, the plaintiff or applicant has a right to the discovery of the case on which the defendant relies, but not of the proofs; he has a right to know what it is the defendant relies upon, in order that he may meet and prepare himself to encounter such defence; but he has no right to say, How do you make out your case? How do you prove it? What is your evidence? *Attorney-General v. Corporation of London, supra.*

The right to a discovery is confined to civil proceedings. Where the proceeding, in aid of which the discovery is sought, is not purely of a civil character, the right to discovery fails; as where it is sought to aid the prosecution of an indictment or information, or the defence to it. *Lord Montague v. Dudman*, 2 Ves. sen. 398. *Cartwright v. Green*, 8 Ves. 405; Vigr. Desc. s. 10. But it is no objection to a discovery in a civil suit that the subject-matter might have given rise to indictment. *Thorp v. Macauley*, 5 Madd. 230. *Sheckell v. Macauley*, 2 Sim. & Stu. 78. *Wilmot v. Maccabe*, 4 Sim. 263. A *mandamus*, the object of which is to enforce a civil right, is a proceeding in aid of which inspection of documents will be granted. *R. v. Ambergate, &c. Railway Co.* 17 Q. B. 957.

No discovery is allowed where it would subject the defendant to penalties or forfeiture (*Harrison v. Southcote*, 2 Ves. sen. 394. *Pritchett v. Smart*, 7 C. B. 625), as where it is directed to ask whether the party is guilty of maintenance (*Wallis v. Duke of Portland*, 3 Ves. 494. *Sharp v. Carter*, 3 P. Wms. 375); or simony (*Parkhurst v. Lowten*, 1 Mer. 391); or subornation of perjury (*Baker v. Pritchard*, 2 Atk. 387. *Selby v. Crew*, 2 Anst. 404); or, where the defendant was a married woman, whether her husband did an act which would subject him to a charge of felony. *Cartwright v. Green*, 8 Ves. 405. And this objection will prevail, although the matter be not directly criminating, if it be a link in the chain of proof. *Short v. Mercier*, 3 Mac. & G. 205. But if matter which is innocent is mixed up with that which is not so, the former must still be discovered. *Attorney-General v. Brown*, 1 Swans. 294. And if the matter would subject the defendant only to penalties in a foreign country it must be discovered. *King of Two Sicilies v. Wilcox*, 20 L. J. Ch. 417. See *East India Co. v. Campbell*, 1 Ves. sen. 247. So if it involve mere turpitude of character, without subjecting to actual punishment. *Parkhurst v. Lowten, supra. Chetwynd v. Lindon*, 2 Ves. sen. 450. So if it criminates third parties only, and not the party interrogated. *King of Two Sicilies v. Wilcox*, 20 L. J. Ch. 421. So if the penalty is a mere payment by way of penalty (*Richards v. Cole*, Redesd. Pl. 194. *African Co. v. Parish*, 2 Vern. 244); or if the forfeiture is not the forfeiture of an interest strictly so called (*Chancey v. Tahourden*, 2 Atk. 392. *Lord Uxbridge v. Staveland*, 1 Ves. sen. 56. *Boteler v. Allington*, 3 Atk. 453), but a mere determination of an interest under a limitation. *Lucas v. Lucas*, id. 260; Wigr. Desc. s. 134. Where, however, the discovery is of a document which forms part of the proceedings in the action, it will be granted. *Rice v. Gordon*, 13 Sim. 580.

A discovery will not be granted of privileged communications between attorney and client. *Desborough v. Rawlins*, 3 Mylne & C. 515. *Reynell v. Sprye*, 10 Beav. 51. *Greenough v. Gaskill*, 1 Mylne & K. 98. *Sawyer v. Birchmore*, 3 id. 572. *Herring v. Cloberry*, 1 Phil. 91. *Jones v. Pugh*, id. 96. *Flight v. Robinson*, 8 Beav. 22. *Carpmael v. Powis*, 9 id. 16. The privilege of an attorney extends to his clerk (*Taylor v. Foster*, 2 C. & P. 195), and his agent (*Parkins v. Hawkshaw*, 2 Stark. 239. *Steel v. Stewart*, 1 Phil. 471); the rule, however, does not apply to communications not made to an attorney in his professional character, as before he became attorney (*Cuts v. Pickering*, 1 Vent. 197), or to him as under-sheriff. *Wilson v. Rastall*, 4 T. R. 753. A case for the opinion of counsel, having reference to the action, is protected. *Coomb v. City of London*, 1 Y. & C. 631. *Nias v. Northern & Eastern Railway Co.* 2 Mylne & C. 355. *Banbury v. Banbury*, 2 Beav. 173. *Bolton v. Corporation of Liverpool*, 1 Mylne & K. 95. *Woods v. Woods*, 4 Hare, 83. *Flight v. Robinson*, 8 Beav. 22. If it do not relate to the action pending, it is doubtful whether or not it is protected. *Radcliffe v. Fursman*, 2 Brown, P. C. 514. *Bolton v. Corporation of Liverpool*, 1 Mylne & K. 95. *See* further, as to privileged communications, vol. ii. p. 19.

(B) *Of the Affidavits in Support of the Application.*[1]

(C) „ „ *in Answer.*[2]

A plaintiff in ejectment is not entitled to a discovery of the defendant's title. *Horton v. Bott*, 21 Jur. 568; 5 W. R. 792.

The court will not grant a discovery where the party applying has been supplied with a copy of the only document in the possession or power of the opposite party, and has been told that it was the only document, and that he might inspect it if he chose. *Bray v. Finch*, 1 H. & N. 468; 26 L. J. Ex. 91.

The application may be made before issue joined (*Rogers v. Turner*, 21 L. J. Ex. 8), and even before plea pleaded. *Forshaw v. Lewis*, 10 Ex. 712.

[1] Upon the application for the rule, the documents of which inspection is desired ought to be named or described (*Hewitt v. Webb*, 20 Jur. 1189; 5 W. R. 73, Q. B.); and their existence must be shown with reasonable certainty. *Thompson v. Robson*, 5 W. R. 728.

The right of a plaintiff in equity is limited, first, to a discovery confined to a question in the cause; secondly, to such material documents as relate to the proof of the plaintiff's case on the trial. It does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must show, first, what is the nature of the suit, and the question to be tried in it: and he should depose in his affidavit to his having just ground to maintain or defend it; secondly, the affidavit ought to state with sufficient distinctness, the reason of the application, and the nature of the documents, in order that it may appear to the court or judge that the documents are asked for in order to enable the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer by swearing he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may submit to show parts, covering the remainder, on an affidavit that the part concealed does not in any way relate to the plaintiff's case. The same course would be pursued in equity. *Per Pollock, C. B.: Hunt v. Hewitt*, 7 Ex. 236; 21 L. J. Ex. 214.

It is not sufficient to allege in the affidavit merely that the documents may be necessary, but it must be alleged that they will be so for the party's case. *Pepper v. Chambers*, 7 Ex. 227. *Sneider v. Mangino*, id. 229. If, however, the affidavit, with reasonable certainty shows that the document is in the possession or control of his opponent, and is material to, or tends to confirm the applicant's case, it is enough. *Scott v. Walker*, 2 E. & B. 555. *Coster v. Baring*, 2 C. L. Rep. 811. *Riccard v. Inclosure Company*, 24 L. J. Q. B. 259.

[2] The party from whom discovery is sought may, by affidavit on showing cause, deny his possession or power over the documents; or if he admit possession he must state grounds, if any, for objecting to produce them: as, that the applicant has no interest in them; or that, for a sufficient reason, stating what, he is privileged from producing the documents; that they relate exclusively to his own case; or he may submit to show part, covering the remainder, and that such concealed part does not in any way relate to the plaintiff's case. *Hunt v. Hewitt*, 7 Ex. 244. *Smith v. Duke of Beaufort*, 1 Hare, 519. *Perle v. Stoddart*, 1 Mac. & G. 192; Redesd. Pl. 283. It is no answer that the documents are at a great distance, though the court may extend the time for production (*Farquharson v. Balfour*, 7 Turn. & Russ. 184); nor is it any answer that great expense will be incurred. *Macintosh v. Great Western Railway Co.* 22 L. J. Ch. 72.

The court will, it seems, give credence to the distinct assertion of the opponent denying possession, or asserting that the documents in his possession will not show the title of the applicant, and will not in such cases grant the rule to produce (*Colls v. Stevens*, 7 Jur. 54. *Perle v. Stoddart*, *supra*), even though the applicant allege that such denial is untrue (*Reynell v. Sprye*, 1 De Gex, M. & G. 656); but if the affidavits of the party called upon to discover are inconsistent, the construction most favourable to the applicant will be adopted. *Edwards v. Jones*, 1 Phil. 501. *Bowes v. Fernie*, 3 Mylne & C. 632. *Attorney-General v. Ellison*, 4 Sim. 238. If the opponent, in his affidavit in answer, admits the documents in question, and so refers to them as to incorporate them in his affidavit, then he is held to have waived all objection, and may be made to produce them, whether he would have been otherwise protected or not. *Hardman v. Ellames*, 2 Mylne & K. 732. *Macintosh v. Great Western Railway Co.* 18 L. J. Ch. 170.

It is a sufficient answer to an application for a discovery of title-deeds in the possession of a party in a suit relating to the title to land, that such title-deeds relate only to the title of the party himself, and do not relate to the title of the party seeking the discovery; and where a party is not entitled to a discovery of title-deeds, he is not entitled to have a description of the names of the parties and the dates set forth in a schedule. *Adams v. Lloyd*, 22 Jur. 590; 6 W. R. 750. *Contra Chester v. Wortley*, 17 C. B. 410; 25 L. J. C. P. 117.

It is, it seems, no answer to the application that the opponent is privileged from producing the document, for that may be shown in the affidavit made in obedience to the rule. *Forshaw v. Lewis*, 10 Ex. 712.

III. Inspection of Real or Personal Property.

Inspection of real or personal property.

By 17 & 18 Vic. c. 125, s. 58, "either party shall be at liberty to apply to the court or a judge for a rule or order for an inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order upon such terms as to costs, and otherwise, as such court or judge may direct: Provided always, that nothing herein contained shall affect the provisions of the Common-Law Procedure Act, 1852, or any previous act, as to obtaining a view by a jury: Provided also, that all rules and regulations now in force and applicable to the proceedings by view under the said last-mentioned act, shall be held to apply to proceedings for inspection by a jury under the provisions of this act, or as near thereto as may be."

INSTANTLY.[1]

INSTRUMENTS to procure Abortion: Using or Procuring.

24 & 25 Vic. c. 100, s. 58. *See* vol. i. p. 55.

INSURANCE against Accidents.

See Accidents, Insurance against, vol. i. p. 86.

INSURANCE, FIRE.

Covenant to Insure. *See* vol. iii. p. 472.

(A) *Nature and Qualities of Contract*, p. 174.

(B) *Misrepresentation or Concealment*, p. 175.

(C) *Alteration of Risk*, p. 176.

(A) *Nature and Qualities of Contract.*[2]

[1] This word has no definite meaning. Such words as *instanter* and *incontinenter* do not import an absolutely instantaneous succession, but only that which is comparatively so (3 Chit. Gen. P. 112; and so (7 Mee. & W. 344; 8 id. 131) dispense with an allegation of time. *Reg. v. Brounlow*, 11 Ad. & E. 119.

[2] Fire insurance is a contract by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses which he may sustain in his house, goods, or merchandise, by fire, within the time limited by the policy. Insurances against fire being within the 14 Geo. 3, c. 48, it is requisite that the insured shall have an interest in the property at the period of insuring, and at the time the loss happened; and in the case of loss the insured will be entitled to recover only to the extent of his interest. *See* 2 Atk. 255.

The insured must have a pecuniary interest in the effects exposed to risk, or he must be accountable or responsible to some person for the safety or security of the property. *Marks v. Hamilton*, 7 Ex. 323. Possession of the premises may suffice. *Marks v. Hamilton*, 18 L. T. 260; 15 Jur. 152. If he has a lien on the goods for money due to him, or if he holds them as bailee, or depositary, or warehouseman, or as a commission agent for sale, or as an artificer or common carrier, or is employing his work and labour upon them, he may lawfully insure them to their full value, and may keep up a floating policy upon them for his own benefit and the benefit of his present and future customers. *Waters v. Monarch Insurance Co.* 5 E. & B. 870; 25 L. J. Q. B. 102. *London and North-Western Railway Co. v. Glyn*, 28 L. J. Q. B. 188.

The profits of a business may be insured, if so specified in the policy. *Sun Fire Office v. Wright, In re*, 3 Nev. & M. 819. *In re Wright v. Pole*, 1 Ad. & E. 621.

The duration of the policy is limited to the payment of the premium; and where the premium is to be paid within fifteen days after the expiration of the time of insurance, it merely vests a right of insurance within that time, if the insurer agree to the same. The assured are at their own risk during this interval; for if any accident happen before the premium is actually paid they stand uninsured. *Tarleton v. Staniforth*, 5 T. R. 695; 1 B. & P. 471; 3 Anst. 707.

In *Salvin v. James*, 6 East, 571, 2 Smith, 646, by a policy under seal, referring to certain printed proposals, a fire-office insured the defendant's premises from 11th November, 1802, to 25th December, 1803,

(B) *Misrepresentation or Concealment.*[1]

for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue so long as the insured should pay the premium at the said times, and the office should agree to accept it. By the printed proposals it was stipulated, that the insured should make all future payments annually, at the office, within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium was paid; and by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there, by policies for a year or more, had been, and should be, considered as insured for fifteen days beyond the time of the expiration of their polices. The court held, notwithstanding this latter clause (the insured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, or otherwise they would not continue the insurance, and the insured having refused to pay such advanced premium), that the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made, though the insured, after the loss, and before the fifteen days had expired, tendered the full premium which had been demanded; for the effect of the whole contract, &c. taken together, was only to give the insured an option to continue the insurance or not, during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract. There should be an express stipulation that the policy should continue until the expiration of the days of grace. Id. Addison on Contracts, 597, 4th ed.

A clerk at an insurance office receiving a premium after the limited time does not bind the office. *Acey v. Fernie*, 7 Mee. & W. 151. To render the office responsible, the proposals in the policy must be complied with (*Worsley v. Wood*, 6 T. R. 710), and there must be an actual fire. *Austin v. Drewe*, 6 Taunt. 436; 2 Monk. 130; 4 Camp. 360. The policy sometimes provides that "no loss or damage by fire happening by any invasion, foreign enemy, or any military or usurped power whatever, will be made good by the insurer." It was held, that "usurped power" meant an invasion from abroad, or an internal rebellion, and not the power of a common mob. *Drinkwater v. London Assurance*, 2 Wils. 363.

Where a fire-office introduced in the preceding exception the words "civil commotion," it was held that the office was not liable for a loss sustained by the plaintiff, whose house and distillery were set on fire by the mob during the riots in 1780. *Langdale v. Mason*, cited Park on Insurance, 591, 6th ed.

An insurance on a cotton-mill, with a steam-engine described as "worked by day only," applies to the working of the mill. *Whitehead v. Price*, 2 C., M. & R. 447.

A policy of insurance against fire is not, from its nature, assignable, and the interest in it cannot be transferred, unless the previous consent of the insurers be obtained; and where the insured dies, the interest shall remain to his heir or personal representatives to whom the property insured may respectively belong, provided, before any new payment be made, they procure their right to be indorsed on the policy, or the premium to be paid in their name. *See* 2 Atk. 554.

The insurance companies in general reserve to themselves an option of reinstating the premises, or paying the amount of the insurance money. 18 Ves. 119. And the Building Act, 14 Geo. 3, c. 78, s. 83, empowers the governors or directors of the several insurance offices, upon the request of any persons interested in or entitled to any houses or buildings which may be burned down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or occupier, or other person, who has insured, has been guilty of fraud, or of wilfully setting houses or buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing the property burned or damaged, unless the parties claiming the insurance money do, within sixty days after the claim is adjusted, give sufficient security to the governors and directors of the office, that the insurance shall be laid out and expended, or unless the insurance money be within that time settled and disposed of amongst the contending parties, to the satisfaction and approbation of the governors and directors. Although, therefore, a policy, as a personal contract, does not pass with the property insured, yet a covenant to insure to a certain amount entered into by a lessee or other person having an estate in land, is so far beneficial to the property that, in cases to which this statute applies, it will run with the land, and an assignee entitled to the benefit of covenants real may maintain an action on the covenant to insure, if it be not observed. 5 B. & A. 1. So insurance money received by a tenant for life in respect of a house burned down, and kept distinct by him as such, was held in a court of equity to be applicable to the uses of a settlement of real property, and not to pass with a bequest of the personalty. 2 Madd. Rep. 278.

[1] Every statement, condition, or representation material to the risk, will amount to a warranty, but not statements or representations concerning matters which do not

(C) *Alteration of Risk.*[1]

INSURANCE, LIFE.

(A) *Nature of Contract, and Construction of Policy*, p. 176.

(B) *The Party Assured must have an Interest in the Life*, p. 177.

(C) *Misrepresentation or Concealment*, p. 177.

(D) *Of Forfeiture of the Policy*, p. 178.

(*a*) *By Non-Payment of Premiums*, p. 178.

(*b*) „ *Self-Destruction*, p. 178.

(E) *Action on the Policy*, p. 179.

(A) *Nature of Contract, and Construction of Policy.*[2]

form the basis of the contract and regulate the risk. *Baxendale v. Harvey*, 4 H. & N. 450. *Benham v. the United Guarantee, &c. Assurance Co.* 7 Ex. 744.

In describing the property, any misrepresentation or concealment vitiates the policy. *Bufe v. Turner*, 6 Taunt. 338; 2 Marsh. 46; 3 Dowl. 253.

A coffee-house need not, however, be described as an inn under a policy rendering the latter liable to double hazard. *Doe d. Pitt v. Laming*, 4 Camp. 76. The property intended to be comprehended in the policy should be accurately set out. *Watchhorne v. Langford*, 3 id. 422.

Where the assured is required to deliver "full particulars" of the damage sustained, is meant the best particulars he can reasonably give. *Mason v. Harvey*, 8 Ex. 819; 22 L. J. Ex. 336.

[1] By converting a house of two stories into a house of three, the liability of the insurer is increased, and the underwriter is discharged. *Sillem v. Thornton*, 3 E. & B. 882; 23 L. J. Q. B. 368.

If the assured is by the terms of the policy to give notice of the erection of new stoves or furnaces, &c., and pay an increased premium, this refers to a permanent alteration, and not a temporary or casual matter. *Pim v. Reid*, 6 Scott, N. R. 982. *Barnett v. Jermy*, 3 Ex. 545. But where it was provided, that if any steam-engine were used notice should be given, and a steam-engine was brought on the premises, and was tried, but no notice was given, and the use of it was not continued, it was held that the policy was rendered void. *Glen v. Lewis*, 8 Ex. 617; 22 L. J. Ex. 228. The alteration, in order to avoid the policy for want of notice, must have the effect of increasing the risk. *Stokes v. Cox*, 1 H. & N. 533; 26 L. J. Ex. 113. *See* 27 L. J. Q. B. 241.

In an action upon an insurance policy against fire upon a dwelling-house and a kiln attached to a granary for drying corn; it appeared that a cargo of bark having been sunk near the premises, the plaintiff had permitted it to be dried gratis at his kiln, in the course of which the fire occurred. The court held, that such single act did not amount to an alteration in the business, of which, by one of the conditions, notice was to be given, or a misdescription in the policy of the trade carried on, although the jury found that corn-drying and bark-drying are different trades, and that the latter was more dangerous than the former; that there was nothing in the policy amounting to an express warranty that nothing but corn should ever be dried in the kiln; and, lastly, that, in the absence of all fraud, there is no distinction between the fire having been occasioned by the negligence of servants or strangers, or of the assured himself. *Shaw v. Robberds*, 6 Ad. & E. 75; 1 Nev. & P. 279.

[2] The contract commonly called Life Assurance is a contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and when once fixed, it is constant and invariable. This species of insurance in no way resembles a contract of indemnity. *Per Parke, B.: Dalby v. India and London Life Assurance Co.* 15 C. B. 387; 24 L. J. C. P. 6.

If a creditor insures the life of his debtor to the extent of the debt, and after the death of the debtor the executors of the debtor pay the debt to the creditor, the creditor may, nevertheless, recover upon the policy the amount insured by him upon the life of such debtor. *Dalby v. the India, &c. supra. Law v. London Indisputable, &c. Assurance Co.* 24 L. J. Ch. 196. *Contra*, *Goodall v. Boldero*, 9 East, 71.

The assignment of a life-policy to secure a debt, with a proviso for redemption, is an assignment by way of mortgage, and requires an *ad valorem* stamp as such. *Caldwell v. Dawson*, 5 Ex. 6.

Where the equitable interest in a policy is assigned, and there is a covenant that the assured will keep the policy on foot for the benefit of the assignee, and pay the pre-

(B) *The Party Assured must have an Interest in the Life.*[1]

(C) *Misrepresentation or Concealment.*[2]

miums from time to time as they become due, and that if he neglect so to do, it shall be lawful for the assignee to pay them, and recover the amount from the assured, as money paid by him to the use of the assured: in case of the assignor's neglect, the assignee may pay them, and recover the amount in an action for money paid to his use, although the payment is made by virtue of a deed, and of an authority under seal. *Barber v. Butcher*, 8 Q. B. 863.

[1] By 14 Geo. 3, c. 48, "no insurance shall be made on the life or lives of the person or persons, or on any other event wherein the party assured hath no interest, or by way of gaming or wagering; and that in all policies the name of such interested party shall be inserted, and nothing more shall be recovered thereon than the amount of the interest of the insured."

The word "interest," in 14 Geo. 3, c. 48, s. 1, means pecuniary interest. A parent has not an insurable interest in the life of his child. *Halford v. Kymer*, 10 B. & C. 724. A wife has an insurable interest in the life of her husband (*Reed v. Royal Exchange Insurance Co.* Peake, 70, Add. Cases); but he has not in the life of his wife; though the Income-Tax Act (16 & 17 Vic. c. 34) seems to assume that the husband may insure the life of his wife. The heir or next of kin has no insurable interest arising from his expectations (*Lucena v. Crauford*, 2 B. & P. 324); nor has expectant devisee. *Cook v. Field*, 19 L. J. Q. B. 461.

Where the debtor had agreed to pay his debt by instalments, in five years:—*Held*, that his creditor had an insurable interest in his life during that period. *Lindenau v. Desborough*, 8 B. & C. 586; 3 C. & P. 353. Where A. having no interest in the life of B., induces him to cause a policy of insurance to be effected in his (B.'s) name, A. finding the funds for the premiums, and intending, by assignment or otherwise, to get the benefit of the policy himself, so that it is substantially the policy of A., such policy is void, as a fraudulent evasion of the stat. 14 Geo. 3, c. 48, ss. 1, 2. *Hodson v. Observer Ins. Co.* 8 E. & B. 40; 26 L.J.Q.B. 303.

Every man is presumed to have an interest in his own life, and in every part of it; therefore an executor suing on a policy effected by his testator on two years of his life, is not bound to show that such testator had any special reason for making such limited assurance. *Wainwright v. Bland*, 1 M. & Rob. 481.

A creditor has an insurable interest in the life of his debtor (*Godsall v. Boldero*, 9 East, 72), even, it seems, though the debtor be an infant, provided the debt be not illegal, as for gaming. *Dwyer v. Edie*, cited Park on Insur. 474, 6th ed. *See* 30 L. J. Ch. 131. The assignee of a policy is not within the act. *Ashley v. Ashley*, 3 Sim. 149.

So a trustee, though not beneficially interested, may insure. *Tidswill v. Angerstein*, Peake, N. P. 151. See *Cook v. Field*, 15 Q. B. 460; 19 L. J. Q. B. 441.

If a creditor insures the life of his debtor for a certain sum, and the debt is paid, he is not thereby deprived of his right of action upon the policy. *Dalby v. India and London Life Ass. Co.* 24 L. J. C. P. 3; 15 Q. B. 365.

If an insurance company lends money at interest, upon the terms that the borrower do insure his life in double the money lent, the policy executed in furtherance of this agreement is not a gaming or a wagering policy within the meaning of the statute. *Downs v. Green*, 12 Mee. & W. 490.

As to the insertion in the policy of the names of the parties interested, see *Hodson v. Observer Life Ass. Soc.* 8 E. & B. 40; 26 L. J. Q. B. 303. *Shilling v. Accidental Death Insurance Co.* 2 H. & N. 42; 27 L. J. Ex. 16. Where there is no insurable interest, the proceeds of the policy belong not to the estate of the persons on whose life the policy was effected, but to the officers issuing the policy. *Treme v. Brode*, 27 L. J. Ch. 697.

[2] And if fraud or misrepresentation appear, the policy will be vitiated. *Stackpole v. Simon*, cited Park on Insur. 582. *Anderson v. Thornton*, 8 Ex. 425. See *Anderson v. Fitzgerald*, 17 Jur. 995, H. L.

A misrepresentation implies a knowledge. *Duckett v. Williams*, 2 C. & M. 348. Answering literally the question put, is not sufficient if any material fact is concealed, though not falling within the usual inquiries. *Lindenau v. Desborough*, 8 B. & C. 586; 3 C. & P. 352. The *suppressio veri* must be as to something material. 29 L. J. Q. B. 17. The materiality should be left to the jury. 4 H. L. C. 484.

A statement respecting the life assured does not, however, amount to a warranty, unless it is made the basis of the contract, and was intended by the parties to have that effect. *Wheelton v. Hardisty*, 8 E. & B. 302; 26 L. J. Q. B. 265. But policies are frequently granted according to the express condition, that if any untrue statement is made concerning the life, in the documents which the assurers require to be filled up previous to the policy, the policy shall be void. *Cazenove v. Brit. Eq.* 28 L.J.C.P. 259; 29 id. 160.

So, false answers to verbal questions respecting spitting of blood, consumptive symptoms, &c., as concerning the general health and condition of the life assured, have been held to be fraudulent misrepresentations avoiding the policy. *Geach v. Ingall*, 14 Mee. & W. 95.

Where a party effects a policy on the life of another, the person whose life is assured is not the general agent of the person procuring the assurance, so as to make his false representations the false representations of the party procuring the assurance; and the same may be said of the false representations of medical attendants and referees,

(D) *Of Forfeiture of the Policy.*[1]

(*a*) *By Non-Payment of Premium.*[2]

(*b*) „ *Self-Destruction.*[3]

unless these representations are expressly made the basis of the policy, or the parties making them are themselves the persons negotiating the contract. There is no analogy between the statements of "the life," or the referees, in the negotiation of a life assurance, and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy. *Wheelton v. Hardisty*, 8 E. & B. 232; 27 L. J. Q. B. 241. But see *Maynard v. Rhodes*, 8 B. & C. 586; 3 C. & P. 352.

Where the assured was described to the assurers as resident at Fisherton, not disclosing that she was in gaol there, it was holden to be a question for the jury whether the imprisonment was a fact material to be disclosed to the assurers. *Huguenin v. Rayley*, 6 Taunt. 186. The warranty as to the health of the party insured means, that he is in a reasonably good state of health. *Ross v. Bradshaw*, 1 Black. 312. *Willis v. Poole*, cited Park on Insur. 584, 6th ed.

A policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appears that the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it. *Swete v. Fairlie*, 6 C. & P. 1.

Where a policy contains a proviso that it is to be deemed void if anything set forth in a written statement, signed by the assured, should be found to be untrue, the insurers are discharged by the assured's misrepresenting a material fact, although such misrepresentation was made verbally, and did not form part of the written statement. *Wainewright v. Bland*, 1 M. & Rob. 481.

But where a policy of insurance contains a warranty that the assured "has not been afflicted with, nor is subject to, gout, vertigo, fits," &c., such warranty is not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. To vacate such policy, it must be shown that the constitution of the assured was naturally liable to fits, or, by accident or otherwise, had become so liable. *Chatlock v. Shawe*, id. 498.

The term "disorder tending to shorten life," is confined to diseases which usually have that tendency. *Watson v. Mainwairing*, 4 Taunt. 763.

To show that the party was in a bad state of health, declarations made to a third person by the deceased may be received. *Aveson v. Kinnaird*, 6 East, 188; 2 Smith, 237.

The usual "medical man" means the medical attendant. *Huckman v. Fernie*, 3 Mee. & W. 517. A reference to a medical man who had been, but was not at the time, vitiates the policy. *Everett v. Desborough*, 5 Bing. 503; 3 M. & P. 190. So, an omission to state that during the intervening period a different medical man attended the party than the one signing the certificate, may vitiate the policy. *Morrison v. Muspratt*, 4 Bing. 60; 12 Moore, 231.

It is a good replication to a plea setting up an untrue statement in the proposal for assurance, that the company professed by their prospectuses to grant policies which were indisputable, except in cases of fraud. *Wood v. Dwarris*, 11 Ex. 493.

The trustees who signed the policy may sue to recover back money paid to the defendants under it, the policy being void. *Lefevre v. Boyle*, 3 B. & Adol. 877.

[1] In all cases of doubtful construction as to the intended duration of the policy, the courts will lean in favour of such an interpretation of the contract as will not defeat it, or make it void, or work a forfeiture. *Sheridan v. Phœnix Life Assurance Co.* Ell. B. & Ell. 156; 28 L. J. Q. B. 94. *Anderson v. Fitzgerald*, 4 H. of L. C. 484. *Jones v. Provincial Insurance Co.* 3 C. B. (N. S.) 65; 26 L. J. C. P. 272.

[2] Where the policy is to become forfeited if the premium is not paid by a given day, but the policy may, nevertheless, be revived on payment of the premium within a certain extended period of time, it is essential to the revival of the policy that the life assured is in being at the time of the payment and acceptance of the premium. *Pritchard v. Merchant Life Assurance Co.* 3 C. B. (N. S.) 642; 27 L. J. C. P. 169. *Simpson v. Accidental Death Insurance Co.* 2 C. B. (N. S.) 295. But the policy sometimes provides, that in case the person on whose life the assurance is effected shall happen to die after the premium has become due, but before payment, the assurance shall, nevertheless, be valid, provided the premium is paid within the days of grace. *Prince of Wales Life Assur. Co. v. Harding*, 27 L. J. Q. B. 301.

The payment of the premium must be according to the terms used, and the apparent intent of the parties, and is not satisfied by a performance *cy près*. *Want v. Blunt*, 12 East, 183. As to quarterly premiums, *see* 27 L. J. Q. B. 227; 28 id. 94; 31 id. 91.

If a man whose life has been insured up to a certain day, die after the day of a wound received pending the insurance, the insurer is not liable. *Lockyer v. Offley*, 1 T. R. 260.

If, after the policy has been forfeited by non-observance of a condition annexed to it, the insurers, or their agents, continue to receive the premiums, with full knowledge of the breach of the condition, they will be deemed to have waived the forfeiture, and will not afterwards be permitted to avoid the policy. *Wing v. Harvey*, 23 L. J. Ch. 511. *Armstrong v. Turquand*, 9 Ir. Com. L. Rep. 32.

[3] A policy effected on a man's own life

(E) *Action on the Policy.*[1]

INSURANCE, MARINE.[2]

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will become void if he is killed in a duel, or feloniously destroys himself, or dies by the hand of the public executioner. *Amicable Society v. Bolland*, 4 Bligh, N. S. 194.

Where there is no express provision in the policy that, in the event of the assured dying by his own hand, the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity. *Horn v. Anglo-Austra*, 30 L. J. Ch. 511.

Where the policy contains a condition making it void in case the party shall die by his own hands, or the hands of justice, or shall be killed in a duel, the condition is not limited to felonious self-destruction, but extends to all cases of voluntary self-destruction; so that if he destroy himself in a fit of frensy or delirium, the insurers will be discharged from liability. *Clift v. Schwabe*, 3 C. B. 476; 17 L. J. C. P. 2. *Dormey v. Borradaile*, 5 C. B. 380. *Moor v. Woolsey*, 24 L. J. Q. B. 40; *Dufaur v. Professional Life Assurance Co.* 27 L. J. Ch. 817.

Where the proviso is that the policy shall be void in case the assured destroy his own life, unless the policy has been legally assigned, circumstances constituting a valid equitable assignment of the policy will satisfy the proviso. *Jones v. the Consolidated, &c. Assurance Co.* 26 Beav. 256; 28 L. J. Ch. 66. But it is otherwise if on assignment by operation of law; therefore, an assignment by force of the Bankruptcy Acts will not keep the policy on foot for the benefit of the creditors, in case of the suicide of the assured. *Jackson v. Forster*, 1 Ell. & Ell. 463; 29 L. J. Q. B. 8. *Moore v. Woolsey*, 4 E. & B. 255; 24 L. J. Q. B. 40.

[1] A denial of the policy being under seal, will not be allowed to be pleaded with a fraudulent misrepresentation of the life insured. *Weld v. Forster*, 12 Moore, 61.

In an action on a policy of insurance on a life, the defendant pleaded that the declaration contained in the policy was untrue in this, that the person was not in good health. *Replication*, that the declaration in the policy was true, and that the party was in good health:—*Held*, that in these pleadings the plaintiff was entitled to begin. *Rawlins v. Desborough*, 2 M. & Rob. 70; S. C. 8 C. & P. 321.

A letter to the secretary of the insurance office from a party stating himself to be the holder of the policy, and inquiring what sum would be given for it:—*Held*, sufficient notice of the assignment; in such cases the slightest circumstance of notice is sufficient. *Ex-parte Slight*, 1 Mont. & Bligh, 502.

In an action by the purchaser of a policy effected on the grant of a redeemable annuity, which had been redeemed, but the particulars of sale did not state such interest to be redeemable:—*Held*, that the sale was not invalidated, it being the practice of the office to pay such policies without inquiry as to the continuance of the interest; and the defendant knew so, having applied to the office to become the purchaser of the policy, there being no direct misrepresentation nor intention so to do, and the practice of the office:—*Held* to be admissible evidence in such case. *Barber v. Morris*, 2 M. & M. 62.

[2] *See* Park on Insur.; Marsh. on Insur. by Shee; Atkinson's Shipping Laws.

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I. Who may be Insurers[1] and Insure.[2]

II. What Property and Interest may be Insured.[3]

[1] For a period, all societies or partnerships, except two, the Royal Exchange and London Insurance Companies, were prohibited by statute from effecting marine policies. The 5 Geo. 4, c. 114, has restored the common law, and any persons, or firm, may be insurers.

[2] In general, all persons may insure. *See* 2 Selw. N. P. 913, 5th ed. But not alien-enemies. *See* 4 East, 396; id. 410. *Beardon v. Nesbit*, 6 T. R. 23.

Several shipowners associating themselves for the purposes of insuring each other's ships was not illegal under 6 Geo. 1, c. 18. *Strong v. Harvey*, 3 Bing. 304; 11 Moore, 72.

One of several part-owners may insure so as to bind the rest. *Robinson v. Gleadow*, 2 Scott, 250; 2 Bing. N. S. 150.

[3] Any absolute or qualified property or interest founded on some legal or equitable title or contract, not being a mere wager in ships or goods; or any inchoate right to or reasonable expectation of profit or advantage to arise from ship or goods, or from contracts or services in relation to them; or any reasonable apprehension of prejudice by reason of contracts entered into in relation to ships or goods, from the risks to which they are exposed, will constitute that sort of interest which may be legally protected by insurance. Marsh. Insur. by Shee, 66. See *Sunderland v. Pratt*, 11 Mee. & W. 296.

The interest must be vested, and not in expectation (*Devaux v. Steele*, 6 Bing. N. S. 358; 8 Scott, 637), and capable of being enforced. *Stockdale v. Dunlop*, 6 Mee. & W. 224. But if at the time of insurance there be a clear explanation of the interest, the party may recover. *Etches v. Aldan*, 1 M. & R. 157. Bills payable on a contingency is not an insurable interest. *Palmer v. Pratt*, 2 Bing. 185; 9 Moore, 358.

A shipowner having entered into a contract for freight has an insurable interest, though the contracts are not in writing. *Miller v. Warre*, 1 C. & P. 237.

An insurance may be effected upon the interest of an alien-enemy, under the protection of a license from the crown. *Hullman v. Whitmore*, 3 M. & S. 338. Such a license, legalising a particular adventure, incidentally authorises all the measures necessary to be adopted for its due and effectual prosecution. *Kennington v. Inglis*, 8 East, 273. And, consequently, a native Spaniard here in time of war between this country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports in Spain, was held competent to effect an insurance on goods embarked in the protected commerce, and to sue in his own name. *Usparicha v. Noble*, 13 East, 332. So subjects who are connected with the adventure, as agents for the shipper, may effect an insurance for his benefit, though he be an alien-enemy, and may maintain an action upon the policy. *Hullman v. Whitmore*, 3 M. & S. 337. But it is incumbent on a person insured, who claims the benefit of a license of this description, if he be not the actual grantee, to connect himself in some manner with the license. *Busk v. Bell*, 16 East, 3. A misdescription in the license seems fatal. *Klingender v. Bond*, 14 id. 484.

The license cannot be assigned, and if given to a person who has not even a qualified property, it is of no avail. *Feize v. Waters*, 2 Taunt. 248. So, a license granted to a vessel to sail in ballast from London to Holland, which country was in a state of hostility, "notwithstanding anything contained in his majesty's order of council of the 26th of April, 1809," was held not to protect a ship the property of an alien-enemy. *Grigg v. Scott*, 4 Camp. 339. But a license to A. B., merchant, on behalf of himself and other British or neutral merchants, to import a cargo from certain limits within which an enemy's port is situate, in any vessel bearing any flag except the French, will protect a ship trading from that port, in which ship A. B. and an alien-enemy are jointly interested, and therefore insurable. *Hagedorn v. Reid*, 1 M. & S. 567; 3 Camp. 377. So, a license granted to A. & B., London shipbrokers, on behalf of themselves and British or neutral merchants, to load and export a cargo on board the Russian ship C., from London to any port in the Baltic not under blockade, was not held to protect Russian property exported from this country on a voyage to a Russian port, Russia being at war with Great Britain. *Neuker v. Ansley*, 5 M. & S. 25. If the license contains a condition, it must be performed in order to make it available (*Vandyck v. Whitmore*, 1 East, 475), and not colourably. *Shiffner v. Gordon*, 12 id. 302.

A British subject cannot insure property bought in a hostile country (*Potts v. Bell*, 8 T. R. 548), in the absense of a license, which ought to be carefully worded, for it has been often a question whether the property be comprehended (*Siffken v. Almutt*, 1 M. & S. 39); and if any fraud appear the license will be deemed invalid. *Shiffner v. Gordon*, 12 East, 295. If no license be essential, the fact of obtaining one will not prejudice. *Blackburne v. Thompson*, 15 id. 81. So, a license sanctioning the importation of one description of property and prohibiting another will protect the privileged part of the cargo (*Pieschell v. Allnutt*, 4 Taunt. 792); as a certain quantity of gunpowder: the excess is not protected, and therefore not insurable. *Kensington v. Andrade*, 6 Taunt. 498; 2 Marsh. 196. And the insured cannot recover to any extent when a part of the cargo covered by the policy is tainted with an illegal character. *Parkin v. Dick*, 11 East, 502; 2 Camp. 221. *Camelo v. Britten*, 4 B. & A. 184.

Formerly slaves were insurable. *Gregson v. Gilbert*, cited Park on Insur. 83 (*Tatham v. Hodgson*, 6T. R. 656), but such an insurance knowingly entered into is now a felony. 5 Geo. 4, c. 113. No insurance can be effected on seamens' wages, or on a perquisite in the nature of such wages (*Webster v. De Tastet*, 7 T. R. 157), because the interest is contingent, and not vested. *See* Magens, 19. But a different rule holds as to the captain, who may insure the commission, privileges, &c. *King v. Glover*, 2 W. R. 206. But no insurance can be effected on money lent to the captain of a ship, payable out of the freight. *Wilson v. Royal Exchange*, 2 Camp. 623. Freight is the subject of insurance. *Lucena v. Crauford*, 3 B. & P. 75. It is no objection that the thing insured has not physical existence. *Barclay v. Cousins*, 2 East, 551. But the property insured must be that in which the insurer has an interest. It seems that the trustees for prize vessels, &c. have such an interest. *Crawford v. Hunter*, 8 T. R. 13: in error, 3 Per. & D.; & 2 W. R. 269. And receiving payments, as for a total loss on capture, does not preclude the assured suing, and labouring to obtain restitution, who therefore may insure any interest thereby acquired in the subject-matter. *Robertson v. Hamilton*, 14 East, 523. So the captors of prizes have an insurable interest (*Bœhm v. Bell*, 8 T. R. 154), even though the king may release before condemnation. *Stirling v. Vaughan*, 11 East, 619. But where a Danish ship was taken by one of our cruisers after the issuing of an order in council to detain and bring into port all vessels of that nation, but at a time when no war existed between this country and Denmark, the captors were held to have no insurable interest. *Routh v. Thompson*, id. 428. *Aliter* if the insurer had been the king. 13 id. 274.

To make freight insurable, the ship must be duly registered. *Camden v. Anderson*, 5 T. R. 709. And where there is a change of possession, the vendor's interest was holden to be correctly stated as continuing till the time when the registration was completed, vendee's title commencing at that time. *Ritchie v. St. Barbe*, 4 Taunt. 768. So where a debtor consigned goods in favour of a person to whom he was indebted, and indorsed the bill of lading to an agent with the necessary directions, the executor was held to have an insurable interest in the goods consigned. *Hill v. Secretan*, 1 B. & P. 315. So a debt which arises in consequence of a consignment, and which will give a lien upon it if it should arrive, creates an insurable interest on the property consigned. *Wolf v. Horncastle*, 1 B. & P. 316. *See* 14 Q. B. 639; 18 L. J. Q. B. 193. And where the shipment is made for the account, and at the risk of the consignor, and the nett proceeds are assigned to the consignee in the case of the arrival of the goods, the consignor is entitled to insure. *Hibbert v. Carter*, 1 T. R. 745; 1 H. Black. 368. *See* 8 Ex. R. 546; 22 L. J. Ex. 124. A valued policy on ship and goods by persons who had chartered a vessel, the underwriters agreeing to pay as for a total loss in case the ship should not be allowed to be discharged at the port of the destination, is sufficient to support an insurance. *Puller v. Glover*, 12 East, 124. So a partial payment of freight in advance seems to constitute a sufficient interest, since the loss of the ship and goods must produce a loss to the freighter of the sum advanced. *Mansfield v. Maitland*, 4 B. & A. 582. So where A., the captain of a ship, having insured expenses on her account, drew a bill on his owner in payment, with a memorandum "that if it should not be honoured the holder would insure the amount, and place the premium, &c. to the ship's and A.'s account," the bill was indorsed to B., and by him presented for acceptance, and dishonoured, and B. then effected an insurance, the interest being declared to be on the bill. In an action by B. against A. for the premium and expenses:—*Held*, that B. was justified in effecting the insurance as for time, instead of on the voyage. *Tasker v. Scott*, 6 Taunt. 234; 1 Marsh. 556. But a demand on the captain of a vessel for money lent is insufficient to enable the creditor to effect an insurance on the ship. *Lowry v. Bourdieu*, 2 Dougl. 468. In fact, to constitute a sufficient interest, the event insured against must be connected with the subject-matter of the loss. *Kent v. Bird*, Cowp. 583. Freight may be insured (*Lucena v. Crauford*, *supra*); but the amount actually loaded can only be recovered. *Forbes v. Cowie*, 1 Camp. 520.

Expected profits may be insured (*Lucena v. Crauford*, 2 W. R. 269), as the profits of a cargo of molasses (*Grant v. Parkinson*, cited Park, 354), or on mahogany. *Henrickson v. Margetson*, 2 East, 549. In fact, profits may be insured *eo nomine* (*Eyre v. Glover*, 16 East, 218; 3 Camp. 276), whether the policy be valued or open. *Hodgson v. Glover*, 6 East, 316. And such an insurance may be effected by a prize-agent. *Le Cross v. Hughes*, cited Park on Insur. 358.

Various persons may insure several interests on the same thing, and each to the whole value. *Godin v. London Assurance Co.* 1 Burr. 489; 1 Bl. Rep. 103. As where money is lent on bottomry or *respondentia*, the lender may insure, as well as the owner of the ship and cargo. *Lucena v. Crauford*, 2 W. R. 269. But if a policy be effected on behalf of a person having a certain interest, the proceeds of the insurance cannot be claimed by another person not privy to the insurance, who has a distinct interest in the same subject-matter. *Neale v. Reid*, 1 B. & C. 661; 3 D. & R. 158.

An insurable interest at the commencement of the risk suffices. *Rhind v. Wilkinson*, 2 Taunt. 237. *See* 11 Mee. & W. 296; 12 L. J. Ex. 235; 13 Q. B. 167.

Freight must be insured *eo nomine*, and is not covered by a policy on goods. *Michael v. Gillespie*, 2 C. B. (N. S.) 627.

For instances of insurances on passage-money, subject to the provisions of the Pas-

III. Form of the Policy.

(A) *Of the Stamp.*[1]

sengers' Act, 1852, see *Gibson v. Bradford*, 4 E. & B. 586. *Willis v. Cooke*, 5 id. 641.

Freight paid before or during the voyage may also be insured, as freight advanced or money paid on account of freight. *Ellis v. Lafone*, 8 Ex. 546. *Hall v. Janson*, 4 E. & B. 500. And the interest of persons who have advanced money for the use of the ship abroad, and taken in respect of these advances a bill of the captain's, drawn against freight, may be insured as an advance on account of freight. *Wilson v. Martin*, 11 Ex. 684.

Where a policy is on freight advanced in respect of the whole voyage described in the policy, and a portion of the freight is advanced after part of the voyage has been performed, this sum may be recovered against the underwriters, although it was paid before the policy was effected; since in this case the whole of the freight must be considered to have been at risk at the time of the loss. *Ellis v. Lafone*, *supra*.

Where a consignor had purchased rice by a binding contract, and by a similar contract had resold it at a profit, and the vessel which was to carry it to the second vendee had been chartered, it was held that the consignor had an insurable interest in such profit, although a portion only of the rice had been shipped, and actually lost. As, however, the policy in this case limited the inception of the risk to "from and immediately following the loading" of the goods, it was held that the insurance applied only to profits arising from the rice actually put on board. *M'Swiney v. Royal Exchange Insurance Co.* 14 Q. B. 634: in error, 646. *See* also *Chope v. Reynolds*, 5 C. B. (N. S.) 642. Where profits were insured by a policy on goods, "beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship," and the ship was lost before she reached the port at which the cargo was ready be shipped, it was held that the policy never attached, and that the owner of the cargo could not recover under it for the delay in the shipment of the cargo and consequent loss of the profits. *Halhead v. Young*, 6 E. & B. 312.

The owners may insure against their liability for any damage which the ship insured may, by running down or otherwise, do to any other vessel. *Thompson v. Reynolds*, 7 E. & B. 172. They may insure for passage or compensation monies, for which they are made liable by the Passengers' Act, 1855. 18 & 19 Vic. c. 119, s. 55. *Gibson v. Bradford*, 4 E. & B. 586. *Willis v. Cook*, 5 id. 641.

The owner of a vessel which, together with her cargo, had been deserted by the crew, and brought into port by sailors having obtained possession of her, entered into a recognisance in the Court of Admiralty, as a security for the whole salvage; the ship afterwards sailed again, and, together with the cargo, was totally lost, and the owner of the ship was obliged to pay the amount of the salvage: it was held that he had an insurable interest in the average contribution due to him from the owners of the cargo on account of the salvage, and that he was entitled to recover this amount under a policy effected before the loss, for the purpose of covering what he might have to pay under the recognisance. *Briggs v. Merchant Traders' Association*, 13 Q. B. 167.

By the Passengers' Amendment Act, 1855, 18 & 19 Vic. c. 119, s. 55, no policy of assurance effected in consequence of any passage or compensation-money, by any person by that act made liable in certain events to provide passages or to pay monies, or in respect of any other risk under that act, is invalid by reason of the nature of the risk or interest.

A policy executed after the loss is binding. *Mead v. Davison*, 4 Nev. & M. 701; 3 Ad. & E. 303.

Where the interest insured was described in the policy to be on bottomry, but it appeared, from the terms of the bond, that the money was payable within eight days after arrival of the obligor in L.:—*Held*, that it was a fatal misdescription of the bond, the plaintiff's claim under it not depending on the risk of the voyage, but, according to the terms used, might be made whether the ship arrived or not. *Murphy v. Bell*, 4 Bing. 567; 1 M. & P. 493.

In an action on a policy on goods, stipulating that the goods should be valued at five tierces of coffee, valued at —— per tierce, "that policy to be deemed sufficient proof of interest;" the court held the policy void under 19 Geo. 2, c. 37, as dispensing with all proof of interest, and in effect amounting to an insurance, interest or no interest. *Simonds v. Hodgson*, 6 Bing. 114; 3 M. & P. 385.

[1] The policy must be duly stamped at the time when it is effected, for it cannot be legally stamped afterwards. *Roderick v. Hovil*, 3 Camp. 103. And where the distinct interests of several are insured under one entire sum, "to be thereafter declared and valued," the stamp must cover the fractional part of 100*l.* in each interest. *Rapp v. Allnutt*, 15 East, 601; 3 Camp. 106.

A practice formerly prevailed among insurers of recognising the terms of an insurance by subscribing a memorandum without stamp called a slip, in which the terms of the contract were embodied previous to effecting a formal policy; but the court will not take notice of it unless stamped (*Warwick v. Slade*, 3 Camp. 127), even to explain the policy. *Marsden v. Reed*, 3 East, 572. But it has been holden that a representation made by an insurance-broker, when the names of the insurers are put upon a slip, is binding. *Edwards v. Footner*, 1 Camp. 530.

(B) *Name of Insured.*[1]

A material alteration renders a new stamp necessary, but not a mistake inconsistent with the real intention. *Sawtell v. Loudoin*, 5 Taunt. 359. As where a mistake is made by an agent in declaring the interest to be in a ship by a wrong name, a new stamp is not essential to effect the alteration. *Robinson v. Touray*, 1 M. & S. 217, n.; 3 Camp. 158. And the same rule applies to an alteration extending the time of the ship's sailing (*Kensington v. Inglis*, 8 East, 273); or a liberty to discharge part of the cargo, the vessel having more on board than she can safely carry (*Weir v. Aberdeen*, 4 Camp. 108); or cancelling a warranty to sail on a certain day, or erasing marks on goods, the import of which is known (*Hubbard v. Jackson*, 4 Taunt. 169); or adding another place of destination. *Ramstrom v. Bell*, 5 M. & S. 267. In these instances no fresh stamp is requisite. But any alteration as regards the subject-matter of insurance requires a new stamp (*Hill v. Patten*, 8 East, 373; 1 Camp. 72), even though made after the commencement of the voyage, and after the risk has attached. *French v. Patten*, 9 East, 351; 1 Camp. 92.

An extension of the risk indorsed on the policy does not, under 35 Geo. 3, c. 63, s. 13, render a stamp requisite. *Brocklebank v. Sugrue*, 1 B. & Adol. 81; 1 M. & Rob. 102.

The amount of the present stamp duties on marine insurance is fixed by statute 55 Geo. 3. c. 184, Sch. 1, Part 1, and is as follows:—

1. Policies upon ship goods, or any other interest (which may be legally insured) for any voyage, from any port or place in Great Britain and Ireland, or Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, to any other port or place in Great Britain, &c.

	s.	*d.*
Where the premium or consideration shall not exceed the rate of 20*s.* per centum on the sum insured, if the whole sum insured shall not exceed 100*l.*	1	3
And if the whole sum insured shall exceed 100*l.*, then for every 100*l.*, and also for any fractional part of 100*l.*	1	3
And where the premium or consideration shall exceed the rate of 20*s.* per cent on sum insured, if the whole sum insured shall not exceed 100*l.*	2	6
And if the whole sum insured exceed 100*l.*, then for every 100*l.*, and also for any fractional part of 100*l.*	0	6

But if the separate interests of two or more distinct persons shall be insured by one policy, then the said duty at 1*s.* 3*d.* or 2*s.* 6*d.* shall be charged therein in respect of each and every fractional part of 100*l.*, as well as in respect of every full sum of 100*l.* thereby insured upon any separate interest.

2. Policies upon ship-goods, or other property on board or upon freight, or other interest (which may lawfully be insured), for any other voyage than is before specified, or for any certain time or period of time not exceeding twelve calendar months.

When the premium or consideration shall not exceed the rate of 20*s.* per cent on the sum insured, if the whole sum insured shall not exceed 100*l.*	2	6
And if the whole sum insured shall exceed 100*l.*, then for every 100*l.*, and also for any fractional part of 100*l.*	2	0
And where the premium or consideration shall exceed the rate of 20*s.* per cent on the sum insured, if the whole sum insured shall not exceed 100*l.*	5	0
And if the whole sum insured shall exceed 100*l.*, then for every 100*l.*, and also for any fractional part of 100*l.*	5	0

But if the separate interests of two or more distinct persons shall be insured by one policy, then the said duty of 2*s.* 6*d.* or 5*s.* shall be charged therein in respect of each and every fractional part of 100*l.*, as well as in respect of every full sum of 100*l.* thereby insured upon any separate interest.

3. Policy of insurance, or other instrument whereby any insurance, commonly called a mutual insurance, shall be made, without any premium or pecuniary consideration, from any loss that might happen to any vessel, or merchandize on board of any vessel, or freight or other interest relating to any vessel which may lawfully be insured.

Upon any voyage from any port or place in the United Kingdom of Great Britain and Ireland, the Islands of Guernsey, British Alderney, or Sark, or the Isle of Man, to any other port or place in the said kingdom or Isle of Man; for every sum of 100*l.*, and also for each and every fractional part of 100*l.*	2	6
Upon any other voyage, or for any certain time, or period of time, not exceeding twelve calendar months, for every sum of 100*l.*, and also for each and every fractional part of 100*l.*	5	0

[1] By the 28 Geo. 3, c. 56, s. 1, it is required that there shall be inserted in every policy of insurance the name or names, or the usual style and firm of dealing, of one or more of the persons interested in such insurance, or of the consignor or consignees of the property insured, or of the person or persons residing in Great Britain who shall receive the orders for and effect such policy, or of the person or persons who shall give the

(C) *Name of the Ship.*[1]

(D) *Description of Subject-matter of Insurance.*[2]

(*a*) *On Ships.*

(*b*) „ *Freight.*[3]

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order or direction to the agent or agents immediately employed to negociate or effect the same.

This statute repealed the 25 Geo. 3. c. 44, under which it was held that where several persons were interested their names were to be inserted. *Wilton v. Basten*, cited Park on Insur. 19. And where a policy was effected by an agent, on behalf of a principal resident abroad, the agent was to be named and designated as such. *Pray v. Idie*, 1 T. R. 313. But as the 28 Geo. 3 has repealed the 25 Geo. 3, and the latter is to be construed liberally (*Wolff v. Horncastle*, 1 B. & P. 322), it has been holden that the former strictness is not essential; and, therefore, that a firm may be described as A., B., & Co. (*Hibbert v. Martin*, 1 Camp. 538. *Dickson v. Lodge*, 1 Stark. Rep. 226. See *Wolff v. Horncastle*, 1 B. & P. 316. *Bell v. Gilson*, id. 345); and that an insurance-broker is a competent agent within the meaning of the statute. *Bell v. Gibson*, id. 345. And it seems that a subsequent adoption by a principal of an insurance effected by an agent, is sufficient to constitute his authority. *Wolff v. Horncastle, supra.* But an act cannot be construed into an adoption of that which the party neither knows nor anticipates at the time; and, therefore, a letter directing an agent to effect an insurance cannot be deemed an adoption of one already effected. *Bell v. Janson*, 1 M. & S. 201.

The agent must be a person resident in Great Britain. A letter dated abroad, directed to A., bearing the English ship letter-mark, is evidence that A. is such a person. *Arcangelo v. Thompson*, 2 Camp. 620, and C. P.

It need not be stated in the declaration that the provisions of the statute have been complied with. *Mellish v. Bell*, 15 East, 4. And the law of England does not require that the character of the person whose name is inserted in the policy shall appear on the face of the contract; the statute 28 Geo. 3 merely says that the party named shall answer one of the descriptions there mentioned, not that the description itself shall be stated on the policy. *Wolff v. Horncastle, supra.* But if the declaration states that the person whose name is inserted in the policy answers a particular description (for instance, that he was the person who received the order for the insurance), the averment, though unnecessary, must be supported by proof, and cannot be rejected as wholly immaterial. *Bell v. Janson*, 1 M. & S. 204. When a plaintiff, who had introduced an averment into the declaration that the policy was effected by a certain person as agent, &c., closed his case without giving the necessary evidence of that fact, but the defendant had agreed to admit the subscription to the policy, which was conformable to the averment, *Lord Ellenborough, C. J.*, allowed the plaintiff to go into further proof. *Dickson v. Lodge*, 1 Stark. Rep. 226.

The statute does not prevent an assured from recovering against persons who are engaged as partners in underwriting, though each has signed in his own name for a distinct sum. *Brett v. Beckwith*, 26 L. J. Ch. 130.

[1] It has been said that the name of the ship ought to be inserted; but even then, if misnamed, it was not, in the absence of fraud, fatal. *Le Mesurier v. Vaughan*, 6 East, 382. But now it is unnecessary, because an insurance may be effected on "ship or ships." *Kewley v. Ryan*, 2 H. Black. 343.

[2] The property insured should be accurately described. The subject-matter of the insurance ought to be inserted in the policy, that is, whether it be ship, goods, freight, &c.; but it is not necessary that the particular kind of goods should be specified.

A misnomer of the ship is immaterial if the words "or by whatsoever other name called" are added (*Hall v. Molineaux*, 6 East, 385; 2 Smith, 495), as "President" for "The President" (*Le Mesurier v. Vaughan, supra*), at least in the absence of fraud or prejudice to the insurer.

The insertion of an English name in the policy does not amount to a representation that she is English. *Clapham v. Cologan*, 3 Camp. 382. But where it was expressly stated that the vessel was called "The Catherine, an American vessel," it was holden to amount to warranty that she was an American. *Lothian v. Henderson*, House of Lords, 3 B. & P. 499.

If from circumstances the name of the vessel cannot be ascertained, the general term "ship or ships" may be adopted. *Kewley v. Ryan*, 2 H. Black. 343.

Although provisions for the crew, being part of the outfit, are included under the word "furniture," in a policy on the ship and furniture (*Brough v. Whitmore*, 4 T. R. 206), yet the term does not extend to seamen's wages and provisions expended during a detention under an embargo. *Robertson v. Ewer*, 1 id. 127. *Eden v. Poole*, id. 132, n.

[3] Where the subject-matter of the insurance is freight, it should be specifically stated in the policy. *Lucena v. Crauford*, 2 W. R. 269. It may be for the whole or a part of the voyage, or for a specified time. *Taylor v. Wilson*, 15 East, 327.

If freight be insured generally, and the insurance be not of a specific freight, although the adventure be protracted by one

(*c*) *On Goods.*[1]
(*d*) „ *Lien or Special Interest.*[2]
(*e*) „ Respondentia.[3]
(*f*) „ *Profits.*[4]

(E) *Description of the Voyage.*[5]
(F) „ *Commencement and Termination of Risk.*[6]
(G) „ *Perils and Risks Insured against.*[7]
(H) „ *Premium.*[8]
(I) *Restricting Liability to Funds of Company.*[9]

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of the perils insured against, yet, if the ship ultimately bring home a cargo from the port in question, there has been no loss of freight. *Everth v. Smith*, 2 M. & S. 278.

[1] The usual words in a policy describing goods and merchandise include coins and jewels (*Da Costa v. Frith*, 4 Burr. 1966), but not bank-notes (*Thomas v. Royal Exchange Insurance*, Manning's N. P. index, 114), or jewels or ornaments worn by passengers. Marsh. Insur. 320. And the words "goods and merchandise" apply only to the cargo actually on board the vessel (*Ross v. Twaite*, 1 Park, Insur. 25. *Backhouse v. Ripley*, id.), which may be stowed consistently with the nature of the commodity. *Da Costa v. Edmunds*, 4 Camp. 142.

[2] The usual form of policy will cover goods on which the insurer has only a lien. *Godin v. London Assurance Co.* 1 Burr. 489. *Glover v. Black*, 3 Burr. 1401.

[3] When the insurance is bottomry or *respondentia*, it must be specifically stated. *Glover v. Black*, 3 Burr. 1394; 1 Bl. Rep. 405.

[4] An insurance may be effected on profits generally, and may be so described in the policy. *Lucena v. Crauford, supra*; and *Royal Exchange v. M'Sweney*, 14 Q. B. 634; 19 L. J. Q. B. 222.

[5] The insurance may be for part of an entire voyage. *Taylor v. Wilson*, 15 East, 324.

Parol evidence is not admissible to prove that the voyage stated in the policy is different from the one contemplated by the parties. *Kaines v. Knightley*, Skin. 54.

[6] The risk on the ship in general commences from her beginning to load, and continues unabated till she has moored twenty-four hours in safety (*see* 1 T. R. 250); on goods, from the loading till they are safely landed, which includes the carriage to the shore in the boats belonging to the ship, but not in those belonging to the owner of the goods. *See* 2 Stra. 1236.

[7] The various perils against which the insured means to be protected must be distinctly enumerated in the policy. This part of the policy is so full, that scarcely any loss that is lawful to insure against can be considered as omitted. In our common policies they are set forth in the following words:—"Touching the adventures and perils which we, the insurers, are content to bear, and do take upon us in this voyage, they are of the seas, men-of-war, enemies, pirates, rovers, thieves, jettisoms, letters of marque, reprisals, taking at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality whatsoever, barratry of the master and mariners, fire and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, or any part thereof." Under these words, "and of all other perils, losses, and misfortunes, that have or shall come to the hurt," every species of risk to which ship and goods are exposed from the perils of the sea voyages is embraced. This general contract is, however, qualified, as we shall hereafter see, by the usual printed memorandum, which will presently be considered in the natural order of the instrument. In most policies are inserted the words, "lost or not lost," by which the insurer not only takes upon himself the risk of future loss, but also the loss on any that may already have happened.

[8] The acknowledgment contained in the policy of the receipt of the premium by the insurance, is conclusive as between him and the insured (*Dalzell v. Mair*, 1 Camp. 532), except in the case of fraud. *Foy v. Bell*, 3 Taunt. 493.

[9] Where the policy contains a stipulation that the funds of the company or corporation underwriting the policy shall alone be subject to make good the loss, and that no shareholder shall be liable to be charged, by reason of the policy, beyond the amount of his shares in the public stock, it has been doubted whether the deficiency of funds, if pleaded in such a case, is any defence. The indication of the fund, out of which the claim is to be paid, seems rather to impose a duty on the insurers to raise the fund, than to make its existence a condition precedent to their liability. *The Sunderland Marine Insurance Co. v. Kearney*, 16 Q. B. 925. *Pilbrow v. Pilbrow's Atmospheric Railway Co.* 5 C. B. 440. It is not necessary to sue the members who signed, the other shareholders may be sued, and are liable to the extent of their shares. *Reid v. Allan*, 4 Ex. 326. *Dawson v. Wrench*, 3 id. 359. *Hallett v. Dowdell*, 18 Q. B. 2. But see *Hassell v.*

(K) *Signature of Underwriter or Agent.*[1]

(L) *Memorandum at end of Policy.*[2]

IV. Legality or Illegality of Contract.[3]

Merchant Traders' Loan & Insurance Association, 3 id. 960; 4 Ex. 525. And where an action was brought against a corporation, on a policy which, in addition to the stipulation confining the liability to the capital stock, contained a covenant that the funds should be liable, and should be applied to make good the loss, it was held that this amounted to an absolute covenant by the corporation to pay the sum insured if a loss was incurred, and that it was not necessary to aver in the declaration that the funds were sufficient to meet the demand. *Sunderland Marine Insurance Co. v. Kearney*, 16 Q. B. 925.

[1] If a person employed as an agent to subscribe a policy signs it in his own name, without mentioning his principal, he will be personally responsible. *See* 5 M. & S. 345; 2 Stra. 955. The policy may be signed by the underwriter personally, or by his agent; but in the latter case the name of the principal should be introduced. A verbal authority suffices to sanction the signing by an agent, unless the policy is under seal; he must then be authorised by deed. 7 T. R. 209.

It is not necessary that a policy underwritten by a company should be signed by any member; it is sufficient if it be subscribed in the name of the firm. *Reid v. Allen, supra. Dowdall v. Allan*, 19 L. J. Q. B. 41.

[2] The memorandum at the end of the policy is usually introduced to prevent litigation about small losses, and losses arising from the perishable quality of some description of goods. The memorandum is generally to the following effect:—"N.B. — Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general *or the ship be stranded;* sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5*l.* per cent; and all other goods, also the ship and freight, are warranted free of average, under 3*l.* per cent., unless general *or the ship be stranded.*"

[3] It may be laid down as a general rule that no insurance can be legally made upon any voyage or trade undertaken or conducted contrary to the laws of this kingdom, or those of its dependencies, or to the law of nations; and it is immaterial whether the insurer be or be not informed that the voyage is illegal. Marsh. Insur. by Shee, p. 37.

Merchandise purchased in a hostile state, to be imported into this country, cannot be made a valid subject of insurance. *Potts v. Bell*, 8 T. R. 548; 1 E. & B. 345. And even touching at an enemy's port, or calling for orders, may vitiate the policy; but a natural-born subject, domiciled in a neutral state, is not prevented from effecting a legal insurance on property to be conveyed from such neutral state to a place at war with this country. *Wilson v. Marryatt*, 8 T. R. 31. To render the trading illegal, some act of hostility must have been done by this country; the other state merely excluding British vessels is not sufficient. *Muller v. Thompson*, 2 Camp. 610. And the object of the adventure may render the insurance valid, although the vessel may have been destined to an enemy's port. *Atkinson v. Abbott*, 11 East, 135; 1 Camp. 535. And the courts will not grant a new trial simply to admit evidence of the illegal design. *Gist v. Mason*, 1 T. R. 88.

When a colony, which has been in the possession of enemies, is incidentally recognised by a British act of state as no longer under their dominion, a subject of this country may lawfully trade to a colony so recognised. *Blackburn v. Thompson*, 3 Camp. 61; 15 East, 81. *Johnson v. Greaves*, 2 Taunt. 344.

A neutral vessel may be employed in carrying enemy's property from the states of the neutral to the enemy's country, and a policy effected thereon is valid. *Barker v. Blakes*, 9 East, 283. So is one by a neutral on a voyage to a neutral or friendly port, although the neutral owner is himself resident in a place occupied by the enemy. *Bromley v. Heseltine*, 1 Camp. 75. But although trading with an enemy is illegal, and a policy effected upon such a risk invalid, yet the king, by license, may authorise and sanction voyages to hostile ports, and thus legalise the speculations.

An insurance in contravention of our revenue laws is invalid, but not if it merely conduces to an infringement of the revenue regulations of a foreign state. *Planche v. Fletcher*, Dougl. 251. *Boucher v. Lawson*, Ca. Temp. Hard. 89. *Tarleton v. M'Gowley*, Peake, 205. *Johnson v. Machielsue*, N. P. 3 Camp. 45. *James v. Catherwood*, 3 D. & R. 190. *Lever v. Fletcher*, 1 Park on Insur. 313.

Trading in contravention of an embargo (*Delmada v. Mottiex*, Park, 311), or of the terms of a treaty (*Bird v. Appleton*, 8 T. R. 562. *Lever v. Fletcher, supra*), or of an order in council, is illegal, and an insurance founded on it is void (*Gibson v. Service*, 5 Taunt. 433; 1 Marsh. 119. *Gibson v. Mair*, 1 Marsh. 39), even although part of the adventure may be clearly legal, and the other part capable, at the expiration of a limited time, of being made so. *Holland v. Hall*, 1 B. & A. 53.

A policy effected on a voyage prohibited by the navigation laws is void. *Morck v. Abel*, 3 B. & P. 35. *Lubbock v. Potts*, 7 East, 449. *Chalmers v. Bell*, 3 B. & P. 604. *Henry v. Staniforth*, 5 M. & S. 122; 4 Camp.

V. Of Valued and Open Policies.[1]

270; 1 Stark. 254. *Redhead v. Cater*, 4 Camp. 128; 1 Stark. 14. *Gray v. Lloyd*, 4 Taunt. 136. *Haines v. Busk*, 5 id. 522. *Sewell v. Exchange Assurance Co.* 4 id. 856. *Cohen v. Hannam*, 5 id. 105. *Gill v. Dunlop*, 7 id. 204. *Oliverson v. Loughman*, 4 M. & S. 346. *Rubechon v. Humble*, 1 Dowl. Rep. 191. *Holland v. Hall*, 1 B. & A. 53.

An insurance against *British capture* is void. *Glaser v. Cowie*, 1 M. & S. 54. But it may be made against such a risk so far as a detention by British vessels would be unlawful (*Lubbock v. Potts*, 7 East, 451; 3 Smith, 401); and this may be done even by a neutral as well as a British subject (*Barker v. Blakes*, *supra*); or against a temporary detention, without any blame being imputable to the insured. *Visger v. Prescott*, 5 Esp. 184.

The property of a foreigner may be insured against a seizure or detention by the state of which he is a subject. *Simeon v. Bagett*, 2 M. & S. 94, 98.

An insurance of the latter part of an integral voyage, illegal in its commencement, is void. *Wilson v. Marryatt*, 8 T. R. 31. Hence, when a ship was insured at and from Canton to Hamburgh, and was engaged in illegal traffic during her stay at Canton, no effect was given to the policy. *Bird v. Appleton*, *supra*. And where a valued policy on goods to be thereafter specified is avoided *in toto*, it applies if the shipment of any portion specified is illegal. *Parkin v. Dick*, 11 East, 502; 2 Camp. 221. And a neutral ship, meeting by agreement a British vessel, in order to receive prohibited goods from her, is sufficient to invalidate the policy. *Gibson v. Service*, 5 Taunt. 433; 1 Marsh. 119. As when an insurance is effected on goods from a hostile country, and part of the cargo is licensed by the crown (*Pieschell v. Allnutt*, 4 Taunt. 792); or where the voyage is clearly distinct and separate from that which is affected by the illegality. *Bird v. Appleton*, *supra*. *Gale v. Dunlop*, *supra*; 2 Marsh. 453.

The sailing of a ship from her port of loading, in contravention of customs' laws does not prevent the owner of the cargo, who was not aware of the illegality, from recovering on a policy on the cargo and freight. *Cunard v. Hyde*, 1 E., B. & E. 670. Where the owner of the cargo is aware of the illegal act, he cannot recover. (Id.)

Insurance of a ship to a blockaded port, with knowledge, is not illegal; and if the ship be seized, but rescued, it is not a total loss under an abandonment, for a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, does not constitute total loss. *Naylor v. Taylor*, 9 B. & C. 718.

[1] When the value of the thing insured is not specified, it is termed an open policy; that is, an insurance open to inquiry as to the amount of the interest of the insured in the property insured. The value of the goods or ship is frequently inserted in the policy, in which case the policy is called a valued policy. The only material difference between an open and a valued policy is, that in case of litigation the insured must, in support of an action on the former, prove in the first instance the amount of his interest in the property insured; but on the trial of an action on a valued policy, such amount is *primâ facie* admitted, and no such evidence is necessary, though the underwriter is still at liberty to dispute the amount of the interest, if he can show that it has been grossly overrated. Ship and freight are usually insured by valued policies. In the case of a ship, the value is said to be what she is worth at the port where the voyage commences, including all her stores, outfits, and money advanced for seamen's wages, the whole covered with the premium of insurance, commission for effecting the same (if insured), and charges of recovery in case of loss, when required. Stev. 168. In the case of freight, it is said that the freight ought not to exceed the amount of what the ship would earn, with the premium and commission thereupon. *See* 13 East, 326. Or, in other words, the interest is the amount of the manifest or freight list, covered with the premium, &c., and charges of recovery in case of loss, where those charges are stated in the policy. Stev. Av. 170, 171. The term "freight," used generally in a policy, means the gross freight: the usage has been to calculate losses in that mode in the case of open policies on freight; and the insured has been held entitled to recover the gross freight, although, if the ship had arrived in safety, he must have paid a considerable sum for seamen's wages, pilotage, light dues, tonnage duty, and dock dues. 1 Bing. 61; 2 East, 581.

Until a declaration of value has been made the policy is an *open*, and *not* a *valued* policy, and the amount of the interest of the insured must be paid. *Crauford v. Hunter*, 8 T. R. 13. But where the value is specified in the policy, it supersedes the necessity of proving the amount. *Lewis v. Rucker*, 2 Burr. 1167.

In estimating the value, goods ought to be taken at the amount of the prime cost, with the addition of the premium commission and probable profit. On freight it should not exceed what the ship might earn. *Usher v. Noble*, 12 East, 646. *Feise v. Aguilar*, 3 Taunt. 507.

The selling or market-price at the port of delivery cannot be alone the standard, as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an owner of goods, who increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by com-

VI. Of Wagering Policies.

By 19 Geo. 3, c. 37, it is enacted, "that no insurance shall be made on any ship or ships belonging to his majesty, or any of his subjects, on any goods or effects laden on board such ships, interest or no interest, or without further proof of interest than policy, or by way of gaming or wagering, or without benefit of salvage to the insurers; that every such insurance shall be void." But by sect. 2 it is provided, that insurances on private ships of war, fitted out by any of his majesty's subjects solely to cruise against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer. And by sect. 3 it is also provided, "that any effects from any ports or places in Europe or America, in the possession of the enemies of Spain or Portugal, may be insured in the same manner as if this act had not been made." By sect. 5, "all sums of money, lent on bottomry or *respondentia*, upon ships belonging to his majesty's subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandise or effects on board, or to be laden on board, and shall be so expressed in the conditions of the bond; and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have a right to make insurance on the money so lent; and the borrower shall recover no more on any insurance than the value of his interest in the ship, or in the goods on board, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship or in the goods on board doth not amount to the sum borrowed, he shall be responsible to the lender for so much of the money borrowed as he hath not laid out in the ship or goods on board, with interest for the same, together with the insurance, and all other charges thereon, in the proportion which the money not laid out shall bear to the whole lent, notwithstanding the ship and goods be totally lost." And by an action brought by the insured, the plaintiff or his attorney or agent shall, within fifteen days after he shall be required so to do in writing by the defendant, or his attorney or agent, declare in writing what sum or sums he hath insured or caused to be insured in the whole, and what sums he hath borrowed at *respondentia* or bottomry for the voyage, or any part of the voyage, in question."[1]

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paring the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i. e.* it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, *i. e.* to the invoice price, being itself calculated as before stated, and you then get the one-half, the one-fourth, or one-eighth of the loss, to be made good in terms of money. This rule of calculation is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. *Usher v. Noble*, *supra*.

In the case of a valued policy on merchandise, no deduction is to be made for freight, even when, in consequence of a sentence of the Admiralty Court, it is to be paid by another person, and not by the insured. *Marshall v. Parker*, 2 Camp. 69. Or can any allowance be made in the case of a valued policy for a diminution of stores and provisions, or for the ordinary consumption of the crew. *Shawe v. Felten*, 2 East, 109. And it is no defence to prove that the insured have already received the amount of the valuation from the insurers of another policy, if the value of the ship be equal to the sum received and that sought to be recovered. *Bonsfield v. Barnes*, 4 Camp. 228. But a valued policy may be opened by showing that part only of that intended by the valuation has been lost. *Forbes v. Aspinall*, 13 East, 323. And when the property is greatly overvalued, with intent to defraud the underwriters, the insurance is entirely vitiated, and the insured cannot recover, even to the extent of his actual interest. *Haigh v. De la Cour*, 3 Camp. 319.

[1] This statute applies to an insurance on profits on goods laden on board a ship. *Smith v. Reynolds*, 1 H. & N. 221.

Whether a policy is a wagering policy or upon an interest, depends upon the facts, and not upon the understanding of the parties. *Kemp v. Vigne*, 1 T. R. 304.

VII. Of the Construction of the Policy.[1]

A *valued* policy is not, therefore, to be considered as a wager policy (*Lewis v. Rucker*, 2 Burr. 1167. *Cousins v. Nantes*, 3 Taunt. 513): for a wagering policy and a policy on interest are contracts distinct in their nature and incidents. *Cousins v. Nantes, supra.* Hence a valued policy, "without further proof of interest than the policy," is good within the stat. 19 Geo. 3, c. 37. *Da Costa v. Firth*, 4 Burr. 1966.

A valued policy on profits expected upon a voyage is not within the act (*Grant v. Parkinson*, 2 Park, Ins. 355); nor is a commission expected by a consignee of a cargo a wager within the act (*Flint v. Le Mesurier*, 2 Park, 355); but a very small interest, where the intent of the parties has evidently been to enter into a wager policy, will not prevent the case coming within the statute. *Kent v. Bird*, Cowp. 583.

Insurances upon the ship and goods of foreigners are not within the stat. 19 Geo. 2, c. 37. *Crauford v. Hunter*, 8 T. R. 14.

[1] A policy is considered as a contract *uberimæ fidei*, and always receives a liberal construction for the benefit of trade and of the assured. *Pelley v. Royal Exchange Insurance*, 1 Burr. 349. *Wolff v. Horncastle*, 1 B. & P. 316. The construction will be according to the words on the face of the policy. *Rickman v. Carstairs*, 2 Nev. & M. 562; 5 B. & Adol. 652. Its terms are to be understood in their plain, ordinary, and proper sense, unless they have in respect to the subject-matter acquired a peculiar sense distinct from the popular meaning of the words. *Robertson v. French*, 4 East, 130.

Where a charter-party has by the custom of trade acquired a definite meaning, an insurance on property under it must be construed with reference to that meaning. *Grant v. Ponton*, 1 Taunt. 463. Thus, upon an insurance to the Baltic, evidence was admitted to show that in mercantile usage the Gulf of Finland is comprehended in the Baltic. *Uhde v. Walters*, 3 Camp. 16. So, a clause "warranted to depart with convoy," has been read subject to a usage for ships not to join convoy until they arrived at a particular place. *Lethulier's case*, 2 Salk. 443. *Charred v. Angerstein*, Peake, 43. *Noble v. Kennoway*, Dougl. 510. And in construing a policy, the particular state of the commerce touching which the insurance is made may be looked at as a guide. *Mellish v. Andrews*, 2 M. & S. 27. Proof of usage, however, is not admissible to contradict the express stipulations in the policy. *Aguilar v. Rogers*, 7 T. R. 423. As to show that, by the custom of trade at a particular place, the risk on the goods as well as on the ship expired in twenty-four hours (*Parkinson v. Collier*, 2 Park on Ins. 416); or, that a ship named in the policy was not to be included within its provisions (*Weston v. Eames*, 1 Taunt. 115); or, that the risk was not to commence at the place specified. *Kaines v. Knightley*, Skin. 54; 2 Salk. 444.

Expressions introduced into a policy may be extended in construction beyond their ordinary signification with reference to the peculiar situation of the destined country. *Rucker v. Allnutt*, 15 East, 278.

Although indemnity is the principle of marine and fire insurance, yet this contract is, like other contracts, subject to explanation and construction, regulated in some countries by positive law in the country by usage; and it will be found that absolute and perfect indemnity cannot be attained in all cases, and under every possible event. *Per Lord Tenterden: Winter v. Haldiman*, 2 B. & Adol. 656.

A usage at Lloyd's is not binding on an assured, unless he is in the habit of effecting policies there. *Stewart v. Aberdein*, 4 Mee. & W. 211. *Mackintosh v. Marshall*, 11 id. 116. *Partridge v. Bank of England*, 9 Q. B. 396. *Bayliffe v. Butterworth*, 1 Ex. 428.

It is for the court to put a construction on what are "perils of the seas," which are terms of general import. *Crofts v. Marshall*, 7 C. & P. 597. A general dictionary of the English language is not authority to show, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage. *Houghton v. Gilbart*, 7 id. 701. A homeward policy, at and from A., on freight, attaches at the period when the ship is in a condition to begin to take in her homeward-bound cargo, which is a question of fact for the jury. *Williamson v. Innes*, 2 M. & M. 88. Upon a policy at and from L. to S., and thence to B., in Spain, and at and from thence and two other ports in Spain to a port in G. B., the ship, arriving at B., was directed to proceed to T., in Spain, and discharge her cargo, and afterwards to proceed to a bay round a headland of T., and there receive her homeward cargo; whilst there loading, she was lost:—*Held*, that the latter bay was a "port" within the meaning of the policy. Judgment affirmed in Dom. Proc. *Scotland Sea-Insurance Co. v. Gavin*, 1 Dowl. & C. 129. In an action on a policy on a ship at and from H. to V., with a warranty that the ship was "in port" on a given antecedent day, it is not sufficient that she was safe in some other port than H. on that day. The meaning of this policy is, that she was safe in the port of H. *Colby v. Hunter*, 1 M. & M. 81.*

"Discharge of the cargo," means the substantial discharge. *Moore v. Taylor*, 3 Nev. & M. 406; 1 Ad. & E. 25. The words "if sold or laid up for every uncommenced month," in law is laying up for the season. *Hunter v. Wright*, 10 B. & C. 715. The words "after the vessel has been moored twenty-four hours in safety," mean her place of ultimate destination. *Samuel v. Royal Exchange Assurance Co.* 5 id. 119. So, on

VIII. Of the Inception and Termination of the Risk.[3]

insurance of canal boats for twelve months, the policy continues throughout the year. *Crowley v. Cohen*, 3 B. & Adol. 478.

[1] *On Goods.*—A policy "at and from" a place does not import that the ship is now there; it is sufficient if she arrive there so soon that the risk be not materially varied. *Hull v. Cooper*, 14 East, 479. And where a vessel is insured from one port to another the policy attaches, though she may have left the port before the day specified therein. *Way v. Modigliani*, 2 T. R. 30. That a policy on goods "at and from X., beginning the adventure from the loading thereof abroad at X.," may attach, they must have been laden at X. *Robertson v. Booth*, 12 East, 130. *Spitta v. Woodman*, 2 Taunt. 416. *Horneyer v. Lushington*, 15 East, 46. But a policy on goods "at or from G., beginning the adventure from the loading," does not cover the goods laden before the ship's arrival. *Langhorn v. Hardy*, 4 Taunt. 628. *Ridsdale v. Newnham*, 3 M. & S. 456. A policy on goods "at and from X. to Y., from the loading thereof on board wheresoever," attaches upon goods laden previously to arrival at X., though not landed and reloaded there. *Gladstone v. Clay*, 1 M. & S. 418. That a policy on ship and goods "at and from all and every port, &c. on the coast of Brazil, and after 17th of September to Cape of Good Hope," may attach, the loading must be on the coast of Brazil. *Robertson v. French*, 4 East, 130. A loading and reloading at X. of a portion of the goods already on board, is sufficient to enable the custom-house officers to inspect and examine the whole cargo, as a sufficient loading at X. within a policy, free from average on goods at and from X. to Y. *Nonnen v. Reid*, 16 East, 176. An insurance upon goods at and from Gottenburgh to the ship's port of discharge in the Baltic, "beginning the adventure upon the loading thereof on board the ship," the goods must be loaded at Gottenburgh, or the policy never attaches. *Mellish v. Allnutt*, 2 M. & S. 106. A policy upon a homeward voyage from India, upon goods "at and from China to all or any ports or places whatsoever beyond the Cape of Good Hope, in port, and at sea, in all places, and at all times, and in all services, with liberty to proceed to, touch and stay at, any port or places whatsoever, for any purpose, until the ship's arrival in London, beginning the adventure upon the goods from the loading thereof at China, and so should continue upon the goods until the same should be discharged," covers only the particular cargo taken in at the first port of loading. *Grant v. Paxton*, 1 Taunt. 463. On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, "beginning the adventure from the loading of the goods on board the ship on the termination of her cruise and preparing for her voyage to London." The ship, on the termination of her cruise, touched at Pernambuco; but, failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither:—*Held*, that the policy attached at Pernambuco. *Lambert v. Liddart*, 1 Marsh. 149; 5 Taunt. 480. There may be a sufficient inception of the voyage within the policy, though made under a fluctuating purpose, to be determined by circumstances whether or not to proceed to the *terminus*. *Hesselton v. Allnutt*, 1 M. & S. 46. If goods be insured only to a particular port, and the ship touches at one port, and after discharging part of her cargo proceeds with the residue, the insurance remains in force until her arrival at the latter port. *Aliter* if the insurance be on the ship and goods. *Leigh v. Mather*, 1 Esp. 411; 1 Park, Ins. 52.

A continuation policy dispenses with the necessity for an original loading at the port designated by it for the commencement of the adventure. *Bell v. Hobson*, 16 East, 240; 3 Camp. 272. The underwriters were held not liable where the captain of a vessel insured to Martinique, sold the greatest part of the cargo there, and then took the remainder of it to Antigua, where she was wrecked while stopping, partly to dispose of the residue of the cargo, and partly to obtain a homeward cargo. *Inglis v. Vaux*, id. 436.

Insurance on goods "from A. to B., until they should be there discharged and safely landed;" on their arrival at B., the merchant to whom the goods belonged employed and paid a public lighter to land them; and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss. *Hurry v. Royal Exchange Insurance Co.* 2 B. & P. 430; 3 Esp. 289. But if, under such circumstances, the merchant uses his own lighter, the underwriter is discharged (*Rucker v. London Insur. Co.* 2 B. & P. 432; 3 Esp. 290); or if the insured officiously superintends the landing in a lighter hired in the usual way, it seems the insurers would be discharged. *Strong v. Natally*, 1 W. R. 16. So they will be discharged if the goods are landed at the port of destination by the officers of government there, and lodged in the government warehouses. *Brown v. Carstairs*, 3 Camp. 161. A policy of insurance on East India ships, including the chance of their being detained in India, and the risk of the country voyage there, is valid. *Salvador v. Hopkins*, 3 Burr. 1707. A ship whilst moving from port to port in an island is covered by a policy at and from the island. *Cruikshank v. Janson*, 2 Taunt. 307.

The outward risk upon a ship ceases after she has been moored at anchor twenty-four hours in the first port of an island to which she is destined; but an outward policy upon goods continues until they are landed. *Leigh v. Mather*, 1 Park, Ins. 52. *Barrass v. Lon-*

don Insurance Co. 1 Esp. 411. An insurance on a ship covers the vessel during the voyage, and for twenty four hours after she has been moored in safety, though the peril through which she was afterwards lost happened during that period. *Lockyer v. Offley*, 1 T. R. 252. *Meretony v. Dunlope*, id. 260. *Camden v. Cowley*, 1 Black. 417.

In all cases where the question of the termination of voyage arises, it is one of fact depending upon the custom and usage of the port and the nature of the voyage. *Lindsey v. Janson*, 4 H. & N. 699. *See* also *Parker v. Winlow*, 7 E. & B. 942. *Whitwell v. Harrison*, 2 Ex. 127.

When a ship arrived at a wharf where she intended to unload, and was laid on the outside of the tier, there being no room in the inside, and she made the usual preparations according to her situation to unload, and after the twenty-four hours she was found adrift and lost:—*Held*, that she was completely moored and in perfect safety previous to the accident. *See* 1 Park, 45.

If a ship insured, on arriving off her port of destination, is prevented from entering it, from its being in the hands of the enemy, or from being ordered away by the British commander there, the policy does not remain in force till she reaches a port of safety. *Parkin v. Tunno*, 11 East, 22.

Where a ship insured to the ports of X., Y., or Z., until her arrival at her last port of discharge, passes X., intending to discharge at Y., but finding that the enemy had possession of it, puts into Z., still retaining the intention of proceeding to Y. when friendly, Y. is her last port of discharge. *Brown v. Vigne*, 12 id. 283. If the ship do not arrive at the port till after an hostile embargo has been laid on vessels of the nation to which she belongs, the underwriters are liable (*Horneyer v. Lushington*, 15 East, 46; 3 Camp. 85). And where a ship, within twenty-four hours after her arrival at the port of London, on being moored there, was ordered to go back to the Hope to perform quarantine, and before she could return was burned, the underwriters were deemed responsible. *Waples v. Eames*, 2 Stra. 1243.

A policy was made on the freight of a chartered ship from T., in ballast, to C. and back to the Channel; the sums insured to be deemed interest on the outward voyage, although in ballast. It was ruled that the policy would cover a loss which happened while the ship lay at C. during an embargo. *Mackenzie v. Sheddon*, 2 Camp. 431.

A ship coming into port with her death wound, or not moored twenty-four hours in safety, because she does not sink until the expiration of that time, entitles the assured as for a total loss. See *Shawe v. Felton*, 2 East, 109.

On Freight.—A policy on freight attaches upon the loading of the cargo; and if a valued policy, the whole attaches upon the loading of any part of it. *Montgomery v. Eggington*, 3 T. R. 362. And it attaches on the ship's sailing under that contract by which the freight is to be earned, though there be then no cargo on board. *Thompson v. Taylor*, 6 T. R. 478. *Horncastle v. Suart*, 7 East, 400.

Where freight is the subject of insurance, the insured, in order to entitle himself under the policy, must show that a right to freight inchoate had commenced, otherwise in right, has been lost. *Everith v. Smith*, 2 M. & S. 278.

The extent to which underwriters will be liable on a *freight policy*, considered with reference to the places embraced by the contract, must in general be determined by the intention of the parties as it appears on the face of the instrument. *Robertson v. Majoribanks*, 2 Stark. 576.

A policy on freight at and from the ship's port of lading at L., to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of goods loaded at an intermediate port. *Barclay v. Stirling*, 5 M. & S. 6.

An insurance on the freight of a ship destined for a fishing adventure in the South Seas, is not determined by the arrival of part of the cargo in another ship. *Phillips v. Champion*, 1 Marsh. 402; 6 Taunt. 3.

Where, in a valued policy on freight, the estimate is made with reference to the freight upon an entire cargo, and an entire cargo is not, in fact, obtained, where there is no contract to load a complete cargo, or to pay dead freight, but the ship is merely a seeking ship, a loss of part of the goods intended to be loaded cannot entitle the insurer to recover, as for a total loss. *Forbes v. Aspinall*, 13 East, 323. *Forbes v. Cowie*, 1 Camp. 520. *Patrick v. Eames*, 3 id. 441. *Knox v. Wood*, 1 id. 543.

Where a chartered ship, after having arrived at the port at which she was to have been invested with her homeward cargo, took on board part of the cargo, but was lost in a storm before the expiration of the time within which her loading was to be completed, the shipowners were held entitled to recover for a total loss on a valued policy on freight, the part of the cargo which was not on board having been on shore, and ready to be shipped at the time of the loss. See *Davidson v. Willasey*, 1 M. & S. 313.

A policy may be made on freight for a portion of a voyage; so, for a specified duration of time. *Taylor v. Wilson*, 15 East, 324.

On Ships.—Under the words, "at and from Jamaica," the ship is protected till her departure on her voyage in going all round the island. *Anon.* Dougl. 370, n.

A policy is determined at the expiration of two months, when there is a stipulation that, in case of a blockade, the ship should be at liberty only to remain that time. According to *Doyle v. Powell*, 4 B. & Ad. 267, declaration upon a policy from L. to M. and B., if open on her final port of discharge on

IX. Of Deviation, and its Effect.[1]

the river P., "with liberty to wait two months at M., if needful; to return —— per cent in case of the voyage ending at M.;" on arrival, M. being blockaded to prevent vessels proceeding to B., the vessel remained at M. above two months, and then proceeded to B., during which she was lost. The court held that the risk was determined at the end of two months, and the underwriters discharged.

[1] Deviation is a voluntary departure out of the prescribed course of the voyage, and will, unless there be some necessity or excuse for the departure, invalidate the policy from the time it was committed. *Green v. Young*, 2 Ld. Raym. 840; 2 Salk. 444. *Goram v. Sweeting*, 2 Saund. 200.

What shall or shall not be a deviation depends on the peculiar circumstances of the case. *Anon.* Lofft. 421; 1 Arnould, 393; Marsh. 138.

An intention to deviate is immaterial, provided the voyage on which the ship sailed is that insured. *Kewley v. Ryan*, 2 H. Black. 343. A designed departure, if the loss happen before it take effect, does not discharge the policy. *Thelluson v. Ferguson*, Dougl. 361. *Wooldridge v. Boydell*, id. 10.

A deviation from the voyage specified is fatal, although the policy is not affected till after it has taken place, and the underwriters have notice of the circumstances. *Redmon v. London*, 1 Marsh. 136; 5 Taunt. 462; 3 Camp. 503. A voluntary deviation vitiates a policy of insurance on freight, as well as one upon ship and goods. *Burdock v. Potts*, 2 Park, Insur. 399; Marsh. 138.

If a ship be insured upon a trading voyage, it is incumbent on the insured to carry on that trade with usual and reasonable expedition; otherwise their conduct will amount to a deviation, and discharge the policy. *Hartley v. Buggin*, 2 Park, Insur. 415; 1 Marsh. Insur. by Shee, 194. *Parkinson v. Collies*, 2 Park, Insur. 416. *Phillips v. Irving*, 8 Scott, N. R. 1.

Calling at Dover for a Mediterranean pass, in an insured voyage from Dunkirk to Leghorn, was held to be a deviation. *Townson v. Guyon*, 2 Park, Insur. 388; Atkinson, 85.

It is a deviation if the master leaves a port for a particular purpose, by the command of the captain of a king's ship lying there, without any remonstrance. *Phelps v. Auldjo*, 2 Camp. 350.

It does not make any difference whether the insured was or was not consenting to the deviation. *Elliott v. Wilson*, 7 Bro. P. C. 459. *Fox v. Black*, 2 Park, Insur. 387.

A ship may trade in the course of her voyage, provided it can be done without deviation or delay, or otherwise increasing the risk of the insurers. *Raine v. Bell*, 9 East, 195. *Laroche v. Oswen*, 12 id. 133; Phil. on Insur. 200.

If the voyage described in a policy be from A. to B. and C., and the ship go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for a subsequent loss, if it be not the regular and settled course of the voyage to go to C. first. *Beatson v. Haworth*, 6 T. R. 531. *Clason v. Simmonds*, id. 533.

When a captain, on a voyage delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions (although he transmit a letter at the same time), it is not a deviation; and it is a question for the jury whether the going in were *bonâ fide* for the purpose of provisions. *Hornor v. the Royal Exchange Co.* 1 Price, 195. *Bottomley v. Bovill*, 5 B. & C. 219.

Where the policy was at and from Pernambuco, or any port or ports in the Brazils, to London, "beginning the adventure from the loading the goods on board the ship on the termination of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched at Pernambuco; but failing to procure a cargo there, she proceeded to Salvador, and was lost on her voyage thither: —*Held*, that the ship's proceeding to Salvador was no deviation. *Lambert v. Liddard*, 1 Marsh. 149; 5 Taunt. 480.

Sailing from the port of lading to the usual place of rendezvous for the sake of joining convoy (there being a warranty to sail with convoy) then ready, though such place be out of the line of voyage, is no deviation. *Bond v. Nutt*, Cowp. 601. *Pratt v. Ashley*, 1 Ex. 257.

Where, from a certain point, there are different courses to the port of destination, each having advantages and disadvantages, and the custom is for the captain to elect according to circumstances, and circumstances have happened which deprive him of this election, concealment of this fact from the underwriter avoids the policy. *Middlewood v. Blakes*, 7 T. R. 162. *Qu.* see *Heselton v. Allnutt*, 1 M. & S. 46.

As to what will Justify a Deviation. — A deviation from necessity is justifiable (*Driscol v. Bovil*, 1 B. & P. 313), as from stress of weather (*Delany v. Stoddart*, 1 T. R. 22); or the compulsion of a superior force (*Scott v. Thompson*, 1 N. R. 181); or the necessity of going into port to repair (*Gurbert v. Redshaw*, 2 Park, Insur. 402); or when the ship is otherwise by force compelled to go, or taken out of the voyage. *Elton v. Brogden*, 2 Stra. 1264. And if a ship be driven out of her course by a storm, she is not obliged to return back to the point from whence she was driven, but may make the best of her way to the port of destination. *Harrington v. Halkeld*, 2 Park, Insur. 304.

It is no deviation to delay for the purpose of giving assistance to a ship in distress. *Lawrence v. Sidebotham*, 2 Smith, 214; 6 East, 45. It is not a deviation for a ship to leave the regular track for the purpose of taking convoy, when *bonâ fide* for the benefit of all concerned, unless expressly prohibited by

the terms of the policy. *D'Aguilar v. Tobin*, Holt, 185; 2 Marsh. 265.

Sickness on the part of the master or crew, to afford an excuse for a deviation, makes it incumbent on the part of the insured to show that proper medicine, &c. was on board. *Woolf v. Claggett*, 3 Esp. 257.

If an insured ship quit the course described in the policy from necessity, she must pursue the new voyage so made necessary in the direct course, and in the shortest time. *Lavabre v. Wilson*, Dougl. 284.

As to the Effect of a License to Touch at Intermediate Ports.—Liberty to touch at any port or ports for orders does not warrant the assured's retracing his course. *Mellish v. Andrews*, 16 East, 312; 5 Taunt. 496.

If a vessel call at more than one of the places of call, she must take them in the order named, or in the usual course when not named in any order. *Gairdner v. Senhouse*, 3 Taunt. 16.

A policy on goods at and from A. to B., with liberty to touch at C., "for any purpose whatever, beginning the adventure from the loading as above," includes liberty to touch at C. for the purpose of taking in part of goods assured. *Violett v. Allnutt*, 3 Taunt. 419.

Under a policy at and from London to the ship's discharging port or ports in the Baltic, not specifying any particular point, with liberty to touch at any port or ports for orders, or any other purposes, the ship may, after touching at and passing a port, retrace her course or revisit it, if done without fraud, and in the *bonâ fide* prosecution of the adventure; *secus*, had there been fixed *termini*. *Mellish v. Andrews*, 2 M. & S. 27.

Policy from London to the ship's discharging port in the Baltic, "with liberty to touch at any port or ports for orders;" the ship may, before her discharging port is fixed, go backwards or forwards to ports for orders in any succession whatever. *Andrews v. Mellish*, 5 Taunt. 496.

A policy is not avoided by trading at an intermediate port at which the vessel has lawfully touched, provided the risk is not thereby enhanced, or the voyage delayed. *Raine v. Bell*, 9 East, 195. *Urquhart v. Barnard*, 1 Taunt. 450. *Laroche v. Oswen*, 12 East, 133.

Policy of insurance from Para to New York, "with leave to call at any of the Windward and Leeward Islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any port or place, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation:"— *Held*, that in this policy the ship having proceeded to two of the Leeward Islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance. *Hammond v. Reid*, 4 B. & A. 72.

By a policy, a ship was insured at and from Hull to her port or ports of loading in the Baltic Sea and Gulf of Finland, "with liberty to proceed to and touch, and stay at any port or ports whatsoever, for any purpose, particularly at Elsinore, without being deemed a deviation." The ship touched and stayed at Elsinore and Dantzic to deliver goods, Pillau being her port of loading: *Held*, that this was a deviation. *Solly v. Whitmore*, 5 B. & A. 45.

If a ship has liberty to touch at a port, it is no deviation to take in merchandise during her permitted stay there, if she does not, by means thereof, exceed the period allowed for her remaining there. *Urquhart v. Barnard*, *supra*.

Where a ship, insured at and from Lisbon, had liberty to call at any one port in Portugal, for any purpose whatsoever:— *Held*, that the permission must be restrained to the northward ports on her way to England. *Hogg v. Horner*, 1 Marsh. Insur. by Shee, 186. *Rontress v. Reeve*, 2 Park, Insur. 445.

If a ship, with a very extensive liberty to touch or stay, and land, load, or exchange goods, enter a port and stay there so long, for the purpose of trade, that she lose her convoy, the underwriters are discharged on the ground of deviation, for the liberty must be construed with reference to the main scope of the voyage insured. *Williams v. Shee*, 3 Camp. 469.

Under a policy from Antigua to England, "with liberty to touch at all or any of the West India Islands (Jamaica included)," the ship may touch at any of the West India Islands, though not in the direct course from Antigua to England, and stay at such as she so visits during the time necessary for completing her homeward cargo. *Metcalfe v. Parry*, 4 id. 123. Or a policy at and from London "to New South Wales, and from thence to the ship's trading port or ports in the East Indies and elsewhere, and that she might proceed and sail to, and touch and stay at, any ports or places whatsoever, and wheresoever, and for any purpose whatsoever." The ship sailed from London with convicts to New South Wales, where, having discharged them, she proceeded in ballast to Batavia, where she took on board a quantity of iron, and discharged the same at Sourabaya, and was there loaded with a full cargo of rice, with which she proceeded to the Mauritius, where it was discovered she had sustained an injury, and she was accordingly broken up:— *Held* to be no deviation. *Armett v. Innes*, 4 Moore, 150.

As to the Effect of a License to Cruise.— When a policy is effected in the usual form, the ship cannot be lawfully employed for hostile purposes, except in a case of necessity, or where express liberty is given by the terms of the policy. *Phelps v. Auldjo*, 2 Camp. 350.

Whether an insurance of a ship expressly declared to be "with or without letters of marque," upon a commercial adventure, enables her to chase for the hostile purpose of attack, is not settled; but the mere words, "with or without letters of marque," do not authorise cruising out of the course of the voyage in search of prizes. *Parr v. Anderson*, 6 East, 207.

An insurance with liberty to cruise six weeks, means six weeks successively from the commencement of the cruise. *Syers v. Bridge*, Dougl. 527.

X. Risks and Perils Insured against.

(A) *Perils of the Sea.*[1]

In an action upon a policy for a voyage from A. to B., the captain took in goods for S., an intermediate port, the policy containing no clause giving liberty for the vessel to put into S. The court held, that the jury having found, under the learned judge's directions, that the cargo had sustained damage to the amount of three per cent before the ship came to the deviating point, it was a loss sustained before any deviation, and the underwriters liable; but putting into S. was a deviation, and they would not have been liable for any loss which accrued subsequently. *Hare v. Travis*, 7 B. & C. 14. And if a vessel goes to a place not named, and returns from it in safety, and is afterwards lost, the insurance is not vacated. *Hunter v. Leathley*, 10 id. 858.

It is not a deviation for a vessel, after completing her outward voyage, to stop at places within the description of the homeward one, to leave part of her outward cargo. *Miller v. Warre*, 1 C. & P. 237.

And it is no deviation under policy to touch and trade at all or any of the ports in the East Indies, to call at Sourabaya. *Leathley v. Hunter*, 7 Bing. 517; 5 M. & P. 457. *See* 3 Taunt. 419; 5 M. & S. 6. So going to a port for a double purpose, as discharging and taking in cargo, when only one is sanctioned by the policy, is not a deviation. *Warre v. Miller*, 4 B. & C. 538; D. & R. 1. But proceeding to a different port within the same bay, though subject to the jurisdiction of the same custom-house, is a deviation. *Brown v. Taylour*, 4 Ad. & E. 241; 5 Nev. & M. 241. So where an insurance allows a ship to act as a tender, it does not mean to render assistance to a ship on a different voyage; and if it does, it is a deviation. *Hamilton v. Sheddon*, 3 Mee. & W. 49. And an insurance to sail to and from certain places and call at other ports, does not sanction the going to another port. *Bottomley v. Bovill*, 5 B. & C. 210.

[1] Losses by perils of the sea are those which happen from the sea, and are necessarily incidental to a ship engaged in a sea voyage, whether usual or extraordinary, whether foreseen or unforeseen. *Paterson v. Harris*, 1 B. & S. 336.

When the loss immediately results from a peril of the sea, it is covered by the policy, though that peril was introduced by a foreign cause. *Hodgson v. Malcolm*, 2 N. R. 236. As if a loss accrue immediately from a peril of the sea, but remotely from the negligence of the master and mariners. *Walker v. Maitland*, 5 B. & A. 171.

In case of an insurance on living creatures, a loss accruing from failure of proper nourishment, resulting from a delay occasioned by foul weather, is a loss by natural death, and not perils of the sea. *Tatham v. Hodgson*, 6 T. R. 656. But a policy in living animals warranted free from mortality and jettison, covers losses occasioned by the agitation of the ship in a storm. *Lawrence v. Aberdein*, 5 B. & A. 107. *Gabay v. Lloyd*, 3 B. & C. 793.

The throwing overboard of slaves in consequence of a scarcity of water, arising from the captain having missed the island of Jamaica, and being longer than the ordinary passage:—*Held*, not to be a loss by the perils of the sea. *Gregson v. Gilbert*, 1 Park, 83.

A vessel, warranted free from capture, when near shore waiting for a pilot, drifted and was lost, and afterwards seized and confiscated by an enemy:—*Held*, lost by perils of the sea. *Hahn v. Corbett*, 2 Bing. 205.

A loss sustained by a ship bulging while hove down to repair, is not a loss by perils of the sea (*Thompson v. Whitmore*, 3 Taunt. 227), but an injury to the bottom of a ship by the violent action of the wind and waves in a storm is. 3 F. & F. 190.

Where a ship is run down by another, not through design but negligence, the loss is by the perils of the sea. *Smith v. Scott*, 4 Taunt. 126. *Buller v. Fisher*, 3 Esp. 67.

Where goods have been sold by the master for want of money in a foreign port to repair damage sustained by the ship in a storm, the underwriters are not liable for the value of the goods. *Powell v. Gudgeon*, 5 M. & S. 431. *Sarquy v. Hobson*, 2 B. & C. 7; 5 D. & R. 192.

When a ship and goods are sunk at sea by another ship firing upon her, mistaking her for an enemy, although this is not strictly a loss by perils of the sea, yet the underwriters are liable under a special count stating the particular circumstances. *Cullen v. Butler*, 5 M. & S. 461; 4 Camp. 289.

When a vessel was insured for twelve months, during which she was placed in a dry harbour, the bed of which was hard and uneven, and on the tide having left her she received damage by taking the ground:—*Held*, that this was a loss by the perils of the sea. *Fletcher v. Inglis*, 2 B. & A. 315. So in the case of a policy on goods warranted free from capture and seizure, when the ship was stranded on a shoal within a few miles from the port of destination, disabled from proceeding, and lost; but while she lay on the sand she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him; this was holden a loss by perils of the sea. *See* 2 Bing. 205; 1 Holt, 149.

Where a ship was placed in a graving-dock containing two or three feet of water, to be repaired, and whilst there, by the violence of the wind and weather, was thrown over on her side and was bulged, this was holden not to be a loss by the perils of the sea. *Phillips v. Barber*, 5 B. & A. 161. So where the ship during the voyage was eaten by the worms and rendered incapable of proceeding on her voyage, and was condemned, that was held not such a loss within the meaning of the policy. *Rohl v. Parr*, 1 Park, Insur. 85; 1 Esp. 445.

The underwriter is liable for a robbery of the goods insured when committed from

(B) *Loss by Capture.*[1]

thieves from without. *Harford v. Maynard*, 1 Park, Insur. 31.

As to when such a Loss is Presumed.—A ship which is missing, and of which no intelligence has been received within a reasonable time after sailing, shall be presumed to be lost by foundering at sea. *Newby v. Head*, 1 Park, Insur. 85. In such cases the *onus* lies upon the plaintiff of proving that when the vessel left the port of outfit she was bound upon the voyage insured. The convoy bond is good *primâ facie* evidence for this purpose. *Cohen v. Hinckley*, 2 Camp. 51; 1 Taunt. 249. But to found a presumption that the ship was lost in the voyage, it is not enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination to show that she never arrived there. *Twemlow v. Oswin*, 2 Camp. 85.

The underwriters are not liable in respect of a loss not arising from the perils insured against, but from the vice of the subject of insurance; as where a ship is sent to sea in a state not fit for the particular voyage, so that, without encountering any more than ordinary risk, she is obliged to put into a port for repair. *Faucus v. Sarsfield*, 6 E. & B. 192. Further, they are not liable when the misconduct of the assured is the efficient cause of the loss, although the immediate cause of it be a peril insured against; for the maxim, *In jure non remota causa sed proxima spectatur*, can never be applied where it contravenes the fundamental rule of insurance law, that the insurers are not liable for a loss occasioned by the wrongful act of the assured. *Thompson v. Hopper*, 6 E. & B. 937.

If no pilot come after a reasonable effort, and the captain endeavour to enter the port, and the ship be lost, the underwriters are liable. *Phillips v. Headlam*, 2 B. & Adol. 380.

A policy on freight from C. coast to B. The ship put in for repairs at a port on the coast, seven miles from which the plaintiff got a cargo ready to be loaded, but the ship was lost by accident going out of dock:—*Held*, a loss of freight within the policy. *Devaux v. Janson*, 5 Bing. N. S. 519.

The insurer of freight, to entitle himself to recover, must show that but for the intervention of some of the perils insured against such freight would have been carried. *Flint v. Flemyng*, 1 B. & Adol. 45.

Horses in a gale, notwithstanding every care, falling down, kicking, killing and bruising each other, is a loss within the perils of the sea. *Gabay v. Lloyd*, 3 B. & C. 793; 5 D. & R. 641.

Underwriters are not liable for goods sold to repair the ship. *Sarqny v. Hobson*, 4 Bing. 131; 12 Moore, 474; 2 B. & C. 7.

It is no answer to an action on a marine policy that the interest in the goods was not acquired until after an average loss by sea damage. *Sutherland v. Pratt*, 11 Mee. & W. 296. If, however, the goods were lost before the contract of purchase was made, there would not be an insurable interest. *Hastie v. Couturier*, 8 Ex. 109; 22 L. J. Ex. 302.

[1] Capture is where a ship is taken by an enemy in war, or by way of reprisals, or by a pirate; every capture, whether lawful or unlawful, is in general within the meaning of the policy. Marsh. on Ins. To constitute a loss by capture within the meaning of the policy, it is not necessary that the ship should be condemned or carried into port or fleet of the enemy. 2 Burr. 694. *See* 4 East, 396, 402; 7 id. 449; 9 id. 283; 11 id. 205; 1 M. & S. 52. A ship is driven by a storm near the enemy's coast, and there captured; this is a loss by capture, and not by the perils of the sea. *See* Peake, 212; 2 N. R. 336. A vessel barratrously given up to the enemy is a loss by capture. *See* 2 Camp. 620; 3 Taunt. 508. A warranty against a capture in port does not extend to a capture in a place within the headlands of a river, but not within the limits of any port. *See* 2 Camp. 541; but if the place be the point at which vessels on the particular voyage usually unload, it is within the warranty. 2 Camp. 615; 13 East, 394. *See* 2 Arnould, 832, 2d ed.; Capture, vol. iii. p. 28, n. [3].

In an action on a policy of insurance on goods and loss by capture, to which the defence was a breach of blockade, it appeared that the ports in the river Plate, belonging to the government of Buenos Ayres, had been declared in a state of blockade by the Brazil government, the ship being destined to any of the ports in that river, with liberty in the event of blockade to proceed to any other port in South America, and the blockading fleet at the time of capture being stationed off Monte Video, a port belonging to the Brazilian government:—*Held*, that as there is no precise limit of distance to which the blockading fleet may be fixed, it might be lawfully stationed at Monte Video, though at a considerable distance from the ports declared in blockade; and that, as the ship left England knowing of the blockade, it was a question for the jury to say whether the ship ought not, in coming in sight of the blockading squadron, to have inquired whether it were such or not, and not have pursued her voyage without gaining that information. *Naylor v. Taylor*, 1 M. & M. 205.

If the ship and goods are lost by capture, although they are never condemned at all, nor carried into any port of the enemy, it is a loss within the policy. *Goss v. Withers*, 2 Burr. 694. *Hamilton v. Mendes*, id. 1209.

The cases establish the principle, that if once there has been a total loss by capture, this is construed to be a permanent total loss, unless something afterwards occur by which the assured either has the possession restored, or has the means of obtaining such restoration. It is immaterial that he has the right to obtain it; for if that were enough to prevent a total loss, there could never be a total loss in the case of a capture by pirates, who have never a right to the possession. *Dean v. Hornby*, 3 E. & B. 180; *per Lord Campbell, C. J.*

(C) *Jettison.*[1]

(D) *By Arrest, Confiscation, and Detention of Princes and People.*[2]

(E) „ *Pirates, Rovers, and Thieves.*[3]

An actual capture made by a lawful authority, although at a time when war had not been declared against the country to which the ship belonged, has been held to be within a warranty against capture and seizure contained in a policy of insurance. *Powell v. Hyde*, 5 E. & B. 607.

An insurance effected in Great Britain on a French ship previous to the commencement of hostilities between this country and France, does not cover a loss by British capture. *Furtado v. Rodgers*, 3 B. & P. 191.

If a ship be driven by stress of weather on an enemy's coast and there captured, it is a loss by capture, and not by perils of the seas. See *Green v. Elmslie*, Peake, 212.

An underwriter of French property in time of peace was held not liable for a loss by capture by the king's ships during hostilities, which commenced between Great Britain and France subsequent to the policy being effected. *Gamba v. Le Mesurier*, 4 East, 407; 1 Smith, 101.

Where a ship was insured for a voyage or cruise of three months, and taken by the enemy within that time, but before she was covered *infra presidia hostis*, was retaken by an Englishman, and was, at the time of the action, a living ship:—*Held*, to be a total loss to the insured. *Pond v. King*, 1 Wils. 191.

If a ship meets with sea damage which checks her rate of sailing, so that she is taken by the enemy, from whom she could otherwise have escaped, the loss is to be ascribed to the capture, and not to the sea damage; for to constitute barratry, it must be an act contrary to the captain's duty towards his owners. *Livie v. Janson*, 12 East, 648.

The sentence of condemnation of a foreign court of Admiralty cannot be received in evidence, without previous proof of the ship having been captured. *Marshall v. Parker*, 2 Camp. 69. *Visger v. Prescott*, 5 Esp. 184.

Insurers are liable to pay the charge of compromise *bonâ fide* made to prevent the ship being condemned as lawful prize, or to avoid a greater expense. *Berens v. Rucker*, 1 Black. 313. *Primâ facie* a capture amounts to a total loss of the possession, if the captiou continue, or even though a recapture take place, if the ship be under a disability to complete her voyage; for if the adventure be not only retarded, but in effect destroyed, the underwriters will be liable for a total loss. *Goss v. Withers*, 2 Burr. 683. *Milles v. Fletcher*, Dougl. 231. But when a capture is followed by a recapture, and the ship is enabled to proceed to her place of destination, although the market and voyage may have been lost, the loss becomes partial instead of total, and the underwriters are only liable to the extent of the partial loss. *Hamilton v. Mendes*, 2 Burr. 1198.

[1] Jettison, as used in a policy of insurance, signifies any throwing overboard of goods *ex justa causa*. Thus a casting away of goods on the approach of an enemy, to prevent them from falling into the enemy's hands in case the ship should be taken, is a loss by jettison within the meaning of the policy. And if the master's conduct in such a case appear not to have been the effect of a vain fear, but of a resolution wisely and honestly taken, the underwriters cannot object to the course adopted, although it may deprive them of some advantages, as, for instance, of the chance of recapture of the property swallowed up by the waves. *Buckley v. Presgrove*, 1 East, 220. *Miller v. Tetherington*, 7 H. & N. 954; 31 L. J. Ex. 363.

When the insured is a foreigner, he is entitled to recover on the policy, although the property has been sacrificed to prevent its falling into the hands of the enemies of his country, and not the enemies of this. *Butler v. Wildman*, 3 B. & A. 398.

[2] The word "people" in the policy means the ruling power of the country, not, therefore, a mob or pirates. *Nesbit v. Lushington*, 4 T. R. 783.

The clause of indemnity against arrests of princes, people, &c. extends to an embargo laid by the government of the country in the port at and from which the ship is insured. *Rotch v. Edie*, 6 T. R. 413. *Schroder v. Thompson*, 1 Moore, 163; 7 Taunt. 462. *Aubert v. Gray*, 11 W. R. 27; 7 L. T. (N. S.) 469. Under this clause there is an implied exception of any loss happening in the course of any contraband adventure, in which the goods would become liable to seizure, or to be forfeited by the laws of the country. *Brandon v. Curling*, 4 East, 410.

A detention by a king's ship, whereby the assured was prevented reaching the port of destination before an embargo was laid on, as he otherwise might have done, is not a loss within the risk of detention by princes. *Forsder v. Christie*, 11 id. 205.

A permission by one government to another to seize property within its territory, is not a confiscation by the former. *Levin v. Allnutt*, 15 id. 267.

In case of a detention of a neutral ship by a foreign power, all charges consequent thereon must be borne by the underwriters, though such detention may be wrongful. *Solonicci v. Johnson*, 1 Park, Insur. 125.

[3] Losses by pirates, rovers, and thieves, are also included in the policy. 2 Arnould, 841. These words apply to the wrongful and felonious acts of individuals, as the words "kings, princes, and people," in the policy apply to the acts of nations in their collective capacity. *See* 4 T. R. 788. Where a ship laden with corn was driven by stress of weather into Aly Harbour in Ireland, and provisions being scarce, the people in a tumultuous manner took the command from the captain, and caused the ship to strike upon a reef of rocks, *Lord Kenyon* thought that the loss

(F) *By Barratry.*[1]
(G) „ *Fire.*[2]

might be considered as a loss by piracy. *See* id. 487; Com. Rep. 360. Piracy, according to our law, includes those offences committed at sea (Hawk. b. 1, c. 38, s. 11), which if done on land would have amounted to felony. *See post*, Piracy. It seems to be piracy for the mariners of a ship to seize the captain, put him on shore against his will, and afterwards employ the ship for their own purposes. *See* 2 East, P. C. 796. When the subject from whom the goods are taken is at enmity with the king of England (*see* Com. Dig. Admiralty, 4 Inst. 154); or at enmity with the state to which the captors belong, the offence is not piracy. Nor is it piracy when the offence is committed in a port or creek, or the river Thames, or other place *infra corpus comitatus*, since the crime is then a felony, and triable at common law. *See* Moore, 736; 3 East, 113; 1 Roll. 173; Hawk. b. 1, c. 38, s. 11.

[1] Barratry is any species of fraud committed by the master or mariners, whereby the owners of the ship or goods sustain an injury; as by running away with the ship wilfully out of her course. *Earle v. Rowcroft*, 8 East, 125. *Vallego v. Wheeler*, Cowp. 143; Lofft. 631. *Knight v. Cambridge*, 1 Stra. 581; 2 Ld. Raym. 1349; 8 Mod. 230, cited 8 East, 135, 136. Or by smuggling. *Lockyer v. Offley*, 1 T. R. 252. *Havelock v. Hancill*, 3 id. 277; 2 Arnould, 863.

It has been said that barratry cannot be committed in respect of an act done for the owner's benefit. *Stamma v. Brown*, 2 Stra. 1173.

The criterion of barratry is, whether the shipowners would be liable to the freighter in consequence of the alleged misconduct of the captain. *Moss v. Byrom*, 6 T. R. 379.

To constitute barratry, there must be a breach of trust in the master *ex maleficio*. *Phyn v. Royal Exchange Insurance Co.* 7 id. 505. Hence, a shipowner can never commit barratry. *Nutt v. Bardieu*, 1 id. 323. But an intention to injure the owner is not essential. *Earle v. Rowcroft*, 8 East, 126. However, a mere breach of contract on the part of the master does not constitute barratry. *Stamma v. Brown*, 2 Stra. 1173. So the improper treatment of the vessel by the master, apparently tending to its destruction, but not shown to have been done against his better judgment, does not amount to barratry. *Todd v. Ritchie*, 1 Stark. 240. *See* 5 B. & C. 212.

The assured is entitled to recover as for a loss by barratry from whatever cause it proceeded, although the loss resulted from other causes as well. *Toulmin v. Anderson*, 1 Taunt. 227. *See* 2 Camp. 620. If, through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized or forfeited, the underwriters are not liable for the loss. *Pipon v. Cope*, 1 Camp. 434.

Where the master of a vessel, condemned for a breach of blockade, swore he was bound for another destination:—*Held*, that this did not so disaffirm his owner's privity to the breach of blockade as to enable the plaintiff to recover as for a loss to barratry. *Everth v. Hannam*, 6 Taunt. 375; 2 Marsh. 72.

When the owner of a ship by his contract places the entire vessel for a time under the sole control of the freighter, during that time any act of the owner of the vessel done in fraud of the freighter is an act of barratry. See *Soares v. Thornton*, 7 Taunt. 627; S. C. 1 Moore, 373.

The underwriter of an insurance made by and in favour of the shipowner is not discharged by barratry committed with the privity of the freighter, unless he can show that the shipowner was also privy. See *Boutflower v. Wilmer*, 2 Selw. N. P. 980. Whether the loss happen in the act of barratry, that is, during a barratrous and fraudulent deviation, or afterwards, is not material. See *Roscow v. Corson*, 8 Taunt. 684. So where a ship and cargo were carried barratrously by the master out of the course of the voyage, and the ship and part of the cargo were sold, and the remainder sent home by a strange ship:—*Held*, that this was a total loss of the cargo from the time of committing the act of barratry, and that the underwriters were liable for such loss, with benefit of salvage only. 1 D. & R. 207; 5 B. & A. 597.

Where prisoners of war rose in the ship and confined all the crew except one, who was heard on the deck in conversation with them, this was considered evidence of barratry to go to the jury. See *Huchi v. Thornton*, Holt, N. P. c. 30.

The insurer of a ship is not liable for the expenses incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process. And the circumstances causing the detainer must be positively shown to have originated in the fraud of the master, in order to support an averment of loss by his barratry. *Bradford v. Levy*, 1 R. & M. 331; 2 C. & P. 137.

Under a declaration stating the loss to have been by perils of the sea, the plaintiff may recover by showing that the ship was wrecked by the barratry of master and mariners. *Heyman v. Parish*, 2 Camp. 149. So, a count stating the loss to have been by capture, is sustained by showing that it happened from a collusion between the master of the ship and the commander of the privateer. *Arcangelo v. Thompson*, 2 Camp. 620.

[2] The insured are liable for losses occasioned by an accidental fire. *Waples v. Eames*, 2 Stra. 1243. And if the policy extend to fire and barratry of the master, they are liable for a loss accruing from the negligence of the master and mariners. *Busk v. Royal Exchange Assurance Co.* 2 B. & A.

(H) *By Stranding.*[1]

(I) „ *other Perils.*[2]

XI. Of Warranties.[3]

(A) *Their general Nature and Effect.*

73. So, the underwriters are liable if the ship be fired by the captain to prevent her falling into an enemy's hands. *Gordon v. Rimmington*, 1 Camp. 123. *Grant v. Etna Insurance Co.* 8 Jur. N. S. 705.

There being a well-known usage for China ships to place their tackle in warehouses or bank-saul in Canton River, the insurers on a ship wrecked were held liable for a loss happening to her tackle by fire in the bank-saul. *Pelly v. Royal Exchange Ass. Co.* 1 Burr. 341.

If a fire arise on board a ship from the damaged quality of the goods insured, the underwriters are not liable; but if the loss is not so occasioned, the policy will not be violated by the non-disclosure of the condition of the goods to the insurer. *Boyd v. Dubois*, 3 Camp. 133.

[1] It is not every stationary taking-ground that will constitute a stranding. Where a vessel takes ground in the ordinary and usual course of navigation and management at a tidal river or harbour upon the ebbing of the tide, or from a natural deficiency of water, so that she may float again upon the flow of the tide or increase of the water, this is not a stranding within the meaning of the memorandum. *Magnus v. Buttemere*, 11 C. B. 867. See *Corceran v. Gurney*, 1 E. & B. 456. Marsh. on Ins. 171–176.

In an action on a policy of insurance, it appeared that the ship in the port took ground in the usual course of the ebbing of the tide, but in consequence of settling on a hard substance holes were made, and the cargo damaged. The court held that the jury properly found it to be a stranding within the exemption in the policy; in effect declaring that the ship had taken the ground, not merely through the ebbing of the tide, and in the place where it was intended she should do so. "Stranding" is where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause. *Kingsford v. Marshall*, 8 Bing. 458; 1 M. & Scott, 657. Marsh. Ins. 172.

In an action on a policy of insurance, it appeared that the vessel arrived in a tide harbour, and was moored at high water alongside the quay, and in order to avoid grounding on a bank at low water, the stern being fastened to the quay, the head was hauled off by a rope carried to the opposite side of the harbour, and fastened; but by the wind blowing towards the bank causing a strain on the rope, her place was changed, and she came to the ground and received some damage. *Wills v. Hopwood*, 3 B. & Adol. 20. *See* 1 B. & B. 388. So, a ship driven into port by stress of weather, and striking a sunken anchor, is a stranding within the policy. *Barrow v. Bell*, 4 B. & C. 736; 6 D. & R. 244. So where a pilot negligently runs her aground. *Carruthers v. Sidebottom*, 4 M. & S. 283.

A subsequent stranding does not alter the liability of the underwriter on the first. *Roux v. Salvador*, 1 Bing. N. C. 526; 1 Scott, 491.

[2] The specification of perils in a policy of insurance is followed by general words, by which the underwriters take upon themselves all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the ship or goods in the voyage. The effect of these words is to remove doubts which might otherwise have arisen with respect to the precise import of the enumerated perils, and to extend the liability of the underwriters to cases which come very nearly, though not precisely, within the specific causes of loss. Marsh. 439; Arnould, 866.

A ship sunk in consequence of a British ship firing on her by mistake, is a loss within the part of the policy which applies to other losses. *Cullen v. Butler*, 2 Selw. 930. So, where a merchant-ship was taken in tow (by mistake) by a British ship of war, and was thereby exposed to a tempestuous sea, which injured the goods on board, this was held to be a loss by the perils of the sea. *Hagedorn v. Whitmore*, 1 Stark. 157. See *Fletcher v. Inglis*, 3 B. & L. 315. *Magnus v. Buttemere*, 11 C. B. 876.

[3] A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. Marsh. Ins. by Shee, p. 279; 2 Arn. 872. It may be either affirmative, as where the insured undertakes for the truth of some positive allegation, as that the thing insured is neutral property, that the ship is of such a force, that she sailed or was well on such a day, &c.; or it may be promissory, as where the insured undertakes to perform some executory stipulation, as that a ship shall sail on or before some given day, that she shall depart with convoy, that she shall be manned with such a complement of men, &c. Warranties are either express or implied. An express warranty is a particular stipulation, introduced into the written contract by the agreement of the parties, as that the thing insured is neutral property, that the ship shall sail by a given day, that she shall depart with convoy, &c. An express warranty being of the nature of a condition precedent, the courts have held that it must appear on the face of the policy, in order that there may be indisputable evidence of a stipulation, the non-compliance with which must necessarily avoid the contract.

(B) *Of Seaworthiness.*[1]

A stipulation, though written in the margin of a policy, is a warranty (*Bean v. Stupart*, Dougl. 11); but if on a separate paper, though pinned or wafered to the policy, it is only a representation. *Pawson v. Ewer*, id. 12, n. *Bize v. Fletcher*, id. 13, n. A writing on the margin of a policy ought to be deemed part of the instrument. *De Hahn v. Hartley*, 1 T. R. 343; 2 id. 186.

There is a marked distinction between a warranty and a representation; a representation is fulfilled if it be equitably and substantially answered, but a warranty must be strictly and literally complied with. *De Hahn v. Hartley*, 1 id. 343; 2 id. 186. *Parson v. Watson*, Cowp. 785.

Where the insured has once provided a sufficient crew, their negligent absence at the time of the loss is no breach of the implied warranty that the ship should be properly manned. *Busk v. Royal Exchange Assurance Co.* 2 B. & A. 73.

Where the warranty is of a matter which continues of importance until the risk determines, as, for instance, a warranty of neutrality, such a warranty is continuous so far as relates to the acts of the assured, whether the policy be for a voyage or for a time certain. See *Sillem v. Thornton*, 3 E. & B. 883.

A warranty in a policy, lost or not lost, that the ship was well on the day of making the policy, is satisfied by her being in safety at any time of that day. *Blackhurst v. Cockell*, 3 T. R. 360.

Where an insurance is declared to be on a named quantity of wine, it does not amount to a warranty that the wine constitutes the whole cargo, and that no other goods shall be taken on board. *Muller v. Thompson*, 2 Camp. 610. Nor does the effecting a policy on a ship in an English name amount to a warranty or representation that she is English. *Clapham v. Cologan*, 3 Camp. 382. *Le Mesurier v. Vaughan*, 6 East, 382.

When a ship is insured while securely moored in a certain harbour, she is warranted in changing her moorings within the same harbour. —— *v. Westmore*, 6 Esp. 109.

A false warranty in a policy of insurance will vitiate it, though the loss happen in a mode not affected by the falsity. *Woolmer v. Muilman*, 1 Wm. Black. 427; 3 Burr. 1419.

[1] In every insurance, whether on ship or goods, there is a warranty on the part of the insured that the ship shall be seaworthy, or, in other words, "light, staunch, and strong," and fit for the service in which for the present time she is engaged, which is presumed till the contrary appear. 3 Taunt. 299; 3 Dowl. 23. If a ship have an insufficient bottom, or unsound timbers, or is without knees, or proper tackle, she is not seaworthy. Marsh. 109; 1 Arnould, 689, 2d ed.

A warranty of seaworthiness is implied, although the insurance be on salvage (*Knill v. Hopper*, 2 H. & N. 277); but there is no implied warranty of seaworthiness in a time policy. *Gibson v. Small*, 4 H. of L. C. 353. *Thompson v. Hooper*, 6 E. & B. 172. See *Jenkins v. Haycock*, 8 Moore, P. C. 351. *Michael v. Tredwin*, 17 C. B. 551. Although it is a sufficient compliance with such a warranty if the vessel be so whilst in port, and before her departure. *Annen v. Woodman*, 3 Taunt. 299. It suffices if she be so when she sail. 2 H. & N. 277; 14 Mee. & W. 476.

If the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if the voyage be down a canal or river, and thence in the open sea, it is enough if the vessel is, at the commencement of each stage of the navigation, properly manned and equipped for it. *Dixon v. Sadler*, 5 Mee. & W. 414. A subsequent unseaworthiness will not affect the liability of the underwriters. *Weir v. Aberdeen*, 2 B. & A. 320. *Hollingworth v. Brodrick*, 7 Ad. & E. 40; 2 Nev. & P. 608.

A reduction of the crew below three-fourths of British seamen may, under circumstances, be allowed, and the insurers liable. *Suart v. Powell*, 1 B. & Adol. 266.

An insurance is void if effected on a vessel which has not a crew sufficient to meet the ordinary contingencies of its voyage: — *Held*, therefore, that on a voyage from the Mauritius to London, where there was none able to do the duties of the captain if he was ill, the underwriters were not responsible. *Clifford v. Hunter*, 1 M. & M. 103.

Underwriters are responsible for the misconduct or negligence of the captain and crew, but the owners, as a condition precedent, are bound to provide a crew of competent skill. *Bishop v. Pentland*, 7 B. & C. 219; 1 M. & R. 49.

A ship may be seaworthy in harbour in a state which would not be sufficient for a voyage. *Forbes v. Wilson*, and *Hibbert v. Martin*, 1 Park, Insur. 344.

It is no breach of warranty if the ship becomes unseaworthy after her departure on the voyage, though it will frequently be presumed that the ship was unseaworthy at the time of her departure if she becomes so during the voyage from no cause in particular, and especially if she becomes so very shortly after the commencement of the voyage. *See* 1 Dowl. 336; 3 id. 24; 4 id. 269. As to the doctrine of seaworthiness in general, *see* Marsh. Insur. by Shee; 1 Arn. s. 253; 7 Ad. & E. 40; 13 Mee. & W. 392. The age of a ship is not a proof of seaworthiness, but of weight in evidence. 1 Dowl. 344.

The assured are not entitled to recover, unless they equip the ship with everything necessary to her navigation during the voyage. The ship itself must not only be seaworthy, but she must have a sufficient crew of competent skill. *Law v. Hollingsworth*, 7 T. R. 160.

At the commencement of the voyage (*Forshaw v. Chabert*, 6 Moore, 369; 3 B. & B. 158), a ship to be seaworthy must be rendered as secure as possible from capture as

(C) *Of Neutrality.*[1]

well as from the perils of the sea. *Wedderburn v. Bell*, 1 Camp. 1.

If a ship sail on a voyage, and in a day or two become leaky and founder, or is obliged to return to port, without any storm or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed. *Munro v. Vandam*, 1 Park, Insur. 333.

A ship which, though to all outward appearance sound, afterwards, from latent defects, turns out unseaworthy, is not the subject of insurance, even by an innocent skipper, who knows nothing of the circumstances, and all the parties have acted *bonâ fide*. *Lea v. Beach*, and *Oliver v. Cowley*, 1 Park, Insur. 343; 1 Marsh. Insur. 153.

Where the very object of the policy requires discriminating knowledge of the coast on the part of the captain, there is an implied warranty that he possesses it. *Tait v. Levi*, 14 East, 481.

When a certain number of "seamen," besides passengers, is specified in a warranty, the warranty is complied with if there is the specified number, including boys. *Bean v. Stuppart*, Dougl. 11.

When a warranty is inscribed that the ship or goods were safe on a particular day, the warranty is satisfied if they were in safety at any time in the day the policy was effected. *Blackhurst v. Cockell*, 3 T. R. 360.

Where the master and crew negligently and improperly threw overboard ballast, whereby the vessel became unseaworthy, and was lost by a peril of the sea, it was held that the underwriters were liable, even although the acts were not barratrous. *Dixon v. Sadler*, 5 Mee. & W. 405. *Redman v. Wilson*, 14 id. 476.

A finding that the ship was seaworthy, but prematurely abandoned by the crew, is a finding for the plaintiff upon an issue on the seaworthiness. *Franks v. Nalusck*, 1 Tyr. & G. 401.

A clause that the cable chain be properly tested is directory only, and not a condition precedent. *Harrison v. Douglas*, 5 Nev. & M. 180; 3 Ad. & E. 396.

As to seaworthiness by special stipulations, see *Steward v. Wilson*, 12 Mee. & W. 11. *Parfitt v. Thompson*, 15 id. 392.

A plea that the assured had knowingly, wilfully, and improperly, sent the ship out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea, affords no answer to an action on the policy, the declaration alleging that the loss had been occasioned by perils of the sea, and the plea containing no averment that the loss had been occasioned by the unseaworthiness. *Thompson v. Hopper*, 6 E. & B. 172.

[1] Under a warrant that the ship and cargo are neutral property, it is sufficient that they are so when the risk commences. *Eden v. Parkison*, Dougl. 732; id. 780. *Holdsworth v. Wyse*, 7 B. & C. 794. *Redman v. Wilson*, *supra*. *Gibson v. Small*, 4 H. L. 353. Marsh. 309; Atkinson, 96.

A policy on a ship warranted neutral is avoided by the ship afterwards so conducting herself as to forfeit her neutrality. *Garrels v. Kensington*, 8 T. R. 230.

A warranty that a ship is American, means that she is so navigated as to entitle her to all the privileges of that flag. *Rich v. Parker*, 7 id. 705. *Baring v. Christie*, 5 East, 398; Smith, 462; 3 B. & P. 208.

A policy upon a ship warranted Portuguese, when the premium on an English ship would have been much higher:—*Held* vitiated, where there was evidence of her having been condemned in France as not a Portuguese. *Fernandes v. Da Costa*, 1 Park, Insur. 245.

If property warranted neutral be not in fact neutral, the insured cannot recover, although the loss may happen from another cause. *Woolmer v. Muilman*, 3 Burr. 1420; 1 Bl. Rep. 427. *Tubbs v. Bendelack*, 4 Esp. 108. The extent to which a ship is required to be documented must be considered with reference to the law of nations, and to those treaties which are binding on the neutral country; it does not oblige the neutral owner to comply with the peculiar laws and regulations of belligerent powers. *Pollard v. Bell*, 8 T. R. 434. But a ship warranted of a particular nation may, in some cases, falsify that warranty by a non-compliance with the municipal laws and ordinances of her own country. *Baring v. Claggett*, 3 B. & P. 205.

The sentence of a foreign court of Admiralty, held in the territories of a belligerent or his ally in the war, condemning property as prize, affords conclusive evidence against a warranty of neutrality. *Havelock v. Rockwood*, 8 T. R. 268. *Oddy v. Bovill*, 2 East, 473. *Hughes v. Cornelius*, T. Raym. 473; Skin. 59; Carth. 32; 2 Show. 232. *Le Caux v. Eden*, Dougl. 594. *Faith v. Pearson*, 6 Taunt. 439; 2 Marsh. 133. *Geyer v. Aguilar*, 7 T. R. 681. Hence, when such a court has condemned a ship and goods as "enemy's property" (*Lothian v. Henderson*, Dom. Prac. 3 B. & P. 499), or for breaking a blockade, a sentence so pronounced is conclusive against a warranty of neutrality (*Everth v. Hannam*, 6 Taunt. 375); and so of a conviction as lawful prize (*Pollard v. Bell*, 8 T. R. 438), or as having violated the law of nations or the faith of treaties. *Christie v. Secretan*, id. 196.

The adjudication is conclusive, even where the grounds on which it was pronounced appear on the face of it to have been erroneous (*Baring v. Royal Exchange Asurance Co.* 5 East, 99. *Lothian v. Henderson*, 3 B. & P. 499. *Baring v. Claggett*, id. 201. *Bolton v. Gladstone*, 5 East, 155; 2 Taunt. 85; 1 Smith, 392; 3 Taunt. 511); nor can a fact stated in the condemnation be contradicted by the insured. *Horneyer v. Lush-*

(D) *To Sail on or before a particular Day.*[1]

ington, 15 East, 46. So it is conclusive, even if the legality of the sentence depends upon the construction of a treaty. *Geyer v. Aguilar, ante. Barry v. Royal Exchange Assurance Co. ante.* So, a judgment of condemnation against a vessel for a breach of blockade, affords conclusive evidence that the ship had violated the blockade. *Everth v. Hannam*, 2 Marsh. 72; 6 Taunt. 375. But it has no effect if it condemn the ship or goods on account of the violation of some private ordinance. *Calvert v. Bovill*, 7 T. R. 523. *Pollard v. Bell*, 8 id. 434. *Bird v. Appleton*, id. 562. *Price v. Bell*, 1 East, 663. Nor is a sentence of condemnation available, if it appear that the court was not constituted according to the law of nations. *Oddy v. Bovill*, 2 East, 473.

A sentence of restitution is as conclusive as a sentence of condemnation. *Siffken v. Lee*, 2 M. & R. 489.

Where the nature and constitution of the foreign court do not appear upon the face of the sentence, recourse must be had to the proceedings to ascertain the ground and foundation of the sentence. *Bernardi v. Motteaux*, Dougl. 575. *See* further, as to the effects of the judgments of foreign Admiralty courts, Admiralty, vol. i. p. 193.

To prove a warranty that a ship was of a particular nation, it is *primâ facie* sufficient to show that the master addressed himself in port to the consul of that country, and that he usually carried the flag of that country. *Arcangelo v. Thompson*, 2 Camp. 620.

The fact of there being an appellate jurisdiction, but no appeal made, does not diminish the conclusiveness of the sentence. *Tyson v. Gurney*, 3 T. R. 478.

The conclusive effect of a sentence of condemnation may be obviated by agreement between the parties. *Lothian v. Henderson*, 3 B. & P. 499.

The sentence of a foreign court of admiralty is not as conclusive in the case of a representation as it is in the case of a warranty of neutrality. *Von Tungeln v. Dubois*, 2 Camp. 151.

[1] A warranty to sail on or before a particular day means, to sail equipped completely for the voyage. *Ridsdale v. Newnham*, 3 M. & S. 456; Atkinson, 91; Marsh. 287.

A distinction is taken between a warranty "to sail," and one "to depart;" the latter means that the ship shall be out of port. *Moir v. Royal Exchange Assurance Co.* 3 M. & S. 461; 4 Camp. 84; 1 Marsh. 573; 6 Taunt. 241.

If a ship warranted to sail on a certain day gets under sail on the day, with intent to pursue her voyage, the warranty is complied with, although she be obliged to put back instantly by an embargo before she sets out of the harbour. *Thelluson v. Ferguson*, Dougl. 369.

On a warranty to sail on a certain day, if the ship departs from her port of loading on that day, and proceeds to the port of rendezvous, expecting to find convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, though the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready. *Earle v. Harris*, Dougl. 357. So, when a policy is effected at and from Surinam, and all or any of the West India Islands, to London, and the ship is warranted to sail on or before the 1st of August, the warranty is satisfied by the ship's sailing from her final port of loading in the West Indies, on her homeward voyage, on or before the specified time, although she afterwards touch at another of the West India Islands to join convoy. *Wright v. Shiffner*, 2 Camp. 247; 11 East, 514. But where a ship insured at and from Jamaica to London, and warranted to sail on or before the 26th of July, was restrained from sailing at that time by the order of the Governor of Jamaica, the policy was holden to be void, although it contained the usual clause against restraint of princes, &c. *Hore v. Whitmore*, Cowp. 784.

If a ship insured at and from Jamaica, warranted to have sailed on or before a particular day, sail before the day from her port of loading with her cargo, &c. on board to the usual place of rendezvous at another part of the island, for the sake of joining the convoy there ready, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. *Bond v. Nutt*, Cowp. 601.

Where a ship was insured at and from New York to Quebec during her stay there, thence to the United Kingdom, the ship being warranted to sail from Quebec on or before the 1st of November, and the vessel was lost on her voyage from New York to Quebec, but she had not sailed from New York at a time reasonably sufficient to have enabled her to sail from Quebec on the day mentioned, it was held that the underwriters were nevertheless liable, since the warranty could not be extended by inference into an undertaking to leave New York by any particular time. *Baines v. Holland*, 10 Ex. 802.

The vessel must sail within a reasonable time after the insurance. *Mount v. Larkins*, 8 Bing. 108; 1 M. & Scott, 165.

A warranty to sail on or before a particular day, is not complied with by leaving the harbour on that day without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail. *Graham v. Barras*, 3 Nev. & M. 125; 5 B. & Adol. 1011.

A warranty to sail on or before a particular day is not fulfilled if the ship does not completely unmoor on that day, though she then has her cargo on board, and is quite ready to sail, and is only prevented doing so by stress of weather. *Nelson v. Salvador*, 1 M. & M. 309.

(E) *Free from Capture in the Port of Discharge.*[1]

(F) *Relative to Convoy.*[2]

A justifiable delay in sailing must be for the purpose of voyage. *Palmer v. Fenning*, 9 Bing. 460; 2 M. & Scott, 624. On a warranty to sail on a certain day, the question is, whether the attempt was *bonâ fide*, and if *bonâ fide*, the warranty is complied with. *Cochrance v. Fisher*, 2 C. & M. 581; 4 Tyr. 424; in error, 1 C., M. & R. 809.

It is sufficient compliance with a warranty to sail the 1st, if the vessel leave on that day, though she anchor for the night, to cross a shoal the next day. *Lang v. Anderdon*, 3 B. & C. 495; 5 D. & R. 393; 1 C. & P. 171. But a ship is not ready for sea within the usual terms of a policy until her full ballast is on board. *Pettigrew v. Pringle*, 3 B. & Adol. 514.

An insurance from Bristol to London, dated 28th of January, when the ship did not sail until the 17th of May:—*Held*, to amount to such a delay as to exonerate the underwriters. *Palmer v. Marshall*, 8 Bing. 317; 1 M. & Scott, 454. If, although the vessel has left the harbour, her captain has gone on shore to complete the ship's papers, the warranty is not complied with. *Thompson v. Gillespy*, 5 E. & B. 209. *Hudson v. Bilton*, 6 id. 568.

With respect to time policies, a contract which cannot be enforced is not an insurable interest. *Stockdale v. Dunlop*, 6 Mee. & W. 224.

It seems that it would be better that a time depending on the age of the ship should be specified in the policy, as the time from which the deduction of one-third new for old should take place, instead of its depending on the first voyage. *Pirie v. Steele*, 8 C. & P. 200; 2 M. & Rob. 491.

[1] If by a policy the ship is warranted "free of capture and seizure in the port or ports of discharge," and she is taken in an open river, not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner, the place where she is taken is to be considered her port of discharge within the meaning of the policy. *Jarman v. Coape*, 13 East, 394.

Where a ship insured is warranted "free from capture and seizure in the port of discharge," and being destined to Pillau, is seized while laying at anchor in Pillau Roads, in order to discharge part of her cargo, to enable her to enter the harbour, this is not a seizure within the warranty. *Brown v. Tierney*, 1 Taunt. 517. *Levy v. Vaughan*, 4 id. 387; but see *Maydhew v. Scott*, 3 Camp. 205. *Dagleish v. Brook*, id. 205. *Baring v. Vaux*, 2 id. 541. *Jarman v. Coape*, Black. 394; 2 Camp. 613.

When the ship and goods are warranted free from confiscation by the government in the ship's port or ports of discharge, the confiscation referred to by the warranty must be an act done on the part of the government of the country where it takes place. *See* 15 East, 269.

A capture by a force issuing from the port of discharge is an immaterial circumstance in construing a warranty against capture in the port of discharge. *Mellish v. Stainforth*, 3 Taunt. 499. *Levy v. Vaughan*, 4 id. 389.

A ship captured at anchor without the *caput portus*, in a place where ships do not unload, is not within a warranty of free from capture in her port of destination. *Keyser v. Scott*, 4 id. 660. *Whitwell v. Harrison*, 2 Ex. 127.

When a loss is occasioned by the event embraced by this species of warranty, the insured cannot recover for a partial sea damage which the ship had sustained in a previous part of her voyage. *Levie v. Janson*, 12 East, 648. And the insured cannot deviate from the usual course in order to avoid the excepted perils, for that would be to throw the liability upon the underwriters by an indirect course, when they would have been exempted if a direct course had been pursued. *O'Reilly v. Royal Exchange Assurance Co.* 4 Camp. 246. *Aliter* if there had been no warranty inserted in the policy. *O'Reilly v. Gonne*, id. 249.

A warranty "against capture and seizure, and the consequences of any attempt thereof," is not confined to legal capture or seizure; therefore, where an English ship insured by a policy which contained such a warranty was fired into from a Russian fort and sunk, there being then no war between England and Russia, it was held that the underwriters were protected by the warranty. *Powell v. Hyde*, 5 E. & B. 607. And upon a like principle, where Coolie emigrants piratically seized the ship and stores, the underwriters of a policy on the stores were held protected by a warranty "against capture or seizure." *Kleinwort v. Shepherd*, 28 L. J. Q. B. 147.

[2] It is *primâ facie* legal to sail from a foreign port without convoy. *Wake v. Atty*, 4 Taunt. 493. But where it is known to the assured of goods that the ship is to sail without convoy, the event of her being duly licensed will alone protect him. *Wainhouse v. Cowie*, 4 id. 178. *See* 15 East, 517. And where a person insures goods on board a ship which he knows is to sail without convoy, he is bound to see that she has a sufficient license for the whole of the voyage. *Darby v. Newton*, 2 Marsh. 252; 6 Taunt. 544. A warranty to sail with convoy, means the usual convoy for the voyage, and not a mere departure with convoy. *Lilly v. Ewer*, Dougl. 72. A sailing with convoy to the general rendezvous, is a sailing with convoy for the voyage. *Anon.* 1 Marsh. Ins. 373.

The term "convoy for the voyage," means such a convoy as shall be appointed by the government. *D'Eguino v. Bewicke*, 2 H. Black. 551. *Smith v. Rendshaw*, and *De Gory v. Claggett*, 2 Park, Ins. 510.

When there is a warranty to depart from England with convoy, the voyages from the port "at and from which the ship is insured to the port of convoy, and thence to the port of discharge," are considered as distinct. *Rothwell v Cooke*, 1 B. & P. 172.

An unforeseen separation from convoy is no breach of the warranty to sail with convoy. *See* Dougl. 74. But where a ship gets under way with the convoy, but waits some time for the master to come on board, whereby she loses her position in the convoy, this is a breach of the warranty, and the underwriters are discharged. 1 Marsh. Ins. 381.

The taking in goods after the convoy's signal to weigh, does not vacate a policy on goods if no delay is thereby occasioned. *Laroche v. Oswin*, 12 East, 131. The liberty to seek, join, and exchange convoy, is introduced for the benefit of the assured, and, therefore, it seems any restraint imposed by them on the captain's option in this particular is immaterial. *Heselton v. Allnutt*, 1 M. & S. 46.

It is sufficient if the ship join convoy at the general place of rendezvous of the convoy appointed for the voyage insured; and she may sail at the risk of the underwriters without convoy from the loading port mentioned in the policy to the place of rendezvous, although there may be a convoy between the loading port and place of rendezvous for ships bound in other destinations. *Warwick v. Scott*, 4 Camp. 62.

A warranty to sail with convoy is complied with if the master do all in his power to obtain sailing instructions, but is prevented from obtaining them by the badness of the weather, or if they are refused by the commander of the convoy. See *Veedon v. Wilmot*, Abb. on Ship. 243.

Neglecting to get under way in time is a breach of the warranty to sail with convoy. *Taylor v. Woodness*, 2 Park, Ins. 454; 1 Marsh. Ins. 380.

Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule. *Webb v. Thompson*, 1 B. & P. 5.

A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous. *Anderson v. Pitcher*, 2 B. & P. 164; 3 Esp. 124.

Where there are no convoys appointed at the port from which a ship commences her homeward voyage, she is not bound to call at a port in the course of the voyage from which the convoys are appointed. *Park v. Hammond*, 2 Marsh. 189; 4 Camp. 344; 6 Taunt. 495; Holt, 80.

A ship warranted to depart with convoy, must not only depart, but continue until the end of the voyage with such convoy, unless prevented by absolute necessity. *Morrice v. Dillon*, 2 Selw. 969.

A sailing under the convoy of a single ship which formed part of the government convoy fleet, but which had not, in fact, joined the fleet at the time, nor was immediately under the orders of the admiral, is not a sufficient compliance with a warranty to sail with convoy. *Hibbert v. Pigou*, 2 Park, Ins. 443; 1 Marsh. Ins. 375. Otherwise if such ship, though separated from the fleet, had in truth formed a part of it. *Anon.* 2 Park, Ins. 502. And where a ship sailed with a frigate to the rendezvous, with directions in such a case to proceed on the voyage, she lost the voyage, and instead of proceeding on the voyage, bore away for the port of destination:—*Held*, that this was a sailing with convoy sufficient to satisfy a warranty. 1 Marsh. Ins. 393.

A bill of lading signed by the captain, stating ship to be bound to the port of destination with convoy, amounts to an undertaking, binding on the owner, that the ship shall sail with convoy. *Sanderson v. Busher*, 4 Camp. 54.

A vessel which sails with convoy, and is driven back by weather into her port of clearance, may lawfully sail there again with her cargo on the voyage, without waiting for the next convoy from any other port. *Laing v. Glover*, 5 Taunt. 49. The warranty is satisfied if the ship join convoy at the usual place of rendezvous. *Lethulier's case*, 2 Salk. 443. Hence a warranty to depart with convoy in a policy from London to Gibraltar, has been held to be satisfied by the ship's joining the convoy for the Gibraltar trade at Spithead. *Gordon v. Morley*, Stra. 1265. *Campbell v. Bordien*, id. If the want of sailing instructions be not attributable to the default of the master, the warranty is satisfied without obtaining them. *Victorin v. Cleeve*, 2 Stra. 1250.

A ship warranted to sail or depart with convoy is obliged to keep with the convoy, and cannot wilfully separate from it after the commencement of the voyage without a violation of the warranty. *Jeffery v. Legender*, 3 Lev. 320; 1 Show. 320; 4 Mod. 60. *Audley v. Duff*, 2 B. & P. 114.

The insertion of a clause in the advertisement of the ship's sailing by the broker, purporting that it would sail with convoy, renders the owners liable, although there was no evidence of their having authorised or assented to the insertion of such clause. *Runquist v. Ditchell*, 3 Esp. 64. But it has been doubted whether sailing without convoy, when the ship has been advertised to sail with convoy, but the bill of lading contains no such stipulation, is binding. *Snell v. Marryat*, Abbott on Ship. 213. But an insurance is not avoided within 43 Geo. 3, c. 57, from the ship having sailed without convoy, unless the assured was privy thereto. *Cohen v. Hinckley*, 1 Taunt. 249. *Henderson v. Hinde*, id. 250. *Metcalf v. Parry*, 4 Camp. 125.

The court will presume, in an action on a policy, that the statute has been complied with, until the contrary be shown. *Thornton v. Lance*, 4 Camp 231.

The statute does extend to unregistered vessels. *Long v. Duff; Same v. Bolton*, 2 B. & P. 209.

XII. Of Representations and Concealment.

(A) *Representations.*[1]

[1] A representation in insurance is a collateral statement, either by writing not inserted in the policy, or by parol, of such facts and circumstances relative to the proposed adventure as are necessary to be communicated to the underwriters to enable them to form a just estimate of the risk. These communications are in general the principal inducement to the contract, and furnish the best grounds upon which the premium can be calculated. Marsh. Insur. by Shee, 345; 1 Arnould, 541.

An insurance effected under a misrepresentation is void, whether it arose from fraud or negligence. *Pawson v. Watson*, Cowp. 785. But the underwriters are bound to know the nature and the peculiar circumstances of the branches of trade to which the policy relates. *Noble v. Kennoway*, 2 Dougl. 510. Representation made to the first underwriter extends to all the others. *Barber v. Fletcher*, 1 Dougl. 305. *Pearson v. Watson*, Cowp. 786. The policy itself is the regular evidence to show who was the first underwriter, and an unstamped slip is not admissible to prove that a party whose name does not appear first on the policy was in truth the first who agreed to the contract. *Marsden v. Reed*, 3 East, 572.

Representations made by the broker to the first underwriters are available for others. *Brine v. Featherstone*, 4 Taunt. 869. A representation made to the underwriters, at the time when their names are put down upon the slip, is binding on the insured, unless qualified or withdrawn by some communication between that time and the execution of the policy. *Edwards v. Footner*, 1 Camp. 530. But where a broker, in effecting a policy on goods, said at the time of subscribing the slip that the ship, on board of which they were, was an American, but nothing was afterwards represented on the subject, the case was considered as standing without any representation. *Dawson v. Atty*, 7 East, 367. If a representation be substantially performed it suffices (*Pearson v. Watson, supra. Weir v. Aberdein*, 2 B. & A. 320); or if it contain a true and faithful representation of the facts which existed at the time of its date, and refers to another account which the underwriters do not desire to inspect (*Freeland v. Glover*, 7 East, 457; 3 Smith, 424; 6 Esp. 14); and when coupled with a refusal to warrant, shows an intention to exclude it from the contract. *Nonnen v. Reed*, 16 East, 176.

On a representation that a ship was seen safe on a named day, at a certain latitude or point of the voyage, if it turn out that she had got safe to the point represented, but was lost two days before the day mentioned, the difference, though by mistake, is material. *Macdowall v. Fraser*, Dougl. 260.

A policy will not be avoided by a misrepresentation, when the fact misrepresented is not material to enable the underwriters to form a just estimate of the risk (*Anderson v. Thornton*, 8 Ex. 427. *See* 13 Mee. & W. 655); nor when the party making it really believes what is asserted, and does not make his assertion positively, but only as a matter of expectation or belief. *Barber v. Fletcher*, Dougl. 305.

When the insurance is only for part of the voyage, the ultimate destination need not be communicated. *Taylor v. Wilson*, 15 East, 324.

When, on the insurance of a voyage *in futuro*, a representation is made of the ship's previous destination, a subsequent declaration will not discharge the underwriters. *Driscol v. Pasmore*, 1 B. & P. 200.

As seaworthiness is a condition or implied warranty in every policy, there need be no representation made at the time of her condition; for if she sails without being so, there is no valid policy. *Shoolbred v. Mitt*, 1 Park, Insur. 346.

Where freight advanced was issued on a ship and goods "lost or not lost, from Monte Video to Havre," the greater part of the cargo was shipped at Santa Cruz, and not at Monte Video. The court held that there was no misdescription of the interest of the assured. *Ellis v. Lafone*, 8 Ex. 546.

Insuring a ship by an English name does not amount to a representation that she is an English ship. *Clapham v. Cologan*, 3 Camp. 382.

A statement made by the broker at the time of effecting a policy that the ship was ready to sail on a particular day, when in fact she had sailed on the day before: — *Held*, to be such a material misrepresentation as to vitiate the policy. *Ellis v. Brutton*, 1 Park, Insur. 292.

Any person acting by the orders of the insured, and who is in anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriters before the policy is effected; and when any misrepresentation arises from his fraud or negligence, the policy is void. *Fitzherbert v. Mather*, 1 T. R. 12.

A representation to the underwriters at the time of effecting a policy, by the owner of goods on board a ship, as to the time of her sailing, being made *bonâ fide* upon probable expectation, does not conclude him. *Bowden v. Vaughan*, 10 East, 415. So where a broker, on effecting a policy, where the ship was on her outward voyage, represented that a cargo was ready for her, and that she was sure to be an early ship, this was considered as only expressing expectation and belief, and the underwriters were held liable. *Hubbard v. Glover*, 3 Camp. 313.

A misrepresentation as to the cargo, if not material, does not avoid the policy (*Flinn v. Headlam*, 9 B. & C. 693; by name of *Flinn*

(B) *Concealment.*[1]

v. Tobin, M. & M. 367); but if there be a charter-party, it should be communicated on effecting the insurance. *Winter v. Headlam*, 2 B. & Adol. 649. So, if the insurer states that two ships sailed together, knowing they parted in a gale, and one has arrived, it is a concealment. *Westbury v. Aberdein*, 2 Mee. & W. 267. And a letter received stating the time a ship sailed from the port ought to be communicated to the underwriter. *Elton v. Larkins*, 8 Bing. 198; 1 M. & Scott, 323; 5 C. & P. 86.

The fact that the incorrectness of the statement would have been detected by reference to Lloyd's list, does not obviate its effect as a misrepresentation. *Mackintosh v. Marshall*, 11 Mee. & W. 116.

[1] A policy of insurance being founded in speculation, and a knowledge of facts being necessary to enable an underwriter to calculate the chances and form a due estimate of the risk, it is a fixed rule that not only a misrepresentation, but even a concealment of circumstances within the knowledge of the insured, or his agents, which are calculated to enable the underwriters to form a due estimate of the risk, will vitiate a policy. *See* Marsh. 357; Atkinson, 57–59; 4 Bro. P. C. 482.

Every intelligence, though eventually it prove false, which may influence the underwriters' determination, must be communicated. *Lame v. Dunsford*, 14 East, 494. *Same v. Hamilton*, 3 Taunt. 37. *Willer v. Glover*, 1 W. R. 14. *Durrell v. Bederley*, Holt, 283. But nothing need be communicated but what is material to the risk. *Kewley v. Ryon*, 2 H. Black. 343. A material concealment, though without fraud, vitiates the policy. *Willes v. Glover*, 1 N. R. 14.

The materiality of any communication is not to be proved by the event. *Lynch v. Dunsford, supra. Lynch v. Hamilton, supra.* It must be a concealment of private, not of public facts. So, mere speculations or private conclusions, drawn by the insured from facts, need not be communicated. *Carter v. Boehm*, 1 Bl. Rep. 593. *Noble v. Kennoway*, Dougl. 510. *Vallance v. Dewar*, 1 Camp. 503. *Ougier v. Jennings*, id. 505.

If facts not disclosed by the broker for the insured, in a representation of the state of the ship, appear material to the jury, though they did not to the broker, who merely on that account abstained from mentioning them, the insurance is void. *Shirley v. Wilkinson*, Dougl. 306. The materiality is always a question for the jury. *Anderson v. Thornton*, 8 Ex. R. 425. *Mountorts v. Marshall*, 11 Mee. & W. 116. *Richards v. Murdoch*, 10 B. & C. 527. *Foley v. Tabor*, 2 F. & F. 663.

Where a ship, having sailed on the voyage, was found to labour and strain much from being over-laden, and on application to the underwriters for liberty to go into port to discharge part of her cargo, they were merely informed that the ship was too deep in the water, this representation was deemed sufficient. *Weir v. Aberdein*, 2 B. & A. 320.

It is sufficient if the assured, in making the insurance, communicates fairly the present state of the ship, and lays open such circumstances, *pro et con*, as may lead the insurer to make further inquiries concerning the prior state of the ship. *Freeland v. Glover*, 3 Smith, 425; 7 East, 457.

A concealment by the captain from the owner of a material injury sustained, is, as between the owner and underwriter, a concealment. *Gladstone v. King*, 1 M. & S. 35.

Concealment of the true port of loading (*Hodgson v. Richardson*, 1 Black. 463), or time of loading, will vitiate a policy. *Bridges v. Hunter*, 1 M. & S. 15.

A letter stating that the ship, which ought to have gone to Falmouth to join convoy, had been seen at sea without convoy, and that this was supposed to have been occasioned by contrary winds, should be communicated. *Sawtell v. Loudon*, 1 Marsh. 99; 5 Taunt. 359.

The mere concealment of the fact that the ship sailed at a certain time, will not vitiate a policy, unless the circumstances show that a true knowledge of the fact was material to enable the underwriters to form a just estimate of the risk. *Kirby v. Smith*, 1 B. & A. 672. *Elkin v. Jonsen*, 13 Mee. & W. 635.

Upon a policy effected after the declaration of war by America, but before it was known in England, in which it was not stated in the policy nor communicated by the underwriter that the assured was an American subject, and the loss happened in consequence of a seizure by the American government, for a forfeiture for the breach of their Non-importation Act:—*Held*, that the action could not be maintained, even after the war had terminated. *Campbell v. Innes*, 4 B. & A. 423.

The fact that a ship insured at and from a place has not reached it, need not be communicated to the underwriters unless demanded (*Hull v. Cooper*, 14 East, 479); nor need it be stated to the underwriters that the ship, though British owned, is foreign built, and so entitled to sail without convoy. *Long v. Duff; Same v. Bolton*, 2 B. & P. 209.

Under a policy at and from London, the fact that the ship has sailed need not, unless demanded, be communicated. *Fort v. Lee*, 3 Taunt. 381.

The time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, except in the case of missing ship. *Foley v. Moline*, 1 Marsh. 117; 5 Taunt. 430.

Facts against seaworthiness need not be communicated. *Haywood v. Rodgers*, 4 East, 590.

By a French edict, all vessels having an English supercargo were to be condemned; an insurance was effected on a Portuguese ship so circumstanced:—*Held*, on a loss by

XIII. Of Total or Partial Loss.[1]

capture and condemnation on that ground, that there was no fraudulent concealment to exonerate the underwriter. *Meyne v. Walter*, 1 Park, Ins. 263.

When a vessel has been a long time at sea, it is a fraudulent concealment if that circumstance be not communicated to the underwriter, or to the broker employed. *Webster v. Foster*, 1 Esp. 407.

If it appear that a plaintiff did not intend to insure until he believed her to be missing, and then not until another ship which had sailed at the same time had arrived in safety, the concealment of the fact is fatal. *Andrew v. Ball*, 1 Esp. 273. *Freere v. Woodhouse*, Holt, 572.

Where the insured knew that his ship had sailed from the coast of Africa on a certain day, and only stated that she was on the coast that day:—*Held*, that it was a material concealment, and vitiated the policy. *Ratcliffe v. Shoolbred*, Park, 349; Marsh. Ins. 357.

Underwriters are not entitled to notice of the part of a ship where goods are stowed, whether on deck or otherwise. *De Costa v. Edmunds*, 2 Chit. Rep. 227; 4 Camp. 142.

Where an insurance was effected on goods from London to Jamaica, generally the goods being destined for a particular place in the island, and the usual course in such a case was for the ship to proceed to an adjoining port, and there tranship the cargo into shallops, but no information of the cargo was given to the underwriters; they were nevertheless held liable for a loss which happened after the transhipment on board the shallops. *Stewart v. Bell*, 5 B. & A. 238. So in an action on a policy at and from Oporto to London, it was held that the underwriters were bound of themselves to take notice of a usage to load part of the cargo outside of Oporto Bar. *Kingston v. Knibbs*, 1 Camp. 508.

If an insurance is made before the commencement of hostilities, but when a war is generally expected, the insured is not bound to give the underwriters notice, though the ship do not sail till after the war is begun. *Planche v. Fletcher*, 1 Doug. 251.

A policy on goods is not vitiated by the non-communication to the underwriters of the damaged state of the goods, unless the loss is occasioned by their being damaged; but if the goods are put on board in a damaged state, and conveyed in that state and then discharged, the underwriters are liable. *Boyd v. Dubois*, 3 Camp. 133.

On a policy at and from T. to L. it is not necessary for the insured, without being requested, to disclose that the ship had been surveyed at T. on account of her bad character, and found sufficient on her survey, although the ship's general bad character would have enhanced the premium, and the survey would not have satisfied the underwriters. *Haywood v. Rodgers*, 1 Smith, 289; 4 East, 590.

There is no implied warranty on the part of the owner of the goods insured that the ship shall be in all respects properly documented. *Carruthers v. Gray*, 15 East, 35. But where the same person insures both ship and goods, the underwriters will not be liable for a loss which may happen to either subject of insurance from the want of proper documentation. *Bell v. Carstairs*, 14 East, 394. However, there is an implication that a neutral ship, represented to be such, shall be properly documented to prove her neutrality, though thereby she would be exposed to confiscation. *Steel v. Lacy*, 3 Taunt. 285. The underwriter is liable to an assured on goods on board a neutral ship condemned for the want of documents necessary to entitle it to the privileges of its natural character, provided there is no warranty of such character, and that the assured is not owner of the vessel. See *Bell v. Carstairs*, *supra*. *Nonnen v. Kettlewell*, 16 East, 186.

A register is not a document required by the law of nations, as expressive of a ship's national character. *Le Cheminarit v. Pearson*, 4 Taunt. 367. Nor does an accidental omission in the captain's manifest of part of the goods on an exportation from this country vitiate a policy on the ship. *Carruthers v. Gray*, 3 Camp. 143; 15 East, 35.

As the carrying of simulated papers is a wrongful act, and a cause of condemnation; therefore, where a ship carried simulated papers, and was condemned on that ground, the underwriters were held to be discharged. *Horneyer v. Lushington*, 15 East, 46; 3 Camp. 85. *Flindt v. Scott*, 5 Taunt. 692. Nor can the insured recover for a loss by capture, if it appear by the sentence of a foreign prize-court that the carrying of simulated papers was one of the grounds of condemnation. *Oswell v. Vigne*, 15 East, 70.

Where an express warranty is given it covers the voyage from its commencement, and if the ship be not properly documented at the time of sailing the underwriters will be discharged, although the loss happen from another cause; but where the obligation to be properly documented is merely implied, the underwriters will not be discharged on account of the ship's being insufficiently or improperly documented, unless the loss happen from that cause. *Rich v. Parker*, 7 T. R. 705.

[1] Total losses are of two kinds: first, where the whole of the property insured perishes; secondly, where the property, or some portion of it, exists: but the voyage is lost if the expense of pursuing it exceeds the benefit arising from it, and the assured may abandon. Marsh. 373; Arnould, 866. *Mitchell v. Edie*, 1 T. R. 608. If the vogage is lost, or not worth pursuing, and the salvage is high, if further expense is necessary, and the underwriters will not at all events undertake to pay that expense, the loss is total, and the assured may aban-

don, notwithstanding a recapture. *Milles v. Fletcher*, 1 Dougl. 231. The mere remoteness of the cause of the loss will not (if there be no other independent cause intervening) prevent its being considered, as the loss is to be attributed. Thus, where a vessel laden with hides and tobacco shipped water, which rendered the hides putrid, and the gas which escaped from them injured the tobacco, it was held that the damage was one which resulted, although not immediately, from the perils of the sea. *Monoya v. London Assurance Co.* 6 Ex. 451. See *Naylor v. Palmer*, 8 id. 739; in error, 10 id. 382.

Where a ship received her death-blow before the expiration of a time-policy, but the extent of the damage was not discovered until after it had expired, when it was found that she could not be prudently repaired, and she was in consequence sold, it was held that the underwriters were liable for the partial loss which had occurred before the expiration of the time limited in the policy. *Knight v. Faith*, 15 Q. B. 649; *see* 1 T. R. 260.

Where the ship, in consequence of a leak, struck on a sand-bank in a tide river, and at high water was entirely covered, soon after which she was sold, and notice of abandonment given; the purchaser shortly afterwards, in consequence of the effect of a change of wind, was enabled to raise her, and she was at a great expense repaired, and in a state to have returned, although not for the purposes of the original voyage: — *Held* that, although the ship insured remained in specie, the circumstances were such as might be equivalent to a total loss, if at the time of sale that measure, as the sound exercise of the best judgment, appeared to be most beneficial to all parties, the loss of the voyage would not affect the liability of the underwriters, who indemnify only against the loss of the ship. *Doyle v. Dallas*, 2 M. & M. 48.

Where a cargo has met with sea-damage, and the master is obliged to put into an intermediate port, it may happen that, considering the state of the market there, and the expense of taking on the cargo, an immediate sale would be more beneficial to the owner of the goods than a prosecution of the voyage; yet if the goods could be carried to their destination in such a condition that, allowing for all the necessary extra expenses caused by the damage, they could be sold there at any profit, the loss is not total. *Reimer v. Ringrose*, 6 Ex. 263. See *Rosetto v. Gurney*, 11 C. B. 176. *Duncan v. Benson*, 3 Ex. 644. *Benson v. Chapman*, 8 C. B. 950.

Where damaged goods are sold at an intermediate port, the question is not whether a prudent person would have sold them, but whether the goods are in such a state that if brought home they could be sold for an amount exceeding the expense of unshipping, drying, or warehousing, and transhipping and salvage. If this is not so the loss is total. *Rosetto v. Gurney*, *supra*. *Reimer v. Ringrose*, *supra*. See *Navone v. Haddon*, 9 C. B. 30.

Freight may be insured by a time-policy, though for a period short of the time necessary to complete the voyage on which the freight is to be earned; and if the cargo be so damaged by a sea-peril as to render it impossible, except at an expense which would greatly exceed its value on arrival to carry it to its port of destination, that will constitute a total loss of the freight. *Michael v. Gillespy*, 2 C. B. (N. S.) 627. See *Benson v. Chapman*, 8 C. B. 950.

In considering the relation which the cost of repair would bear to the value of the ship when repaired, the question is not varied by the age of the vessel, if, by reason of her natural decay, more extensive repairs would be necessary to repair the injuries caused by the perils insured against, and from this cause the expenses would exceed the value of the ship when repaired, the assured may still abandon. *Phillips v. Nairne*, 4 C. B. 343. See *Hyde v. the Louisiana State Insurance Co.* 3 Mason, R. 27, Am.; Marsh. 118, n. f.

Where memorandum, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy, to be separately insured; and there is no general average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, although consisting of one or more entire package or packages, and although such entire package or packages be entirely destroyed or otherwise lost by the specified perils. *Ralli v. Janson*, 6 E. & B. 423. But where the insurance was for "240*l.* on goods so valued, against total loss only," and the assured put on board goods of different kinds and descriptions, and in separate cases and packages, and the goods were lost, except three of the packages, it was held that the insured might recover in respect of the packages, which were totally lost. *Wilkinson v. Hyde*, 2 C. B. (N. S.) 30.

And where master's effects were insured "free from all average," and some of the articles were wholly lost, but others were saved, it was held that the master might recover for those which were lost; since the word "effects" was used merely to save the enumeration in the policy of the articles insured, and it was therefore intended that the insurer should be liable for any total loss of the specific things referred to by this general word. *Duff v. Mackenzie*, 2 C. B. (N. S.) 16. Where the policy was on rice, to be declared "warranted free of particular average," it was held that the insured could not by indorsing on the policy a declaration of interest, with a separate valuation of each bag of rice, create a separate insurance on each bag. *Entwistle v. Ellis*, 2 H. & N. 549.

As to whether a loss be total or partial there is no difference between valued and open policies. *Allen v. Sugrue*, 8 B. & C. 561.

Where the crew have to abandon the ship, and notice of abandonment is given, the ship being ultimately recovered, does not save

the liabilities of the underwriters for a total loss. *Holdsworth v. Wise*, 7 B. & C. 794; 1 M. & R. 673.

To enable the insured in a valued as well as in an open policy on goods to recover as for a total loss, the whole subject-matter intended to be covered by the valuation in the policy must have been lost. *Forbes v. Aspinall*, 13 East, 323. If goods reach their place of destination, not in the ship in which they are insured, but in another, having been removed in consequence of one of the perils insured against, the loss is total. *Buller v. Christie*, cited 2 M. & S. 374.

The assured in a valued policy is entitled to recover for a total loss, where the part of cargo is lost, the residue being ready on shore to be shipped. *Davidson v. Willasey*, 1 M. & S. 313.

When the object of the voyage is lost, there is a total loss as to the cargo, though the ship is safe. *Baillie v. Mondiglioni*, Park, Insur. 70.

Where a ship and goods are insured for a voyage, if the former be taken and recaptured, and, after the recapture, the captain, acting for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured may abandon and recover as for a total loss. See *Milles v. Fletcher*, Dougl. 231.

A loss of the voyage, with due notice of abandonment, operates as a total loss of the goods. *Barker v. Blakes*, 9 East, 283.

The disappointment of the arrival of a ship occasioned by the perils of the sea affords no ground for abandoning and claiming for a total loss on goods, when the goods may be forwarded in an ensuing season. *Anderson v. Wallis*, 2 M. & S. 240. *Hunt v. Royal Exchange Assurance Co.* 5 id. 47.

The mere loss of the voyage is not a loss of the ship. *Parsons v. Scott*, 2 Taunt. 363. *Falkner v. Ritchie*, 2 M. & S. 290.

When the master, on a loss taking place, sells the ship and cargo, and thereby puts an end to the adventure, the underwriters are liable for a total loss, provided the sale was a matter of necessity, and for the benefit of all concerned. *Idle v. Royal Exchange Assurance Co.* 8 Taunt. 755; 3 Moore, 115. *Meaburne v. Lockie*, 4 D. & R. 207. *Cambridge v. Anderton*. 2 B. & C. 691. *Robertson v. Clarke*, 1 Bing. 445. *Van Omeron v. Dowick*, 2 Camp. 42. *Joseph v. Knox*, 3 id. 320. *Wilson v. Millar*, 2 Stark. 1. A neutral proceeding from her own port to A., in the enemy's country, is brought into an English port pending proceedings in the Admiralty; the king declares A. in a state of blockade:—*Held*, that this was a total loss of the voyage. *Barker v. Blakes, supra.*

Where the consignee of a captured cargo was allowed to retain the amount of his acceptances:—*Held*, that the assured, not having abandoned, might consider the loss partial, and, therefore, what was saved was saved for his benefit. *Goldsmid v. Gillies*, 4 Taunt. 803. *Anderson v. Wallis*, 2 M. & S. 240. *Fleming v. Smith*, 1 H. L. 514.

The crew of a ship deserted her on the high seas from motives of self-preservation, on account of the damage which she had received at sea, and the ship was then taken possession of by a fresh crew, who succeeded in bringing her safely into port: it was held, first, that the desertion of the crew did not amount to a total loss; and, secondly, that the ship having been sold under a decree of the Admiralty court to pay the salvage, and it not appearing that the insured had taken any means to prevent such sale, that they had no right to abandon, and there was no more than a partial loss. *Thornely v. Hobson*, 2 B. & A. 513. See *Falkner v. Ritchie*, 2 M. & S. 200.

Where a ship and cargo were barratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel:—*Held*, that this was a total loss of the cargo, from the time of the committing the act of barratry. *Dixon v. Reid*, 5 B. & A. 597. See *Brown v. Smith*, 1 Dow. H. L. C. 349.

If property insured be taken and condemned as prize, the underwriters are liable, though no claim be made by the assured. *Tyson v. Gurney*, 3 T. R. 477.

An assured, by doing what is best for the interest of all concerned with the property saved, does not thereby preclude himself from recovering for a total loss, if otherwise entitled. *Plantamour v. Staples*, 1 T. R. 611.

The sentence of a court of appeal reversing a condemnation, under which the property insured had been landed and sold, and decreeing a restitution or the value, does not make the loss partial. *Mallett v. Sheddon*, 13 East, 304. *Mellish v. Andrews*, 15 id. 13. *Bondrett v. Hentyg*, Holt, N. P. 149. *Irving v. Manning*, 1 H. L. 817.

On a loss by seizure and detention or barratry, if the insured be afterwards indemnified by a restoration in the whole, or in part, they cannot recover for a total loss, unless notice of abandonment be given by them when the loss happened. *M'Masters v. Shoolbred*, 1 Esp. 237.

When only a very small proportion of the goods insured is saved, and that upon the condition of their not proceeding to the intended place of destination, but to some other port, in such a case the insured may abandon, and recover for a total loss. *Cologon v. London Exchange Assurance Co.* 5 M. & S. 477. *Roux v. Salvador*, 3 Bing. N. C. 266.

It seems that where there has been an abandonment made during a total loss, this will not, without acceptance, entitle the assured to recover for such, where the total loss has ceased to be the total at the time of action brought. *Bainbridge v. Neilson*, 10 East, 329. *Taylor v. Taylor*, 9 B. & C. 718.

Where, after notice of abandonment had been given, a recapture took place, and the goods arrived at their place of destination, with the exception of a part, which was sold to pay the salvage, and another part, which had been plundered and lost, in consequence of the capture and recapture, the underwriters were held liable only for a partial loss, although, by reason of the capture, the

XIV. Of Adjustment.[1]

voyage was delayed till the following season. *Patterson v. Ritchie*, 4 M. & S. 393.

When a ship is seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss, for the property in the ship is not divested out of him. *Wilson v. Foster*, 1 Marsh. 425; 6 Taunt. 25.

An insurer may be liable for a partial damage under the policy, although eventually the cause of a total loss occurred, which was exempted from its operation. *Livie v. Janson*, 12 East, 648. *M'Sweney v. Royal Exchange Insurance Co.* 14 Q. B. 634–646.

The expense of forwarding passengers from a port short of their destination, at which they were landed upon the destruction of the ship, is recoverable under a policy against all liabilities to which the owner might become liable under the Passenger Act, 1852 (15 & 16 Vic. c. 44), for one of the sections of the act referred to in the policy makes it the duty of the master to forward the passengers at the expense of the owner under such circumstances (*Gibson v. Bradford*, 4 E. & B. 586); but under such a policy the expense of maintaining passengers during the repair of the ship was held not recoverable, the policy not including the section of the act which throws this expense upon the owner. *Willis v. Cook*, 5 E. & B. 641. *Lindsay v. Leathley*, 2 F. & F. 696. *Grainger v. Martin*, 31 L. J. Q. B. 186.

Under the words, "free from average loss, except, &c." on an insurance of wheat, a considerable part being lost in pumping out water:—*Held*, to be an average loss, and the underwriters not liable. *Hills v. London Assurance Co.* 5 Mee. & W. 569. *Paterson v. Harris*, 1 B. & S. 336.

In an action on a policy on "money advanced on account of freight," subject to the ordinary memorandum in respect of a general average loss, the defendant pleaded that, by a custom of London, the insurers were not bound to make good general average losses on such a policy: it was held that the plea was bad, such a custom being inconsistent with the terms of the policy, and therefore inadmissible. *Hall v. Janson*, 4 E. & B. 500.

The underwriters are not liable under the ordinary policies for losses occurring on shore to goods landed for trading purposes. *Harrison v. Ellis*, 7 id. 465.

[1] When an average loss is settled, the broker concerned in general procures the amount to be indorsed on the policy, and signed by the insurer, which is called the adjustment. Atkinson, 42. It is *primâ facie* evidence against the insurer without the production of any other proof of the loss. Beav. 310; 2 Selw. N. P. 969; 4 Esp. 289. It does not require a stamp. *Weeke v. Simpson*, 2 Selw. 917; 1 Arnould, 118, 2d ed.

When a policy is adjusted, it is a common practice for the broker of the underwriters to give to the assured or his agent his own note, called a credit-note, for the amount of the loss, payable in a month. This does not, however, affect the liability of the underwriter, who, should the broker become insolvent during the month, must pay the loss to the assured. *Macfarline v. Grannocopulo*, 3 H. & N. 860.

When an entire insurance is effected on ship and cargo and no cargo is shipped, the insurer, in adjusting the loss, is only liable for such a proportion of the sum insured as the property upon which the policies attach bears to the whole. *Amery v. Rogers*, 1 Esp. 207. To an action on a valued policy it affords no defence to prove that the insured have received the amount from the underwriters in another policy, if the subject insured be proved to be of a value equal to the sum received and sought to be recovered. *Bonsfield v. Barnes*, 1 Camp. 228. *See* 1 Bl. Rep. 416.

The value of the goods is to be estimated according to the invoice price; an insurer is not liable for the rise or fall of the market (*Lewis v. Rucker*, 2 Burr. 1170. *Robertson v. Ewer*, 1 T. R. 130. *Johnson v. Shedden*, 2 East, 581. *Usher v. Noble*, 12 id. 639); or for a loss that may arise from the difference of exchange. *Thelluson v. Bewicke*, 1 Esp. 77. And the rule for calculating a partial loss on goods by sea damage is, to estimate the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds. *Johnson v. Shedden*, *supra*. *Hurry v. Royal Exchange Assurance Co.* 3 B. & P. 308. *See* 2 B. & Adol. 649. Stevens on Average, 80, 5th ed.

Where on the voyage insured the ship had suffered partial injury, and been repaired:—*Held*, that the rule in practice to ascertain the rate of indemnity, viz. by deducting one-third of the repair, was that on which a jury ought to act, unless there appeared any circumstances to take the case out of that rule. *Poingdestre v. Royal Exchange Assurance Co.* 1 R. & M. 378. The great object of a policy of insurance on a ship is to indemnify the assured, and the supposed rule of deducting one-third new for old after the first voyage has grown up to prevent controversy. The question, whether a ship is on her first voyage is not determined by the policy. *Pirie v. Steele*, 2 M. & Rob. 49; 8 C. & P. 200.

Where a vessel is damaged by a collision, and in consequence detained, the underwriters are not liable for the additional sum paid for wages and maintenance of the crew. *De Vaux v. Salvador*, 4 Ad. & E. 147; 6 Nev. & M. 13. *See* Marsh. on Insur. 391; 2 Arnould, 791; 2 Phillips, 392, 3d ed.

In the case of a freight policy, a usage that the loss shall be calculated upon the gross amount, and not upon the net value of the freight, is legal. *Palmer v. Blackburn*, 7 Moore, 329; 1 Bing. 62. If it is established that an agent had authority to sign

XV. Of Abandonment.[1]

a policy for an underwriter, it follows that he had authority to adjust it. *Richardson v. Anderson*, 1 Camp. 43.

Where, by a memorandum on the policy, the underwriter was to adjust a loss in three months after notice, a direct notice from the assured is not required if he has had notice by other means. *Abel v. Potts*, 3 Esp. 242.

Fraud, or a mistake, or a misconception on the part of the underwriter, invalidates an adjustment signed by him. *Christian v. Coombe*, 2 Esp. 489. *Steel v. Lacey*, 3 Taunt. 285. So where the underwriter, immediately after signing the adjustment, expresses doubts as to the loss, and requires further proof. *De Garron v. Galbraith*, 1 Park, 163. So, on the other hand, an adjustment is not binding on the insured if it proceeds from a mistake of the facts on his part. *Reyner v. Hall*, 4 Taunt. 725. An adjustment, indeed, is not in any case conclusive; its effect when regularly made is merely to transfer the burthen of proof from the insured to the insurer. *Steel v. Lacey*, *supra*. Hence it follows that an underwriter is not estopped by an adjustment (*Herbert v. Champion*, 1 Camp. 134); although at the time of signing, if he had the means of rendering himself acquainted with the history of the voyage, and the mode of loss, if his attention was not then drawn to the circumstances, which he afterwards learned, by which the policy was avoided. *Shepherd v. Chewter*, id. 274. An adjustment may be given in evidence without being stated specially with declaration. *Rogers v. Maylor*, 1 Park, Ins. 163. *Christian v. Coombe*, *supra*; 1 Arnould, 118, 2d ed.

Where the broker who effected the policy, and whilst the policy was in his hands, entered into an adjustment, which the defendant, the underwriter, signed, and his name was erased: — *Held*, that the plaintiffs having in no way recognised or adopted such adjustment, nor any custom being established to bind them, were entitled to recover the amount of the loss from the underwriters. *Benson v. Maitland*, 1 Gow. 205.

After a total loss and adjustment for freight within a month, and whilst the policy remained in the hands of the broker, the initials of the insurer were struck out of the adjustment to indicate payment, and the broker debited the insurer with the loss, the insurer is liable to the insured. *Jell v. Pratt*, 2 Stark. 67. When at the time of adjustment a loss is apparently total, and is paid by the insurer as such, but subsequent events occur which reduce it to a partial loss, the insurer cannot recover back money paid, but stands in the situation of the insured with regard to salvage. *Tunno v. Edwards*, 12 East, 488.

An adjustment may either be absolute or conditional (*Gammon v. Beverley*, 8 Taunt. 89; 1 Moore, 563); but after a payment of a total loss of freight, a subsequent payment to the insured of a portion of the freight, which had been earned, may be recovered back by the insurer. *Barclay v. Stirling*, 5 M. & S. 6.

A stipulation that all average claims shall be ascertained by arbitration, and no action maintained till that be done, is legal. *Tredwen v. Holman*, 31 L. J. Ex. 398. See *Scott v. Avery*, 5 H. L. C. 811; and 8 Ex. 487; 22 L. J. Ex. 287; 25 id. 308; 29 id. 28; 31 id. 399; id. Q. B. 17.

[1] An abandonment signifies a giving up to the underwriters of the thing insured, or such part of it as may remain on a loss taking place: when the property, or a part of it, is still in existence, and the insured yet claim for a partial loss (as in certain cases they may), they must abandon what is saved to the underwriters; for if they would retain what is saved, and yet recover for a total loss, they would receive more than one indemnity. Marsh. by Shee, 443.

The assured is in no case bound to abandon; he has always an election, where the property, or any part of it, exists in specie, whether he will abandon or not. *Mitchell v. Edie*, 1 T. R. 615. *Da Costa v. Newnham*, 2 id. 407. *Anderson v. Royal Exchange Assurance*, 7 East, 38. *Tanno v. Edwards*, 12 id. 491. *Martin v. Crokatt*, 14 id. 466. *Davy v. Milford*, 15 id. 565.

To constitute a claim for a total loss, notice of abandonment must be given (*Roux v. Salvador*, 3 Bing. 266. *See* 15 Q. B. 649; 1 Scott, 491); but no abandonment is essential on an insurance of freight. *Mount v. Harrison*, 4 Bing. 388; 1 M. & P. 14; Atkinson, 219–20.

The effect of an abandonment is to transfer the whole property and interest in the thing insured to the underwriter, as from the date of the loss; and consequently it enures as a binding agreement to assign, if necessary, what is abandoned, the assured in the meantime being in the position of a trustee for the underwriter. *Cammell v. Sewell*, 3 H. & N. 617. *Scottish Marine Insurance Co. v. Turner*, 1 Macqueen's H. of L. C. 342: *per Lord Truro*.

If the owner fail to abandon when the loss is only constructively total, he is entitled to indemnity as for a partial loss only. *Knight v. Faith*, 15 Q. B. 649. *See* 7 T. R. 210; 3 B. & Adol. 35.

Upon the happening of such a peril suspending the voyage, and inducing the necessity of repair to such an extent as entitles the insured to consider the loss total, abandonment is necessary. *Martin v. Crokatt*, 14 East, 465. The wreck and deterioration of the goods cannot be considered a total loss, without abandonment. *Davy v. Milford*, 15 id. 559. An assured can only abandon where there has been a total loss of the property insured. *Cazalet v. St. Barbe*, 1 T. R. 187.

When the vessel is not worth repairing, the assured may abandon (*Da Costa v. Newnham*, 2 T. R. 412); or where the voyage is lost, or an embargo after the risk has attached. *Rotch v. Edie*, 6 id. 413. *Hamilton v. Mendez*, 1 Bl. Rep. 276. So, where there

can be no effectual restitution, the insured may abandon (*Cologon v. London Assurance Co.* 5 M. & S. 447); or when a considerable part of the cargo is lost or damaged by the perils of the sea, and it becomes necessary to sell or dispose of the residue, so that the further prosecution of the voyage is impracticable, the insured may recover for a total loss. *Hudson v. Harrison*, 3 B. & B. 97. Or where a capture takes place, and the circumstances which follow it are such that the ship is not set free upon the deposit of a large sum, which renders it probable that the whole or greater part of the value may be absorbed in the expenses. *M'Iver v. Henderson*, 4 M. & S. 576.

Where a ship is abandoned before the voyage is completed, and the cargo is transhipped and carried to its destination by another vessel, the underwriters are not entitled to the freight earned by the latter; for the master, in chartering her, acts as agent for her owners, and not for the underwriters. *Hickie v. Rodoconachie*, 4 H. & N. 455. See *Barclay v. Stirling*, 5 M. & S. 6.

Where a shipowner who abandons has carried in the ship goods on his own account, nothing in the nature of freight for the carriage of these goods passes to the abandoner. *Miller v. Woodfall*, 8 E. & B. 493.

The assured should give notice of abandonment at the earliest opportunity. *Dean v. Hornby*, 3 E. & B. 180.

In a case the facts were these:—A ship, insured by a time policy, was captured by pirates, and retaken as a prize, and taken into a port by a queen's ship. The assured, on learning these facts, gave notice of abandonment, after the expiration of the policy, but within a reasonable time. The ship was sent home for adjudication, but on her voyage, meeting with bad weather, she was taken into port, and sold by the prize-master who had charge of her. It was held that the notice of abandonment was sufficiently early, and that the assured were entitled to recover for a total loss. See *Dixon v. Reid*, 5 B. & A. 597.

Embargo by an alien's own government does not entitle him to abandon. *Conway v. Davidson*, and *Same v. Gray*, 10 East, 536. So, a loss of the voyage, or the season, is not a ground of abandonment upon a policy on goods warranted free from average, unless general, when the cargo is in safety, and not of a perishable nature. *Hunt v. Royal Exchange Assurance Co.* 5 M. & S. 47. *Anderson v. Wallis*, 2 id. 240; 3 Camp. 440.

Where there is merely a partial loss, the assured cannot abandon. *Thelluson v. Fletcher*, 1 Esp. 73; Marsh. 600; 2 Wm. Saund. 203, n.

In the case of freight (*Green v. Royal Exchange Assurance Co.* 6 Taunt. 68; 1 Marsh. 447. *Parmeter v. Todhunter*, 1 Camp. 541; 1 Park, Insur. 286. *Mordy v. Jones*, 4 B. & C. 394), the insured cannot recover for a total loss under a notice of abandonment, if freight be subsequently earned (*M'Carthy v. Abel*, 1 Smith, 534; 5 East, 388. *Everth v. Smith*, 2 M. & S. 278. *Brotherston v. Barber*, 5 id. 418.

On a wagering policy there can be no abandonment. *Kemp v. Vigne*, 1 T. R. 304. So, when the goods are consigned to a particular port, which is found to be in the hands of an enemy, that circumstance does not warrant the assured to abandon. *Lubbock v. Rowcroft*, 5 Esp. 50.

When a considerable part of the cargo is lost or damaged by perils of the sea, and it becomes necessary to sell or dispose of the residue, so that the further prosecution of the voyage is impracticable, the insured may recover for a total loss. *Hudson v. Harrison*, 6 Moore, 288; 3 B. & B. 97.

When the ship, being driven by stress of weather, entered a port where there was no dock to receive her, and was found on a survey to be considerably damaged, and incapable of being removed to any port for the purpose of repair, so that it was deemed expedient to break her up for old timber, an abandonment was holden to be necessary. See *Bell v. Nixon*, Holt, id. 425.

Where a ship was so much damaged by the perils of the sea that, in order to render her seaworthy, it would cost more to repair her than she would be afterwards worth, and the captain sold her to a purchaser, who partially repaired her, and sent her on a voyage she never completed, in consequence of her infirmity: — *Held*, that the insured was entitled to recover as for a total loss, with notice of abandonment. *Cambridge v. Anderton*, 4 D. & R. 203; 2 B. & C. 691; 1 R. & M. 60.

Freight is insured from A. to B.; ship sails, but is obliged to put back from stress of weather, when she is found to be incapable of complete repair, and the cargo is accordingly unloaded, and the ship sold:— *Held*, there was no necessity for an abandonment, but that the insured was bound to use all reasonable endeavours to repair the ship. *Green v. Royal Exchange Assurance Co.* 1 Marsh. 449; 6 Taunt. 68.

An insured ship being taken, the insured may demand as for a total loss, and abandon to the insurer. *Goss v. Withers*, 2 Burr. 683.

Where an insurance was effected on a ship from Rio de Janeiro to Liverpool, and the ship was captured and afterwards recaptured, but in the interval the insured, having received intelligence of the capture, gave notice of abandonment, and after the recapture the ship arrived at Liverpool, having only sustained a partial loss, it was held that only a partial loss could be recovered. *Brotherston v. Barber*, *supra*.

On a policy on goods, the underwriters were held only to be liable for an average loss where the ship, being captured and recaptured, was sent into port stripped of all her hands, and the captain not being able immediately to procure a fresh crew, or to raise money to pay the salvage, sold the ship and cargo, and broke up the adventure. *Underwood v. Roberston*, 4 Camp. 138.

In case of seizure and detention on barratry, if the insured be afterwards indemnified by a restoration in the whole, or in part, they cannot recover for a total loss, unless notice of abandonment be given when the

loss happened. *M'Masters v. Schoolbred*, 1 Esp. 237.

To render an abandonment necessary, it seems that the thing insured, or a part of it, must exist in the hands, or, at least, be for the benefit of the insured. *Mullet v. Shedden*, 13 East, 304. *Mellish v. Andrews*, 15 id. 13. *Bondrett v. Hentyg*, Holt, 149. *See* 2 N. R. 336.

A neutral ship, bound from America to Havre, was detained and brought into a British port for the purpose of search, and pending the proceedings in the Admiralty Court the king declared Havre in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held to entitle the neutral insured to abandon. *Barker v. Blakes*, 9 East, 283.

The general rule is, that the loss of a voy age does not entitle the insured to abandon. *Falkner v. Ritchie*, 2 M. & S. 290.

Barratry of the master is a ground of abandonment, as for a total loss, though the goods ultimately reach their destination, through the agency of strangers, to the as sured. *Dixon v. Reed*, 1 D. & R. 207; 5 B. & A. 597.

When an abandonment is necessary, it must be made as soon after the news of the loss has reached the assured as possible. *Mitchell v. Edie*, 1 T. R. 608. *Anderson v. Royal Exchange Assurance Co.* 3 Smith, 48; 7 East, 38; Marsh. 478.

Notice given five days after they received intelligence of the loss was held too late. *Hunt v. Royal Exchange Assurance Co.* 5 M. & S. 47.

The insured is entitled to reasonable time for examining into the state of damaged cargo before he makes his election on the question of abandonment (*Gernon v. Royal Exchange Assurance Co.* 2 Marsh. 88; 6 Taunt. 383); and is not bound to abandon in any case; but he must make his election quickly, and cannot lie by and treat the loss as an average loss, and take measures for recovery, without communicating that fact to the underwriters, and letting them know the property is abandoned. *Allwood v. Henchall*, 1 Park, Insur. 280.

Upon the first notice of a total loss, the assured are bound to abandon; but it must appear that they had notice, or the policy will be vitiated. *Abell v. Potts*, 3 Esp. 242.

Where a ship arrived at the port of Kinsale on the 24th of November, and on the 14th of December a survey was had, notice of abandonment to the insurers in London on the 6th of January was held too late, the communication between Kinsale and London being then usually four or five days. *Aldridge v. Bell*, 1 Stark. 498.

Where the captain of a vessel which had been damaged by stormy weather arrived in London the 25th of April, where his owners resided, and the latter received the ship's papers on the 3d of May following, and the broker who affected the policy gave verbal notice of abandonment to the underwriters on the 5th:—*Held*, that such notice was given in due time. *Read v. Bonham*, 6 Moore, 397; 3 B. & B. 147. *Kelly v. Walton*, 2 Camp. 155.

Where goods, in the case of a shipwreck, were brought on shore in a damaged state, so that they became unprofitable to the insured, it was held that the underwriters on the goods, which were fixed by the policy from particular average, could not be made liable as for a total loss by a notice of aban donment. *Thompson v. Royal Exchange Assurance Co.* 16 East, 214. *Davy v. Milford*, 15 id. 559; 7 Taunt. 154. *Glennie v. the London Assurance Co.* 2 M. & S. 371.

Where, after notice of abandonment had been given, a recapture took place, and the ship and goods arrived at their place of destination, with the exception of a part, which was sold to pay the salvage, and another part which had been plundered and lost in consequence of the capture and recapture, the underwriters were only held liable for a partial loss. *Patterson v. Ritchie*, 4 M.& S.393.

A notice of abandonment is necessary, though the ship and cargo have been sold and converted into money, when the notice of the loss was received. *Hodgson v. Blackeston*, 1 Park, Insur. 240.

In a case of capture, when the recapture takes place before the notice of abandonment is given (*Bainbridge v. Neilson*, 10 East, 329; 1 Camp. 237), or even if a recapture take place after notice of abandonment but before an action is brought, and the loss be thereby changed from a total into a partial one, the insured cannot recover for a partial loss. *Patterson v. Ritchie*, 4 M.& S.393. *Brotherston v. Barber*, 5 id. 418.

An ineffectual notice of abandonment will not preclude the insured from recovering for a total loss when the loss is total. *Mellish v. Andrews*, 15 East, 13.

As to the Effect of an Abandonment.— An abandonment not accepted, cannot convert into a total loss what, at the time of abandoning, had, in fact, ceased to be such. *Bainbridge v. Neilson*, *supra*. *Parsons v. Scott*, 2 Taunt. 363. *See* 4 M. & S. 395; 5 id. 418; 9 B. & C. 718.

Insurance on a ship from Rio de Janeiro to Liverpool; and the ship was captured and afterwards recaptured; but, in the interval, the assured, having received intelligence of the capture, gave notice of abandonment; and after the recapture, the ship arrived at Liverpool, having sustained a partial damage, and action brought to recover a total loss:—*Held*, that the assured could only recover for a partial loss. *Brotherston v. Barber*, *supra*.

When the ship and freight are abandoned to the respective underwriters, in consequence of an embargo, and the abandonment is accepted, and subscriptions paid by the underwriters on freight, in consideration of the assured undertaking to assign all right of recovery, &c. in the freight, the assured is precluded by this agreement from afterwards setting up, as between himself and the underwriter, the right of the insured on ship to freight. *Thompson v. Rowcroft*, 4 East, 34. *Leatham v. Terry*, 3 B. & P. 479.

If, after abandonment to the respective

XVI. Alteration of Policy.[1]

XVII. As to the Premiums.[2]

underwriters on ship and freight, and acceptance thereof, freight is earned, the underwriters on freight are not liable. *M'Carthy v. Abel*, 5 East, 388; 1 Smith, 524. But it is now established that an abandonment by the underwriters on the ship transfers to them as an incident the freight which the ship may subsequently earn, although a separate insurance may have been effected on the freight by the other underwriters. *Case v. Davidson*, 5 M. & S. 79; 2 Price, 443; 2 B. & B. 379; 5 Moore, 72. *Thompson v. Rowcroft*, 4 East, 47. *Sharp v. Gladstone*, 7 East, 30. *Barclay v. Stirling*, 5 M. & S. 6. *See* 4 H. L. C. 312.

If one of several jointly interested in a cargo effects an insurance for the benefit of all, he may give notice of abandonment for all. *Hunt v. Royal Exchange Assurance Co.* 5 M. & S. 47.

[1] A material alteration, made without consent, invalidates the instrument both in law and equity, and renders it incapable of being enforced, either according to its original or altered state. *Masters v. Millar*, 4 T. R. 320; 2 H. Black. 141. Hence, if a policy be executed in the common form of goods, without specifying the kind, and the insured afterwards insert a description of a particular species of goods as the subject of insurance, the policy is vitiated as against an underwriter who did not assent to the alteration. *Langhorn v. Cologon*, 4 Taunt. 330. So if the insured, after the policy has been signed, strike out a warranty to sail at a certain time, and insert a memorandum of an enlarged time in the margin. See *Fairlie v. Christie*, 7 Taunt. 416; 1 Moore, 114; Holt, 331, *contra*. So, an alteration in the vessel's place of destination cannot be made without the insurer's consent. *Campbell v. Christie*, 2 Stark. 64. *Laird v. Robertson*, 4 Bro. 488. And the same rule holds as to a liberty to call at a port not in the course of the voyage as originally described. *Forshaw v. Chabert*, 3 B. & B. 158. But an alteration made by one of the parties, without the consent of the other, does not vitiate the policy if it occur in an immaterial part, and do not vary the legal effect of the instrument (*Clapham v. Cologon*, 3 Camp. 382. *Saunderson v. Symonds*, 1 B. & B. 426; 3 id. 158); or by the consent of both parties (*Bates v. Grabham*, 2 Salk. 444; Holt, 469); or where, at the time of making the alteration, all is *in fieri*, or to be done. *Robinson v. Tobin*, 1 Stark. 336. *See* Marsh. on Insur. 275; and *Inos v. Wickham*, 31 L. J. C. P. 364.

Where a broker, instructed to effect a policy on goods, effected it on the ship, and the mistake was rectified, with the consent of the underwriters, by a memorandum in the margin, it was held that no step was necessary to render the contract effectual. *Sawtell v. London*, 5 Taunt. 359; 1 Marsh. 99. So if a broker, by mistake, misdescribe the ship on which the goods are aboard, he may afterwards, without the assent of the underwriters, and without a new stamp, declare the interest to be on goods by another ship. *Robinson v. Touray*, 3 Camp. 158; 1 M. & S. 218. *See* Alteration, vol. i. p. 309.

[2] *With respect to the Party liable for Premiums.*—Although, in a policy of insurance, it is always understood, and therefore tacitly agreed, that the policy-broker alone shall be liable to the underwriter for the premium (*Shee v. Clarkson*, 12 East, 507. *De Gaminde v. Pigou*, 4 Taunt. 246), yet this tacit agreement supposes that all is fair on the side of the assured, and the transaction in the common course of business; for if there has been any fraud or malpractice, the underwriters may require him to pay the premium (*Foy v. Bell*, 3 id. 493); or where the assured procures the assurance to cover a debt from the broker to himself, setting the premium against the debt. *Mavor v. Simeon*, id. 497.

The plaintiff undertook to effect an insurance on behalf of the defendant, with such names as should be to his satisfaction: — *Held*, that the plaintiff might recover the premiums without having submitted the names to the defendant. *Dixon v. Hovill*, 4 Bing. 665; 1 M. & P. 656.

A broker who has *covenanted* to pay premiums cannot recover the amount against his principal, as for money paid. *Power v. Butcher*, 10 B. & C. 329.

Where the assured upon a voyage clearly illegal had paid, and never gave any notice of an intention to rescind the contract: — *Held*, that he could not recover back the amount so paid. *Palyart v. Leckee*, 6 M. & S. 290.

As to Return of Premiums.—The premium paid by the insured, and the risk which the insurer takes upon himself, are considerations each for the other; they are co-relatives, whose mutual operation constitutes the essence of the contract of insurance. The insurer shall not be exposed to the risk without receiving the premium; nor shall he retain the premium, which was the price of the risk, if, in fact, he ran no risk at all. For whenever a man receives the money of another upon a consideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honesty and natural justice, to refund it. In such case the law implies a debt *quasi ex contractu*, and gives the insured an action against the insurer for money had and received to his use, to recover back the money so received. Marsh. Insur. by Shee, 515.

In all cases where the risk never has begun, there shall be a return of the premium. *Stevenson v. Snow*, 3 Burr. 1237; 1 Bl. Rep. 315. *Tyrie v. Fletcher*, Cowp. 668; Dougl. 587. Misrepresentation without fraud, vacating a policy, entitles the assured to a return of premium. *Feise v. Parkinson*, 4 Taunt. 640. When the assured fails

XVIII. Of Double and Re-Insurance.[1]

from an exception in the policy, express or implied, there can be no return of premium. See *Gladstone v. King*, 1 M. & S. 35.

Though a verdict for the defendant, on the ground that the risk never commenced, does not necessarily imply that the plaintiff is entitled to a return of premium, and though the plaintiff's counsel has not mentioned it in his opening, yet he is entitled to it where there is a count for money had and received. *Penson v. Lee*, 2 B. & P. 330. See *Nesbitt v. Whitmore*, 1 East, 972.

Where the policy contains two distinct risks and two voyages, and one risk only has begun, there shall be an apportionment of the premium. *Rothwell v. Cooke*, 1 B. & P. 172. *Stevenson v. Snow*, 3 Burr. 1237; 1 Bl. Rep. 315. But if a ship is insured against capture for twelve months, at a specified rate per month, making a fixed gross sum, though the risk cease before the end of two months by the loss of the ship in a storm, there shall be no apportionment nor return of premium, the contract being entire. *Loraine v. Thomlines*, Dougl. 585. Hence, if there be an insurance on a ship and goods, at and from A. to B., during her stay and trade there, at and from thence to her port or ports of discharge into, and at and from thence back to A., it is an entire contract; and if the loss happen at any time after the commencement of the risk, there shall be no apportionment or return of premium. *Bermon v. Woodbridge*, Dougl. 781.

An insurance being made without interest and the premium paid, the insured cannot recover it back. *Lowry v. Bourdieu*, Dougl. 468.

If A., in his own name, insures on behalf of B., who afterwards refuses to adopt the policy, A. cannot recover back the premium from the underwriter. *Hagedorn v. Oliverson*, 2 M. & S. 485.

A premium given for a reassurance, illegal under the stat. 19 Geo. 2, c. 37, cannot be recovered back (*Andree v. Fletcher*, 3 T. R. 266); nor in general, where it is illegal, can it be so obtained (*Cowre v. Barber*, 4 M. & S. 16): as in the case of a policy on a voyage undertaken in contravention of the navigation laws (*Marck v. Abel*, 3 B. & P. 35. *Lubbock v. Potts*, 7 East, 449. *Shiffner v. Gordon*, 12 id. 296); or a policy intending to cover a trading with the enemy (*Vandyck v. Hewit*, 1 East, 96); or when the insurance is on money lent to the captain of a ship, payable out of the freight. *Wilson v. Royal Exchange Assurance Co.* 2 Camp. 626. But if a voyage be unavoidably prevented, a return of premium may be obtained (*Oom v. Bruce*, 12 East, 225); or where a license for the voyage has been obtained, and not granted till after the voyage has commenced, and was therefore invalid, because it could not operate retrospectively *Henry v. Staniforth*, 5 M. & S. 122; 4 Camp. 270; 1 Stark. 254); or where, by reason of the voyage being protracted to an unusual period, it is not covered by the license. See *Siffken v. Allnutt*, 1 M. & S. 39.

When the policy is avoided by an alteration by the assured, the premium cannot be recovered back. *Langhorn v. Cologon*, 4 Taunt. 330.

An arrival of the ship entitles to the stipulated return of premium, notwithstanding a capture or recapture, and payment of salvage during the voyage. *Aguilar v. Rodgers*, 7 T. R. 421.

Where part of the premium is to be returned if the ship sails with convoy, and arrives, she need not arrive in company with convoy (*Simond v. Boydell*, Dougl. 268. *Audley v. Duff*, 2 B. & P. 111); although generally, when the policy is vitiated by concealment, without any fraud, and the premium is restored, yet if the fraud is notoriously gross, the court will order the underwriter not to return the premium (*Tyler v. Horne*, 1 Park, Insur. 480); or where a policy is purposely underwritten by one party, to induce another to sign. *Wilson v. Duckett*, 3 Burr. 1361. *Tyler v. Horne*, Park, 329. And it is now settled in all cases of actual fraud on the part of the insured, or his agent, the underwriters may retain the premium. *Chapman v. Fraser*, 1 Park, Insur. 286.

When the captors of a ship insure their interest therein, they are not entitled to a return of premium, though it be afterwards adjudged to be no prize. *Bœhm v. Bell*, 8 T. R. 154.

Where the policy was at and from Jamaica to London, and the jury found an invariable usage in such voyage to return the premium, with a deduction of one-half per cent, either when the ship sailed before the day without convoy, or after it, in any case: — *Held*, that an action for a return of the premium would lie. *Allen v. Long*, 2 Park, Insur. 580; Marsh. 529.

The rule by which the insured is entitled to return the whole premium when the risk has once commenced, necessarily precludes his liability for a return in case of deviation. *Tait v. Levi*, 14 East, 481. And in the case of a policy on freight, when the ship is chartered for the voyage, and is guilty of a deviation after sailing upon it, and before any goods are laden, the insured are not entitled to a return of premium for short interest. *Moses v. Pratt*, 4 Camp. 297.

Where there is an insurance on ship and freight, and the ship arrives in safety, and earns freight, the insured cannot afterwards claim a return of premium on the ground that he had an insurable interest, on account of a defect in his title to the ship. *M'Cullock v. Royal Exchange Assurance Co.* 3 Camp. 406.

[1] Double insurances are legal; they occur when several policies are effected for the benefit of the same persons, and upon the same subject-matter. *Godin v. London Assur. Co.* 1 Burr. 492; Marsh. Insur. 103. In such case, if the insurers in one policy should pay the whole amount of the loss, they will be entitled to recover a rateable contribution from the insurers in the other policy. *Rogers v. Davis*, Park, Insur. 424; Marsh. Insur. 242.

XIX. As to Insurance-Brokers.[1]

Newby v. Reed, 1 Bl. Rep. 416. *Davis v. Gildart*, 2 Park, Insur. 424. It, however, affords no defence to an action on such a policy to prove that the insured have received the amount of valuation from the underwriters on another, if the subject-matter insured be proved to be of a value equal to the sum received, and that ought to be recovered. *Bousfield v. Barnes*, 4 Camp. 228.

In mutual insurances all parties must be contributory. *Reed v. Cole*, 3 Burr. 1512.

The 19 Geo. 2, c. 37, renders every re-assurance, either by British subjects or foreigners, whether on British or foreign ships, illegal, unless the insurer be insolvent, become bankrupt, or die. *Andree v. Fletcher*, 2 T. R. 161; 3 id. 266. It enacts that it shall not be lawful to make re-assurance, unless the insurer shall be insolvent, become bankrupt, or die, in any of which cases such assurer, his executors, administrators, or assigns, may make re-assurances to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-assurance.

It seems that an agreement between two underwriters, that the subscription to a policy by one shall be considered as transferred to the other, is not a re-assurance within the statute, unless the premium paid to the said underwriters is less than what they first received. *Delves v. Barnes*, 1 Taunt. 48. And in the case of an illegal re-assurance, an action will not lie to recover back the premium after capture. *Andree v. Fletcher*, 3 T. R. 266. *Bœhm v. Bell*, 8 T. R. 154.

[1] These usually negotiate insurances with the underwriters. There is rarely any direct communication between the insured and the insurer. An order given by a partner on account of the firm of which he is a member, to make insurance on a vessel the property of the partnership, is binding on the firm (*Hooper v. Lusby*, 4 Camp. 66); but not so with regard to part-owners of a vessel or ship. *French v. Backhouse*, 5 Burr. 2727. *Bell v. Humphries*, 2 Stark. 346.

Commissioners appointed for the management and disposal of ships delivered at sea, in the event of their arrival in this country, may insure. *Lucena v. Crawford*, 2 N. & R. 324. And persons authorised to prosecute a claim upon a vessel in a prize court abroad, to forward the ship to London, and pay all demands upon her, have been considered as clothed with power to effect insurance on the property intrusted to their management. *Robertson v. Hamilton*, 14 East, 522.

Where an insurance is made by a captain (himself having no insurable interest), as agent, any declaration as to the party interested must be taken as binding upon him. *Routh v. Thompson*, 13 East, 274.

If one man make a contract expressly for another, though the one be not the other's agent, express or implied (implied, as where he is his general agent), the latter may adopt the contract. *Hagedorn v. Oliverson*, 2 M. & S. 485. Informing the broker that property insured in the time of war is neutral, sufficiently indicates that the party, though insuring in his own name, is only an agent. *Moone v. Henderson*, 1 East, 335. *Irving v. Richardson*, 3 B. & A. 193.

The authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip, till such time as they actually subscribe the policy. See *Warwick v. Slade*, 3 Camp. 127. *Tarpen v. Bilton*, 5 Man. & G. 455.

As to the Duties of a Broker. — In general, an obligation to procure insurance to be effected on behalf of another person cannot be imposed without the consent of the agents; but though no express consent has been given, it may be implied from the relative situation of the parties. *Smith v. Lascelles*, 2 T. R. 189. *Corlett v. Gordon*, 3 Camp. 472. And when a person, though without consideration, undertakes to procure an insurance, if he proceed to carry the measure into execution, he will be liable for an injury occasioned by his negligence or unskilfulness. *Wilkinson v. Coverdale*, 1 Esp. 75. *Wallace v. Telfair*, id. 76. *Elsee v. Gatward*, 5 T. R. 143. *Mallough v. Barker*, 4 Camp. 357.

When no particular directions are given as to the manner in which the insurance is to be made, the agent will be protected in the exercise of his discretion, provided he act *bonâ fide* to the best of his judgment. *Moore v. Mourgne*, Cowp. 479. *Comber v. Anderson*, 1 Camp. 525. The holders of a bill of exchange, which contained a memorandum that if it was not honoured the holders might insure the amount and place the premium to the account of a particular vessel, and of the drawer, who was the master thereof, the bill being drawn for supplies, were holden to have executed the direction with propriety in insuring for three months. *Tosker v. Scott*, 6 Taunt. 234; 1 Marsh. 556. See *Park v. Hammond*, 6 Taunt. 495.

An insurance-broker is only entitled to recover payment for the assured from the underwriters in money; and a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal. *Todd v. Reed*, 4 B. & A. 210; 3 Stark. 16. *Russel v. Bangley*, 4 B. & A. 395.

A broker, in pursuance of instructions previously received from T., effected a policy at Lloyd's, at a time when a letter lay on his table at the Coal Exchange opened, announcing the loss of the vessel: — *Held*, that the jury were warranted in finding this no such want of diligence as to avoid the policy. *Wake v. Atty*, 4 Taunt. 493.

If an insurance-broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it. *Bousfield v. Creswell*, 2 Camp. 545.

There is an implied promise that a broker shall give notice to his principal of his inability to effect an insurance. *Callendar v. Oelrichs*, 5 Bing. N. S. 58; 6 Scott, 761.

Where a broker is only authorised to receive payment in money, the underwriter is not discharged by settling the amount of loss with him on account. *Bartlett v. Pentland*, 10 B. & C. 760. *Scott v. Irving*, 1 B. & Ad. 605. *Holland v. Russell*, 1 B. & S. 424.

In an action against a broker, general evidence is admissible to show what he ought to have done according to the instructions he had received from his principal. *Chapman v. Walton*, 10 Bing. 57; 3 M. & Scott, 389.

As to their Rights.—From the nature of the accounts between the insured and the broker, it seems that the latter, before he has actually paid the premiums to the underwriters, may maintain an action against the insured to recover the amount of them as money paid to his use. *Dalzell v. Mair*, 1 Camp. 534. *Amy v. Blond*, 2 Park, Ins. 36; Marsh. Ins. 294. But after payment of the amount of a loss by a broker to his principal, the broker cannot recover it back on the ground of his not being aware at the time that one of the underwriters had become insolvent. *Edgar v. Burnstead*, 1 Camp. 411. Nor can he, after settling an account, receiving the balance, and suffering two years to elapse, make a further claim upon his principal on such ground. *Jameson v. Swainstone*, 2 id. 546. Nor can he recover expenses incurred in effecting an illegal insurance (*Stackpole v. Earle*, 2 Wils. 133. *Ex-parte Mather*, 3 Ves. jun. 373); or prove a debt so contaminated under a commission of bankruptcy (*see* 3 Ves. 373; 6 Taunt. 235; 1 Marsh. 556); or recover for premiums, or charges incurred with reference to the effecting of unstamped policies. *Roderick v. Hovil*, 3 Camp. 103.

Whilst the agency of the broker subsists in the usual manner, the underwriter cannot recover from him the premium without allowing for returns to which, by events, the assured has become entitled. *Shee v. Clarkson*, 12 East, 507. A broker is not entitled, upon the ground of any usage of trade, to a commission of twelve per cent on the balances which he pays over to the underwriters who employ him; such allowance is merely a gratuity. See *Levi v. Barnes*, Holt, 412.

As to their Liabilities.—An agent is not liable for neglect when the insurance is illegal (*Webster v. De Tastet*, 7 T. R. 157. *Fornin v. Oswell*, 3 Camp. 357); but he is expected to possess a competent degree of knowledge, and is liable for losses accruing from the want of it. *Park v. Hammond*, 6 Taunt. 495; 2 Marsh. 189; Holt, 86; 4 Camp. 344.

An insurance-broker, who debits an underwriter with a loss, and takes his acceptance for a protracted payment of the balance of account between them, is liable to the assured for money had and received. *Wilkinson v. Clay*, 6 Taunt. 110. *Ovington v. Bell*, 3 Camp. 237. *Baker v. Langhorn*, 4 id. 399, *contra*.

Where a person employed by shipowners, or their agent, effects a policy of insurance, and represents himself as the principal broker who cause such assurance to be effected:—*Held*, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are not liable to the owners in an action for money had and received. See *Bell v. Jutting*, 1 Moore, 155. *Callon v. Kelson*, 10 W. R. 193.

When an insurance is discovered to be void, from the broker having suppressed a material communication, the assured is not bound in favour of the broker to resist refunding subscriptions paid to him by underwriters, under a mistaken supposition of liability. *Maydew v. Forester*, 5 Taunt. 615.

A broker, by his conduct, may render himself liable to be sued for the amount of a loss, in an action for money had and received, although he has not, in fact, received the money from the underwriters. *Farmer v. Russell*, 1 B. & P. 296. *Dixon v. Hamond*, 2 B. & A. 310. *Andrews v. Robinson*, 3 Camp. 199. *Wilkinson v. Clay*, 6 Taunt. 110.

A broker who has received the full amount of the insurances is liable to an action for money had and received, at the suit of a part-owner of the vessel, although there are several other persons interested as part-owners, and who have given the defendant notice of their interest. *Roberts v. Ogilby*, 9 Price, 269.

A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence that he was directed also to insure against British capture, for that does not render the whole insurance illegal, though it would be void *pro tanto*. See *Glaser v. Cowie*, 1 M. & S. 52.

Brokers were directed to effect an insurance "at and from Teneriffe to London:"—*Held*, they were liable for not inserting in it "liberty to touch and stay at all or any of the Canary Islands," that being usually inserted in policies from Teneriffe. *Mallough v. Barber*, 4 Camp. 150. *Smith v. Price*, 2 F. & F. 748. *Fomin v. Oswell*, 3 Camp. 357.

Where a broker, who has been ordered to effect a policy, represents that he has executed the order, an action of trover may be maintained against him for the instrument, although no policy has been actually entered into. *Harding v. Carter*, Park, Ins. 4. And he may avail himself of any ground of defence which would have been an answer to an action on the policy if properly effected. *Delany v. Stoddart*, 1 T. R. 22. *Bristow v. Waddington*, 2 W. R. 355. But a broker is not liable to an action for damages, if nothing could have been recovered from the underwriter, although they may have been in the habit of submitting to losses on similar occasions. See *Webster v. De Tastet*, *supra*.

XX. Of Actions upon the Policy.

(A) *When Maintainable.*[1]

(B) *Parties.*[2]

(C) *Declaration.*[3]

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[1] An action lies although there be a stipulation in the policy that the matter shall be referred in case of a loss or dispute. *Kill v. Hollister*, 1 Wils. 129. *Thompson v. Charnock*, 8 T. R. 139.

Although where a right of action has accrued the parties cannot by contract provide that the courts shall not have jurisdiction to award and enforce damages in respect of it (*Harris v. Reynolds*, 7 Q. B. 71. *Horton v. Sayer*, 4 H. & N. 643. *Scott v. Avery*, 8 Ex. 487), yet there is no objection to a condition in a policy of insurance stipulating that, if any difference shall arise, it shall be referred to arbitration to settle the amount payable, and the obtaining the decision of the arbitrators shall be a condition precedent to the maintaining an action; for this is, in fact, only a qualified contract of insurance, and such a provision operates to prevent any cause of action whatever from arising, until the amount to be paid has been ascertained by the arbitrators. *Scott v. Avery*, 5 H. of L. C. 811. *Tredwen v. Holman*, 31 L. Ex. 398. *Dauntern v. Accidental Insurance Co.* 10 Q. B. 17; and *see ante*, 211 n., and *Westwood v. India Board*, H. T. Q. B. 1863.

[2] When the policy is effected in the name of a broker or agent the action may be brought in his name, or in the name of the principal. *Parker v. Beasley*, 2 M. & S. 426. *Hagedorn v. Oliverson*, id. 485.

If the policy has been effected in the names of two persons, when only one of them is interested, the action may be brought in the name of that one. *Marsh v. Robinson*, 4 Esp. 98. And though the person whose name is used in the policy is interested in the property insured jointly with another, the action may be brought in his separate name, the joint interest being stated in the declaration. *Cosach v. Wells*, 1 Chit. on Pl. 5, 4th ed. But an insurance-broker who effects a policy not in his own name, but in the name of his principal, can in no event sue thereon in his own name. *Carter v. Eason*, 2 M. & S. 128.

If a ship insured is sold with the policy, the vendee cannot sue thereon. *M'Carthy v. Abel*, 5 East, 393. If the policy is by deed-poll, and is effected with one of several owners who is named in it, the other parties really interested in the subject-matter of the insurance may sue on it jointly with him, although they are not named in the deed, provided they are sufficiently designated in it; that is to say, if the policy shows that there are other parties interested, and the covenants are made with the assured. *The Sunderland Marine Insurance Co. v. Kearney*, 16 Q. B. 925.

A change in the interest on the policy by assignment will not preclude the original insured from suing. *Sparkes v. Marshall*, 2 Bing. N. S. 761; 3 Scott, 172.

[3] The policy, if set out, should be set out in the past tense, according to its legal effect, the regulations indorsed being deemed part of it. *Strong v. Harvey*, 3 Bing. 304. But clauses which do not bear upon the plaintiff's cause of action, and are unnecessary to a just comprehension of it, need not be detailed. *See* 4 Taunt. 285. The qualifications introduced into the contract by means of warranties or exceptive stipulations should be stated. *See* Form, B. & L. 106.

If it be stated, though unnecessarily, that the plaintiffs were the persons residing in Great Britain, who received the order for and effected the insurance, the allegation must be proved. *Bell v. Janson*, 1 M. & S. 201.

When the policy is effected through the medium of an agent, it need not allege the agency. *Hamilton v. Mendes*, 2 Burr. 1198.

When a policy is in the common form on ship and goods, a general averment is proper, that the defendant became an insurer on the premises mentioned in the policy. *Haughton v. Ewbank*, 4 Camp. 88.

Where the insurance is on a particular species of goods, an averment that divers goods were put on board is made sufficiently definite by a subsequent allegation that the insurance was made on the goods. *De Symonds v. Johnstone*, 2 N. R. 77.

Where particular exceptions to a general risk are made by warranty, the assured, in declaring on a loss by a risk, need not negative the exceptions. *Rucker v. Green*, 15 East, 288.

When an adjustment has taken place it need not be declared upon specially, but may be given in evidence as an admission, upon the usual declaration. *Rogers v. Maylor*, Park, 163; Marsh. 644. *Christian v. Combe*, 2 Esp. 489. *De Gamon v. Galbraith*, Park, 183. *Sheriff v. Potts*, 5 Esp. 96.

An Allegation of Interest is necessary even in the case of a foreign ship, unless the policy contains a clause denoting the proof of interest to be unnecessary, as the words "interest or not interest," or other words to the like effect. *Cousins v. Nantes*, 3 Taunt. 513. *Nantes v. Thompson*, 2 East, 358; but see *Crawford v. Hunter*, 8 T. R. 15; 3 B. & P. 75. And where on goods, must correctly describe the parties in whom the interest is vested. *Page v. Fry*, 2 id. 240; 3 Esp. 185. This is a material allegation, which requires to be proved in substance as stated. *Emanuel v. Hannan*, 5 Taunt. 101. *Bell v. Ansley*, 16 East, 141. It may be that A., B., C., and D. (or some or one of them) were or was interested, &c., and it may be averred that the insurance was made for the use and benefit of the persons so interested. Rule 9, T.T. 1853.

A declaration that the plaintiffs A. and B.

(D) *Defence and Pleas.*[1]

caused to be effected a policy purporting that C. and Co. did make assurance, and averring the interest in D., is unobjectionable after verdict. *Mellish v. Bell*, 15 East, 4.

In a declaration on a foreign ship, not the property of the king or any of his subjects, there should be an averment to that effect in lieu of an averment of interest. *Nantes v. Thompson*, 2 id. 385. *Kellner v. Le Messurier*, 4 id. 396.

An averment that A., B., C., D., and certain persons trading under the firm of E., F. and Co., were interested in the property, was sufficient on a motion in arrest of judgment. *Wright v. Welbie*, 1 Chit. Rep. 49.

It does not appear necessary to specify in what proportion the several persons were interested. *Carruthers v. Sheddon*, 6 Taunt. 14; 1 Marsh. 416. And the plaintiff may, even before r. 9 T. T. 1853, be admitted to prove a sole interest in himself, although the policy was effected in the names of two persons. *Marsh v. Robinson*, 4 Esp. 98.

An averment of interest at the time of effecting the policy is immaterial, and, if alleged, need not be proved: it suffices to prove that the interest was vested during the period of the risk. *Rhind v. Wilkinson*, 2 Taunt. 237.

The payment of money into court precludes the defendant from objecting that the averment of interest was not substantiated. *Bell v. Ansley*, 16 East, 146.

The averment that the ship sailed, &c. is introduced to show a compliance with the requisitions of the policy; but whether the ship sailed before or after making the policy is immaterial. *Peppins v. Solomans*, 5 T. R. 496; recognised in *Lucena v. Crauford*, 2 W. R. 308. But with reference to the period at which the loss took place, an averment that the ship was lost after she had received her cargo on board and sailed on the voyage, is not satisfied by proof that she was driven from her moorings and lost before the commencement of her voyage. *Abitbol v. Bristow*, 6 Taunt. 462; 2 Marsh. 157.

As to the averment of Loss.—The cause of loss must be correctly stated. *Cullen v. Butler*, 5 M. & S. 461; 4 Camp. 289; 1 Stark. 138. *Butler v. Wildman*, 3 B. & A. 398. *Phillips v. Barber*, 5 id. 161. *Rohl v. Parr*, 1 Esp. 445. *Kulen Kempe v. Vigne*, 1 T. R. 304. Hence, an averment of loss by a seizure by an armed body of rioters is not equivalent to an averment of a loss by seizure by people to the insured unknown. *Nesbitt v. Lushington*, 4 id. 783.

It is a sufficient allegation of barratry that the goods were lost by the fraud and negligence of the masters and mariners. *Knight v. Cambridge*, 1 Stra. 581; 2 Ld. Raym. 1346; 8 Mod. 230.

A count on a policy stating a loss by the perils of the sea appears to be sustainable upon proof that the ship was wrecked, although this was occasioned by the barratry of the master and mariners. *Heymon v. Parish*, 2 Camp. 149. So a count stating a loss by capture is sustainable on proof that the ship was captured by a privateer. *Arcangelo v. Thompson*, id. 620.

The averment of the amount of the loss is not material, for a total loss may be given in evidence under an allegation of a partial loss. *Gardiner v. Croasdale*, 2 Burr. 904; 1 Bl. Rep. 198. So the plaintiff may give in evidence any damage that is within the cause of action as stated, without its being specially averred. *Carey v. King*, Hardw. 304. *Pulver v. Glover*, 12 East, 124.

A loss by barratry is well alleged, though the proof is that it happened by the act of an enemy and barratry jointly. *Toulman v. Anderson*, 1 Taunt. 227.

[1] In an action on a policy of insurance an order may be obtained for the inspection, &c. of all papers in the possession of the insured relative to the alleged loss. *Goldschmidt v. Marryat*, 1 Camp. 59. But under such an order it is sufficient to give extracts of those parts of the papers, &c. which are relevant to the subject. *Clifford v. Taylor*, 1 Taunt. 167.

The Statute of Limitations may be pleaded where the loss accrued beyond six years before the commencement of the action. *Hibbert v. Martin*, 1 Camp. 539. To an action for money paid, it seems that the defendant may plead that the policy was so framed as to be useless. *Cole v. Le Soueft*, 5 Dowl. P. C. 41; 3 Scott, 188.

The defendant may plead a settlement and adjustment according to the usage of the customs of merchants. *Stewart v. Aberdeen*, 4 Mee. & W. 211. A release by one of several plaintiffs in an action on a policy of insurance is a bar to the action. *Wilkinson v. Lindo*, 7 id. 81.

A plea alleging unseaworthiness and neglect to repair, without showing knowledge, and an opportunity to repair, is no defence to an action on a time policy. *Hollingworth v. Brodrick*, 2 Nev. & P. 608; 7 Ad. & E. 43.

A Set-off cannot, in general, be pleaded to an action on a policy. *Grant v. Royal Exchange Assurance Co.*, 5 M. & S. 439.

A claim against the assured for premiums due from them cannot be set off in an action upon the policy for a partial loss, even if it have been adjusted, for in either case the action is only for unliquidated damages. *Castelli v. Boddington*, 1 E. & B. 66, 879. *Luckie v. Bushby*, 13 C. B. 864. See *Beckwith v. Bullen*, 8 E. & B. 683. The two insurance companies under 6 Geo. 4, c. 18, may plead generally that they have not broken the covenants. 31 L. J. Q. B. 93.

As to Payment into Court.—When the defendant paid money into court generally upon a declaration containing a count on a policy of insurance with the money counts, the court of King's Bench held this was an admission of the policy stated in the special count. *Andrews v. Palsgrove*, 9 East, 325. *Dyer v. Ashton*, 1 B. & C. 3. But the court

(E) *Consolidating Actions.*[1]

(F) *Evidence.*[2]

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of Common Pleas refused to allow the payment to have such effect where the plaintiff had by his conduct induced the defendant to suppose that the question to be tried was a question of fraud. *Muller v. Hartshorne*, 3 B. & P. 556. And a payment of money into court on a policy on goods, beginning the adventure from the loading thereof, does not preclude the underwriter from showing that the goods were laden at the place mentioned in the policy. *Mellish v. Allnutt*, 2 M. & S. 106. Nor is the defendant precluded from objecting to the legality of the contract. *Cox v. Parry*, T. R. 464. *Ribbans v. Crickett*, 1 B. & P. 264.

The payment of money into court on a policy precludes the defendant from objecting that the action is prematurely brought. *Harrison v. Douglas*, 5 Nev. & M. 180; 3 Ad. & E. 396. But where several actions had been consolidated, and a rule for a new trial obtained, the court refused to order the defendant to bring the money into court. *Ohrly v. Dunbar*, 1 Nev. & P. 244.

[1] In an action upon a policy of insurance against several underwriters, the court or a judge will make a rule or order on the application of the defendants for staying the proceedings in all the actions but one, upon the defendants undertaking to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, should a verdict be given therein for the plaintiff. *See* Tidd. 7th ed. 637. The courts may oblige the defendants to submit to reasonable terms, such as admitting the policy (and perhaps if need be, the interest, or any other matter about which no question is raised), producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error. (Id. 636.) And if the defendants be not bound to refrain from bringing error, and error be brought in the cause tried, which is no stay of execution for want of bail in error being put in, still the other defendants will not be precluded from bringing error in the other action, and putting in bail in error so as to stay execution against themselves. 2 N. R. 430. So, when error is brought by leave of the court, the court will stay execution in another action till the judgment of the Court of Error is known, upon reasonable terms. *See* 1 Moore, 79.

If the court think fit to open a consolidation rule, and try a second cause, they will extend to the second trial all those terms necessary for the attainment of justice which they imposed on the first trial; such, for instance, as obliging the underwriters to consent that the deposition of the captain should be read in evidence. *See* 5 Taunt. 165; id. 607.

If the plaintiff succeed in the action tried, he may, after judgment signed therein, obtain a judge's order for leave to enter up judgment, and tax costs, and issue execution in the other actions in terms of the rule. By Reg. Gen. (Pr.) H. T. 1853, r. 13, where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court. *See* Consolidating Actions, vol. iii. p. 178.

Actions may be consolidated before declaration. *Hollingworth v. Brodrick*, 4 Ad. & E. 646; 6 Nev. & M. 240. But where the proceedings are not vexatious the court will not compel a party to consolidate. *Doyle v. Stewart*, 4 Nev. & M. 873. And if the same plaintiff sues different defendants, the court will not consolidate the actions without consent. *M'Gregor v. Horsfall*, 3 Mee. & W. 321; 6 Dowl. 338. *See* vol. iii. p. 178.

[2] On the production of the policy, it may be shown that it was not stamped when effected, although it may appear to be so when produced at the trial. *Roderick v. Hovil*, 3 Camp. 103. *See* duties payable by 7 Vic. c. 21.

Secondary evidence of the policy may be received after showing it to have been lost. *Williams v. Younghusband*, 1 Stark. 139. *Brewster v. Sewell*, 3 B. & A. 299.

Proof that the agent had been in the habit of subscribing policies in the name of the defendant, with his knowledge (*Neale v. Irving*, 1 Esp. 61. *Haughton v. Ewbank*, 4 Camp. 88); or that he had been in the habit of paying losses upon policies so subscribed by the agent, is sufficient proof of the agency. *Haughton v. Ewbank, supra.*

If executed by an agent, the agency must be distinctly proved. *Palmer v. Marshall*, 8 Bing. 79; 1 M. & Scott, 161.

A memorandum indorsed on a ship's policy of insurance, for a change of voyage, was signed by an agent of the insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the company: — *Held*, that this was sufficient proof of the agent's authority to sign such memorandums, and that the other policies on which such memorandums had been signed need not be produced. *Brocklebank v. Sugrue*, 5 C. & P. 21; 2 M. & M. 102.

When the declaration contains an averment that the plaintiffs were the persons residing in Great Britain who received the order for and effected the policy, proof must be produced which corresponds with the averment. *Bell v. Janson*, 1 M. & S. 201; *Arcangelo v. Thompson*, 2 Camp. 620.

An allegation that the policy was effected for the plaintiff by A., B., and C., is satisfied by proof that it was effected by the firm of A. & B., there being, in fact, two firms which had two members in common. *Dickson v. Lodge*, 1 Stark. 226.

The production by the assured of a policy of insurance, with an adjustment on it, and the name of the defendant struck off the policy itself, does not prove the payment of the sum so adjusted. *Adams v. Sanders*, 1 M. & M. 373; 4 C. & P. 25. So, in an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that, when the vessel left the port of outfit, she was bound upon the voyage insured. *Koster v. Innes*, 1 R. & M. 333.

If the act of incorporation provides that it shall be judicially taken notice of, it is sufficient to produce a copy from the queen's printer. *Beaumont v. Mountain*, 4 M. & Scott, 177; 10 Bing. 404.

Connected with insurances, knowledge is always a question for the jury. *Harratt v. Wise*, 9 B. & C. 712.

The non-arrival of the ship at her destined port within a reasonable time is evidence of loss. *Kosler v. Reed*, 6 B. & C. 19.

Parol evidence as to the usage at Lloyd's is inadmissible. *Blackett v. Royal Exchange Assurance Co.* 2 C. & J. 244; Tyr. 266.

As to the Proof of Interest.—The interest in a ship is proved by acts of ownership. *Amery v. Rogers*, 1 Esp. 207. *Robertson v. French*, 4 East, 130. *Marsh v. Robinson*, 4 Esp. 98.

A ship's registry, previous to the 14 & 15 Vic. c. 99, was not evidence for the insured in an action on a policy (*Pirie v. Anderson*, 4 Taunt. 652. *Fraser v. Hopkins*, 2 Taunt. 5; 2 Camp. 170. *Flower v. Young*, 3 Camp. 241), for the owners could not rely upon the register as evidence if their title for it amounts to nothing more than their own declaration. (Id. 241.)

But now, by the 14 & 15 Vic. c. 99, s. 12, registers, and copies thereof, and certificates of registry granted under the acts then in force relating to the registry of British ships, purporting to be signed as required by law, shall be received as *primâ facie* proof of all the matters contained or recited in such registers and copies, and of all the matters contained or recited in or indorsed on such certificates of registry. And by the Merchant Shipping Act, 1854, s. 107, every register of or declaration made in pursuance of the second part of that act, in respect of any British ship, may be proved either by the production of the original or by an examined copy, or by a copy purporting to be certified under the hand of the registrar, or other person having the charge of the original, and shall be received as *primâ facie* proof of all the matters contained or recited in such registers, or copies thereof, and of all the matters contained in or indorsed on such certificates of registry, and purporting to be authenticated by the signature of a registrar. The register may, therefore, be given in evidence for this purpose, but it ought to be coupled with acts of ownership.

A certificate of registry affords conclusive evidence that a person not named therein is not owner. *Marsh v. Robinson*, 4 Esp. 98. *Camden v. Anderson*, 5 T. R. 709.

When the interest in the ship is claimed in pursuance of a bill of sale or other writing, and the insured do not rely upon possession, the bill of sale, or other document, must be proved. *Teed v. Martin*, 4 Camp. 90.

The purchase of a ship in a foreign country may be proved by a copy of a bill of sale, issued by a public officer, whose duty it was to record the original and authenticate the copy. *Woodward v. Larking*, 3 Esp. 286.

An averment that A. was the sole owner of the ship to a certain day, is not disproved by evidence that he executed a bill of sale of a part before that day, and that on that day the requisites of the registry acts were complied with. *Ritchie v. St. Barbe*, 4 Taunt. 768. Nor is parol evidence of ownership, arising from possession at a certain period, disproved by showing a prior register in the name of another person, and a subsequent register to that person. *Robertson v. French*, 4 East, 130.

Where there is a stipulation in a policy on a foreign ship that the policy shall be sufficient proof of interest, and there is judgment by default, the plaintiff in the writ of inquiry need only prove the defendant's subscription, without giving any evidence of the interest. *Thelluson v. Fletcher*, 1 Dougl. 315.

Evidence of Value must also be given, except in the case of a valued policy, where it is only necessary to prove some interest to take the case out of the objection of an insurance without interest. *Lewis v. Rucker*, 2 Burr. 1171.

When the policy is on goods, producing a bill of parcels from the vendor abroad, with a receipt to it, and proof of his handwriting, is sufficient evidence of interest. *Russell v. Bæhme*, 2 Stra. 1127. Or the evidence of the captain that he had the goods on board, and that the bill of lading was signed by him. *M'Andrew v. Ball*, 1 Esp. 373.

A bill of lading is evidence of property in the goods, and if indorsed, the indorsement must be proved. *Hibbert v. Carter*, 1 T. R. 745. *Caldwell v. Ball*, 2 id. 205. When it is not indorsed, the master should be produced, or his handwriting should be proved. *Haddon v. Parry*, 8 Taunt. 808.

The shipment may be proved by a copy of an official paper containing an account of the cargo. *Johnson v. Ward*, 6 Esp. 47.

The production of the bill of lading is not indispensable to prove the shipment of the goods. See *Davis v. Reynolds*, 1 Stark. 115.

When the policy is on freight, evidence must be given that the right to freight had attached. *See* 1 M. & S. 303.

License.—When it is necessary to prove a license, the regular document must be produced, if in existence; or, in case of a loss, proof of the loss must be adduced, and secondary evidence given of the contents of the instrument. *See* 8 East, 273; 3 B. & A. 296; 1 Camp. 501.

Compliance with Warranties.—When the ship is warranted to sail with convoy, the compliance with the warranty will be pre-

(G) *Verdict.*[1] (H) *Costs.*[2]

INTEREST.

I. When Payable.[3]

sumed if that was required by the existing laws; evidence of the laws having been infringed must be adduced by the defendant. *Thornton v. Lance*, 4 Camp. 231.

The official letter of the commander of a convoy to the Admiralty at the end of the voyage, is good evidence of the facts there stated respecting the convoy. *Watson v. King*, 4 Camp. 275. So is the log-book of a ship of war. *D'Israeli v. Jewett*, 1 Esp. 427.

Nationality is proved by showing that the vessel carried the flag of that state when free from all danger of capture, and that the captain addressed the consul of such state in a foreign port. *Arcangelo v. Thompson*, 2 Camp. 620.

Of the Loss and its Amount.—The loss proved must correspond with the nature of the loss described in the declaration. *Kempe v. Vigne*, 1 T. R. 304. And the best evidence must be adduced. The captain's protest is not sufficient. *Senat v. Porter*, 7 id. 153. So salvage, payable under the decree of a Court of Admiralty, must be proved by regular evidence of the judgment of the court. *Thelluson v. Sheddon*, 2 N. R. 299.

A loss occasioned by the expense of salvage may be given in evidence under a general allegation that the ship was sunk and the goods spoiled. *Cary v. Smith*, Ca. Temp. Hard. 306.

An entry in Lloyd's books stating a capture is evidence of the fact as against the defendant, a subscriber to Lloyd's. *Abel v. Potts*, 3 Esp. 242.

And the sentence of condemnation of a ship by the court of Admiralty is good evidence of the grounds of condemnation, but not of a capture. *Marshall v. Parker*, 2 Camp. 69.

As barratry is in the nature of a crime, a loss by barratry cannot be presumed. *Everth v. Hannam*, 6 Taunt. 375; 2 Marsh. 72. This, however, does not mean that there must be an actual eye-witness to the fact: it may be decided by reasonable evidence of the circumstances. See *Hucks v. Thornton*, Holt, 30.

In the case of a supposed loss at sea there must be some evidence of the ship sailing upon the voyage mentioned in the policy. *Cohen v. Hinckley*, 2 Camp. 51.

The amount of loss may be shown by a certificate from the vice-consul abroad. *Waldron v. Coombe*, 3 Taunt. 162.

In an action for a loss by barratry in the master, an objection by defendant, that the plaintiff ought to prove that the master was not owner or freighter, and that he did not act under the direction of the person who was:—*Held*, that, if the master was owner or freighter, or acted under the directions of the owner, the burden of proving that fact lay on the defendant. *Ross v. Hunter*, 4 T. R. 33.

[1] Where there has been only an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find a total loss, the plaintiff entering into a rule to account to the underwriters for what part of the insured property he shall recover. *Barber v. French*, 1 Dougl. 294 And if the plaintiff has evidently sustained some damage, and the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages. *Ferze v. Thompson*, 1 Taunt. 121.

Where, in an action on a policy on a ship for loss by striking on a rock, the jury found that the plaintiff had sustained a partial loss, but to what extent there was no evidence, and that the ship might have been repaired but for the negligence of the resident agents:—*Held*, that they ought to find for the plaintiff, with nominal damages. *Tanner v. Bennett*, 1 R. & M. 182.

[2] A cause concluded in the consolidated rule may be tried again, without paying for the costs of the first. *Doyle v. Douglas*, 4 B. & Adol. 544.

Where several suits are stayed pending one, and money paid into court, the plaintiff is entitled to costs in the other suits up to time of such payment. *Powell v. Parkinson*, 6 M. & S. 107.

[3] The most general term to denote a property in lands or chattels, estate, right, or title. In the text it refers to a sum paid or allowed, or compensation for the loan or use of another's money, or an increase or addition to it. 2 Steph. Com. 137.

By 3 & 4 Wm. 4, c. 42, s. 28, it is enacted, "that, upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment: Provided that interest shall be payable in all cases in which it is now payable by law."

By sect. 29 it is enacted "that the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assur-

ance made after the passing of this act."

And it is further enacted, "that if any person shall sue out any writ of error upon any judgment whatsoever, given in any court, in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof."

By 1 & 2 Vic. c. 110, it is enacted, "that every judgment-debt shall carry interest at the rate of four per cent from the time of entering up the judgment. See *Newton v. Grand Junction Railway Co.* 16 L. J. Ex. 276.

According to the rule at common law, in order to entitle a creditor to recover interest it was necessary to show, where the action was not on a bill of exchange or promissory note (vol. ii. p. 410), that there was a promise to pay interest, either express or implied, from the usage of trade or other circumstance: for the general rule at common law is, that the law does not imply a contract on the part of a debtor to pay interest on the sum he owes, though the debt may be of a fixed amount, and may have been frequently demanded. Nor is interest due as a matter of right (independently of the statute) in the absence of an express stipulation, even in the case of written instruments, unless they be commercial instruments of a negotiable nature, such as bills of exchange and promissory notes. Chit. Contr. 5th ed. 563.

An agreement between the parties that interest should be paid, may be inferred from the course of dealing between them, *e. g.* if it had been frequently charged and paid without objection in former and similar accounts. *Calton v. Bragg*, 15 East, 223. *Eaton v. Bell*, 5 B. & A. 34. *Gwyn v. Godby*, 4 Taunt. 346. And if it appear to be the invariable custom or usage in any particular trade or business to charge interest, this may amount to evidence of a contract to allow it between parties having transactions therein. (Id.) See *Ikin v. Bradley*, 2 Moore, 206. Or where it can be inferred from the terms and nature of a contract. *Ashwell v. Staunton*, 30 Beav. 52.

To recover interest on advances of money, a contract must be proved. *Carr v. Edwards*, 3 Stark. 132. A contract on a loan of money, to add the interest to the principal at the end of each year, and pay interest on the whole sum as principal, is valid in law, and may be inferred from accounts stated by the debtor on that footing (*Newall v. Jones*, 1 M. & M. 449; S. C. 4 C. & P. 124); but upon a deposit under an agreement, no interest until after demand of the principal:—*Held*, upon a bankruptcy, not to apply to a demand by the assignees. *Edwards v. Vere*, 2 Nev. & M. 120; 5 B. & Adol. 282. And where goods were consigned by a foreign house to their own account, with directions to the defendants to remit the proceeds to the plaintiffs, and advise them of having done so, and the plaintiffs wrote to know the probable amount, to which the defendants replied that they had received the goods with such directions, but had not then disposed of them; the consignors afterwards failing, the defendants retained the proceeds in satisfaction of their own balance:—*Held*, that the plaintiffs were entitled to recover the amount as money had and received; but the claim for interest could not be supported. *Fruhling v. Schroder*, 2 Scott, 135; 7 C. & P. 193. See *Noble v. National Discount Co.* 29 L. J. Ex. 210.

Where a surety has been compelled to pay money for his principal, he is entitled, in an action to recover that sum against the principal on the implied contract of indemnity, to recover interest from the time of payment. *Petre v. Duncombe*, 20 L. J. Q. B. 242. *Smith v. Howell*, 6 Ex. 737.

Interest payable on a bill or note cannot, in a legal sense, be separated from the principal. *Hollis v. Palmer*, 2 Bing. N. S. 713.

Where, after action brought on an attorney's bill, it is referred for taxation, the plaintiff cannot proceed with the action to have the interest assessed by a jury. *Berrington v. Phillips*, 1 Mee. & W. 48; 4 Dowl. P. C. 758; 1 Tyr. & G. 322.

Interest, it is said, is at common law always payable on a written contract for the payment of money on a day certain. *De Havilland v. Bowerbank*, 1 Camp. 50.

Interest is, it seems, recoverable on an account stated for money lent. *Blaney v. Hendrick*, 2 W. Black. 761; 3 Wils. 205. But mere striking of a balance of an account for goods sold does not entitle the party, in whose favour the balance is found, to interest from that time, unless the money then was to be paid. *Chalic v. York*, 6 Esp. 45.

Agents, in account with their principal, may charge interest and make annual accounts without any express contract to that effect. *Bruce v. Hunter*, 3 Camp. 467.

It seems doubtful whether interest necessarily accrues on a deposit which is recovered back. *Maberly v. Robins*, 5 Taunt. 625; 1 Marsh. 258.

Interest is not payable on the price of goods sold, although a day fixed for the payment of the amount. *Gordon v. Swan*, 12 East, 419; 2 Camp. 429. *Calton v. Bragg*, 15 East, 225. *Semble*, overruling *Mountford v. Willis*, 2 B. & P. 337. But it is recoverable where goods are sold under a contract for bills or notes to be given on a specified day, and the interest in such case may be recovered under the common count for goods sold and delivered (*Marshall v. Poole*, 13 East, 98. *Slack v. Lowell*, 3 Taunt. 157); or under a special count, whether the defendant has or has not accepted the goods. *Boyce v. Warburton*, 2 Camp. 480.

Interest is not, in general, recoverable in an action for money had and received (*Walker v. Constable*, 1 B. & P. 306), even where it is paid into the defendant's hands by a third person expressly for the plaintiff's use (*De Bernales v. Fuller*, 2 Camp.

II. Rate of Interest.[1]

INTEREST reipublicæ ut sit finis litium. 6 Rep. 9. *It is for the public good that there be an end to litigation.*[2]

INTERLINEATIONS. *See* Alteration, vol. i. p. 308.

INTERPLEADER ISSUE.

I. Relative to Private Claimants, p. 225.

(A) *Statute*, p. 225.

(B) *In what cases Interference may be obtained*, p. 226.

(C) *Construction of the Interpleader Act*, p. 226.

(D) *To what Court Application for Rule to be made*, p. 226.

(E) *Of the Affidavit*, p. 226.

(F) *Service of, and Abandoning Rule*, p. 226.

426); and the circumstance of the money having been obtained fraudulently will not vary the rule. *Crockford v. Winter*, 1 Camp. 129.

Interest is not allowable by law upon money lent without a contract for the payment of it, either express or implied (*Calton v. Bragg*, 15 East, 223. *Shaw v. Pictors*, 7 D. & R. 201; 4 B. & C. 715); or, unless it is to be repaid on a day certain under a written contract. 3 & 4 Wm. 4, c. 42, s. 28, *ante*, p. 222.

Interest is not, in general, recoverable after a tender has been made, even in action on a bill or note. *Dent v. Dunn*, 3 Camp. 296.

The jury cannot include interest in the amount of their verdict in an action for work and labour, unless a demand has been made under 3 & 4 Wm. 4, c. 42. *Trelawny v. Thomas*, 1 H. Black. 303. *Neilson v. Hayward*, Ex. 9 Price, 134. As to interest on Bills and Notes, *see* vol. ii. p. 410. When payment of a condition precedent, *Dodd v. Ponsford*, 6 C. B. (N. S.) 324.

The following is the common count for interest:—"Money payable by the defendant to the plaintiff for interest upon money due from the defendant to the plaintiff, and forborne at interest by the plaintiff to the defendant at his request."

[1] Contracts for more than five per cent interest were formerly prohibited by the legislature; but by the 17 & 18 Vic. c. 90, all laws against usury are repealed from the 10th day of August, 1854. *See post*, Usury.

There cannot be a title to compound interest without a contract, express or implied, from the modes of dealing with former accounts or custom, and in general a contract or promise for compound interest is not available in England, except, perhaps, in the case of mercantile accounts current for mutual transactions. *Fergusson v. Fyffe*, 8 Cl. & F. 121. A customer is not bound or affected by the practice of his bankers, to charge interest upon interest, by making rests in their accounts at stated intervals, unless it be proved that he was aware that such was their custom. *Moore v. Voughton*, 1 Stark. 487.

When the payment of a debt is wrongfully withholden, the rate of interest is to be calculated according to the laws of the country where the debt was contracted, and is not governed by the amount of the interest allowed in the country where the debt is sued for; but in a court of equity the debtor is allowed the rate of exchange of the country where the debt was contracted. *See* 1 Eq. Abr. 289; 2 Bridgm. Ind. 88. In an action on a bill of exchange, drawn in Bermuda on a person in England, and also payable in England, the plaintiff recovered seven and a-half per cent interest, being the rate of interest at Bermuda. *See* Chitty on Bills, 5th ed. 540; 6 T. R. 171, 172. Where a debt was contracted in England, but the bond was taken for it in Ireland, to be paid at a certain time, and at seven per cent, it was held by the Court of Chancery that it should carry Irish interest (*see* 2 Atk. 382; Prec. Chanc. 128; 1 P. Wms. 395; 2 Atk. 465); but a different doctrine was held when the bond, contract, or mortgage, was executed in England, in which case only five per cent was allowed, independently of the stat. 14 Geo. 3. *See* 1 P. Wms. 696; 3 Atk. 727; 1 Ves. 1027; 11 Ves. jun. 314. *See* vol. iii. p. 494.

[2] If an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different result. In such a case the matter in dispute having passed *in rem judicatem*, the former decision is conclusive between the parties if either attempts by another action to re-open the question. *Greathead v. Bromley*, 7 T. R. 456. *Outram v. Morewood*, 3 East, 365: *Per Lord Kenyon, C. J. Lord Bagot v. Williams*, 3 B. & C. 235. *See* Estoppel, vol. iv. p. 280.

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I. Relative to Private Claimants.

(A) *Statute.*[1]

[1] There was a process of interpleader at common law, but it had a very narrow range of application, and, prior to the statute of 1 & 2 Wm. 4, it fell into entire disuse, and although the application of the legal remedy of interpleader has been greatly extended, yet the jurisdiction in equity seems to have been left substantially on the old foundation. A bill of interpleader is one which is filed by a person from whom two or more other persons, whose titles are connected by reason of the one being derived from the other, or of both being derived from a common source, and whose rights he cannot readily determine, have claimed the same thing wherein he himself claims no interest. By the statute before referred to (1 & 2 Wm. 4, c. 58, s. 1), it is enacted, "that upon application made by or on behalf of a defendant in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued, or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay, or dispose of the subject-matter of the action in such manner as the court or any judge thereof may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order to hear the allegation as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally, to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner; and to make such other rules therein as to costs and all other matters as may appear to be just and reasonable."

The judgment of the court in any such action or issue, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them. (Sect. 2.) If such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators (saving nevertheless the right or claim of such third party against the plaintiff), and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable. (Sect. 3.) Every order not made by a judge sitting in open court is liable to be rescinded or altered by the court (Sect. 4); but a judge, instead of himself deciding upon the application, may refer it to the court. (Sect. 5.) All rules, orders, matters, and decisions, to be made and done in pursuance of this act (except only the affidavits to be filed), may, together with the declaration in the cause, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the cause may be evidence in future times, if

(B) *In what cases Interference may be obtained.*[1]
(C) *Construction of the Interpleader Act.*[2]
(D) *To what Court Application for Rule to be made.*[3]
(E) *Of the Affidavit.*[4]

required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule and order so entered shall have the force and effect of a judgment (except only as to becoming a charge on any lands, tenements, and hereditaments), in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fieri facias* or *ca. sa.*, adapted to the case, together with the costs of such entry, and of the execution if by *fi. fa.*, and such writ or writs may bear teste on the day of issuing the same, whether in term or in vacation, and the sheriff, or other officer executing any such writ, shall be entitled to the same fees, and no more, as upon any similar writ grounded on a judgment of the court. (Sect. 7.) By sect. 12, 23 & 24 Vic. c. 126, these provisions are extended to cases where the title of the claimants have not a common origin, but are adverse to, and independent of, one another. See *Slaney v. Sidney*, *infra*, and 2 Dowl. P. C. (N. S.) 801.

[1] The statute only applies where the cross-claims are on the same subject-matter. *Farr v. Ward*, 2 Mee. & W. 844.

A party disclaiming all interest beyond a lien on the chattel may obtain the interference of the court (*Cotter v. Bank of England*, 2 Dowl. 728; 3 M. & Scott, 180. *Best v. Heyes*, 3 F. & F. 113); but if the proceedings be stayed by injunction the court will not grant the rule. *Arayne v. Lloyd*, 1 Bing. N. S. 720; 1 Scott, 609. So a claim as to goods in the hands of a constable, and claimed by the party charged with stealing them, is not a case within the act. *Parker v. Linnett*, 2 Dowl. 562.

A tenant who receives a notice from mortgagee not to pay the rent (*Murdoch v. Taylor*, 6 Bing. 293); or a claim by an administrator under a sale (*James v. Pritchard*, 8 Dowl. P. C. 890; 7 Mee. & W. 216); or conflicting claims for a reward offered, have been held not within the 1 & 2 Wm. 4. *Gay v. Pitman*, 5 Scott, 795. *Grant v. Fry*, 4 Dowl. P. C. 135. And it seems the act does not extend to cases where special damage is claimed (*Lucas v. London Dock Co.* 4 B. & Adol. 378); nor to an action for dividends in a railway company (*Dalton v. Midland Railway Co.* 12 C. B. 458), for a stake in an illegal race (*Applegarth v. Colley*, 2 Dowl. N. S. 223), or where the Crown is a party (*Candy v. Maughan*, 1 D. & L. 745; 7 Scott, N. R. 401. *Reid v. Hearn*, 6 Jur. N. S. 267), or a foreigner residing abroad. *Patorni v. Campbell*, 12 Mee. & W. 277. *Lindsey v. Barron*, 6 C. B. 291. And this relief will not be granted where the defendant has by his own act incurred a personal liability in respect of the subject-matter (*Horton v. Earl of Devon*, 4 Ex. 497. *Patorni v. Campbell, supra. Lindsey v. Barron, supra*); and before 23 & 24 Vic. c. 126, s. 12, where the parties claim different things, as where one claims the goods and another the price. *Slaney v. Sidney*, 14 Mee. & W. 800. And it was refused where the defendant did not know with whom he contracted. *Turner v. Mayor of Kendal*, 13 Mee. & W. 171; 2 D. & L. 197. But see *Meynell v. Angell*, 31 L. J. Q. B. 14.

Where a party to an interpleading rule declined to proceed, the court refused to substitute another claimant, unless the former were party to the rule for substituting the other. *Lydal v. Biddle*, 5 Dowl. 244.

The act does not apply to claims set up in consequence of proceedings in equity. *Sturgess v. Claude*, 1 Dowl. P. C. 505.

Where a party has given a promissory note for money due by him, and which is deposited with a third person for the benefit of the creditor, and an action is brought upon it by the trustee, it is no ground for obtaining relief under the 1st sect. that an action is anticipated at the instance of the creditor. *Newton v. Moody*, 7 Dowl. P. C. 582.

The act does not apply to actions for unliquidated damages. *Walter v. Nicholson*, 6 id. 517.

A case where the acceptor was sued on the same bill by two holders, was held to be within the statute. *Regan v. Serle*, 9 Dowl. 193.

[2] The act is not compulsory upon the court, but discretionary only. *Belcher v. Maberly*, 2 M. & Scott, 189.

[3] Under 1 & 2 Wm. 4, c. 58, a judge could not interfere by summons (2 Dowl. P. C. 25); but now, by 1 & 2 Vic. c. 45, s. 2, he may, and he or the court, wherever from the smallness of the amount in dispute it shall appear desirable, may dispose of the matter summarily, upon such terms as shall be thought fit. 23 & 24 Vic. c, 126, s. 14. *See* 13 Mee. & W. 816.

Where process is sued out of different courts, and directed to the same sheriff, he must apply for relief to the respective courts out of which the process issued. 2 Dowl. P. C. 151. Thus, where in the King's Bench it was made part of the motion that the rule should include the execution-creditor in a Common Pleas' cause, so as to save the expense of a separate application to that court, *Patteson, J.*, said it was a point of considerable importance to sheriffs, but he did not think he could be relieved in that way, and granted the rule only in the King's Bench causes.

Where actions for the same subject were brought in two courts against an auctioneer:—*Held*, that he must obtain rules in each court; and he was required to pay into court the whole amount of the produce of the goods sold. *Allen v. Gilby*, 3 Dowl. P. C. 143.

[4] The affidavit must be properly intituled

(F) *Service of, and Abandoning Rule.*[1]
(G) *Form of the Issue.*[2]
(H) *Evidence.*[3]
(I) *Bringing Money into Court, &c.*[4]
(K) *Trial of Issue.*[5]
(L) *Verdict and Judgment.*[6]
(M) *Costs.*[7]

in the action (*Parnite v. Pennell*, 7 Scott, N. R. 834), and show the stage of the cause (*Frost v. Heywood*, 2 Dowl. N. S. 801), and deny collusion with the claimant. It may be made by any one acquainted with the facts.

[1] If the goods be delivered up by the party obtaining the rule, on an indemnity from the claimant, the rule will be discharged with costs. *Tucker v. Morris*, 1 C. & M. 73; 1 Dowl. P. C. 639.

In case of bankruptcy, service of the rule on the execution-creditor, petitioning creditor, and provisional assignee, is sufficient. *Northcote v. Beauchamp*, 1 M. & Scott, 158. *Parker v. North*, id. 156.

A rule on the 1st sect. of 1 & 2 Wm. 4, c. 58, cannot be drawn up for a stay of proceedings, unless notice has been given. *Smith v. Wheeler*, 3 Dowl. P. C. 431.

A married woman may be a claimant in an interpleader issue. *Shingler v. Holt*, 7 H. & N. 65; 30 L. J. Ex. 318. A party in an interpleader issue who has obtained an order for his costs under 1 & 2 Wm. 4, c. 58, s. 7, is a judgment creditor within the sections 60 and 61 of the 17 & 18 Vic. c. 125. *Hartley v. Shemwell*, 1 El. B. & S. 1; 30 L. J. Q. B. 223.

[2] An issue may vary the ordinary effect of the rules of pleading and evidence. Thus, where the court directed, on an interpleading rule, that the right to receive money should be tried in an action for money had and received, the court held that a special agreement was receivable in evidence, although in other cases it would only be admissible under a special count, and that an affidavit, sworn in the original action by the plaintiff, but not used, and reciting the agreement, might be received as secondary evidence of it, where the loss proved; and it would be presumed to have been properly stamped.

The issue is framed by the party ordered to be the plaintiff, and the order either limits a time for the trial, or it may be amended so as to do so.

[3] Interrogatories may be delivered. *White v. Watts*, 12 C. B. 267; 31 L. J. C. P. 381. On a question whether goods belonged to the wife's trustee or the husband on the bankruptcy of the husband, the goods being taken in the execution, evidence of the husband's title under the assignee cannot be received (*Carne v. Brice*, 8 Dowl. P. C. 884; 7 Mee. & W. 183); but the defendant may set up a title in a third party. *Gadsden v. Barrow*, 23 L. J. Ex. 134. *Edwards v. English*, 26 L. J. Q. B. 193; *see* 2 C., M. & R. 658; 7 Mee. & W. 18.

Rules, orders, and other proceedings may be entered of record, and made evidence. 23 & 24 Vic. c. 126, s. 18.

[4] Where the money has been brought into court, a rule for taking it out cannot be obtained before judgment signed on the issue. *Cooper v. Lead Smelting Co.* 9 Bing. 634; 1 Dowl. 728.

[5] Where the declaration on an issue averred that the goods were not the property of the plaintiffs, or either of them: — *Plea*, that the goods were the property of the plaintiffs or one of them: — *Held*, that the defendant had the right to begin, the affirmative lying on him. *Hudson v. Brown*, 8 C. & P. 774. Upon an application for relief under the Interpleader Act, the court will not try the merits of the respective parties upon affidavits. *Dickinson v. Eyre*, 7 Dowl. 721.

A new trial of the issue may be had as in other cases (*James v. Whitbread*, 11 C. B. 406), but there can be no error brought on the judgment, nor any bill of exceptions (*King v. Simmonds*, 7 Q. B. 312; 1 H. of L. C. 754. *King v. Birch*, 7 Q. B. 669); but by sect. 15, 23 & 24 Vic. c. 126, a special case may be stated, and error brought thereon. (Sect. 16.) *See* 10 Ex. 496; 11 id. 113–321. And there may be an appeal to the Exchequer Chamber from interlocutory decisions. 6 Jur. N. S. 22.

[6] The decision is final against claimants served with the rule who do not appear and support their claims. *Ford v. Dillon*, 2 Nev. & M. 662.

Verdict on a feigned issue under the Interpleader Act must be entered up as sect. 7 of that act directs, and, therefore, a judgment signed in an ordinary manner on such issue was set aside by the court. *Dickinson v. Eyre, supra.*

When judgment is signed, the party succeeding may apply to a court or a judge to have the money or property delivered to him (*Cooper v. Lead Smelting Co.* 9 Bing. 634; 1 Dowl. 728), and the court will enforce its order, though a suit in Chancery may be pending as to the subject-matter. *Smith v. Clinch*, 2 Dowl. N. S. 48. The application is for a rule *nisi*, or summons only. *Stanley v. Perry*, 1 Har. & W. 669. It is made to a judge of the court in which the original action was (*Levi v. Coyle*, 2 Dowl. N. S. 932); and if the judge who made the interpleader order reserved the question of costs, the application should be made to him. *Marks v. Ridgway*, 1 Ex. 8.

The proceedings must be entered on a judgment-roll, and carried on as directed by sect. 7 of the act, and sect. 18, 23 & 24 Vic. c. 126; and, we have seen, it is irregular to sign judgment in the usual way. *Dickinson v. Eyre*, 7 Q. B. 307; 7 Dowl. 721. *Lambert v. Barrington*, 2 Dowl. N. C. 149. The judgment and decision is final. 1 & 2 Wm. 4, c. 58, s. 2; 23 & 24 Vic. c. 126, s. 17.

The successful party may either sue out execution by *fi. fa.* or *ca. sa.* under the 7th sect. or he may have execution on the rule of court under 1 & 2 Vic. c. 110, s. 18. *Cetti v. Bartlett*, 9 Mee. & W. 840; 1 Dowl. N. S. 928.

[7] A stakeholder who acts *bonâ fide* is entitled

II. Relative to Sheriffs or other Persons engaged in the Execution of Legal Process.

(A) *Parties to.*[1]

to costs. *Reeves v. Barraud*, 7 Scott, 281.

In case the application is made by a party sued who claims no interest, where the claimant appears, and the court directs a feigned issue between the plaintiff and the claimant, the defendant who applied for the rule will be allowed his costs of the application, and the party who ultimately fails in the issue will be liable for such costs. Marshall on Costs, p. 395.

If the subject-matter of the action is money, the defendant's costs will in general be ordered to be paid out of the fund which the defendant holds, the surplus paid into court, and that the party ultimately successful shall be reimbursed those costs by the other. *Parker v. Linnett*, 2 Dowl. 562. *Pitchers v. Edney*, 4 Bing. N. C. 721. *Smith v. Wigley*, 3 M. & Scott, 174. The defendant is not, however, in every case allowed his costs of the application out of the fund in dispute. Thus, where an auctioneer was sued by the purchaser of an estate for the return of the deposit, on the ground that the vendor had failed to make out a good title; and he applied for a rule calling upon the vendor and purchaser to interplead, the court in directing the issue refused to allow him the costs of the application out of the deposit-money. "The auctioneer," said *Lord Campbell, C. J.*, "contracts with the purchaser to return the deposit in case the sale turns out to be void. It may be reasonable, that where the defendant has become possessed of property to which there are rival claimants without the intervention of a contract, he should have his costs out of the fund, but that is not so here." *Deller v. Prickett*, 20 L. J. Q. B. 151.

Where assignees succeeded on an issue as to the property passing under a fiat, the money having been paid into court:—*Held*, that they were entitled to the costs of trying the issue, and of the application to take the money out, although no application had been made for a consent to do so. *Meredith v. Rogers*, 7 Dowl. 596. So where a party succeeds on an issue, directed under the Interpleader Act, he has a right to his costs of applying to take the proceeds of the sale out the court, although he has not applied to the opposite side for a consent to take the money out. (Id.)

Actions, where commenced by two persons claiming to be the lawful owners of a bill of exchange, against the acceptor, the court directed an issue to try who was lawfully entitled to recover on the bill, and relieved the acceptor from all claim in respect of costs. *Regan v. Searle*, 9 Dowl. P. C. 193. Where an issue directed upon a rule of interpleader, under 1 & 2 Wm. 4, c. 58, to try the right, the party succeeding:—*Held*, entitled as against the unsuccessful party to the costs of the application for an order to the stakeholder, who had been ordered to detain the property until the issue decided, and who after that and demand had declined until application had been made to the court. *Burnes v. Bank of England*, 7 id. 319. But where, in a feigned issue directed under an interpleader rule, the plaintiff claimed 182*l.* and recovered only 50*l.*, and a judge at chambers, in the exercise of the discretion given to him by the statute, directed each party to pay his own costs, the court refused to grant a rule to set aside the order. *Carr v. Edwards*, 8 id. 29; S. C. 8 Scott, 337. And where an issue is tried by direction of the court under the Interpleader Act, the unsuccessful party is liable for the costs. *Bowen v. Bramidge*, 2 Dowl. P. C. 213. So where neither party appears to be in the wrong, the expenses will be directed to be paid by the party ultimately unsuccessful. *Ducar v. Mackintosh*, id 730; S. C. 3 M. & Scott, 174. And where, on an application under s. 1 of 1 & 2 Wm. 4, c. 58, the claimant did not appear, the court refused to allow the costs of the applicant out of the fund in dispute. *Lambert v. Cooper*, 5 Dowl. P. C. 547. An application by a successful party in an issue directed under the Interpleader Act for costs, &c., may be made before judgment actually signed, but the rule cannot be drawn up except on condition of its being signed. *Bland v. Delano*, 6 id. 293.

An auctioneer sued for the deposit is entitled to costs out of the fund, the vendor not appearing. *Pitches v. Edney*, 4 Bing. N. S. 721; 6 Scott, 582. *See* 3 F. & F. 65.

The party succeeding on the issue is generally entitled to his costs, though he do not succeed on the whole of his claim. *James v. Whitbread*, 11 C. B. 406. But in some cases the issue may be taken distributively, where each party has succeeded to a portion of the matters in dispute. Thus, where the plaintiff on the trial of an interpleader issue had a verdict in respect of part of his claim to the amount of 130*l.*, and the defendant had a verdict for the residue of 12*l.*, the court ordered that the costs should be taxed without reference to the fact which was plaintiff and which defendant; each being victorious *pro tanto*, and entitled to the costs to that extent. *Clifton v. Davis*, 6 Ell. & B. 392. And in a case where the claimant alleged a title to 182*l.*, and recovered only 50*l.*, the judge at chambers ordered that each party should pay his own costs, and the court expressed themselves satisfied with the order, saying that the order was just and reasonable. *Carr v. Edwards*, 8 Dowl. 29. As to security for costs, see *Ridgway v. Jones*, 29 L. J. Q. B. 97.

[1] By 1 & 2 Wm. 4, c. 58, s. 6, "when any claim shall be made to any goods or chattels taken or intended to be taken in execution under any process of the superior courts, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process is issued, upon application of such sheriff or other officer, to call

(B) *In what cases Interference may be obtained.*[1]

(C) *Of the Application for Rule or Order.*[2]

before them by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained (*see ante*, p. 225), and make such rules and decisions as shall appear to be just according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court."

By 1 & 2 Vic. c. 45, after reciting the 1 & 2 Wm. 4, c. 58, s. 6, enacts, "that it shall be lawful for any judge of the said Court of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the said Court of Common Pleas, or the County Palatine of Lancaster, or Court of Pleas of the County Palatine of Lancaster, or Court of Pleas of the County Palatine of Durham (being also a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and, the protection of the sheriff or other officer as may, by virtue of the last-mentioned act, be exercised by the several courts respectively, and to make such order thereon as shall appear to be just; and the costs of such proceedings shall be in the discretion of such judge."

[1] The court has power to give a sheriff relief under the Interpleader Act, though the claimant is an infant. *Claridge v. Collins*, 7 Dowl. P. C. 698. Where a new claim was raised after the rule *nisi* granted, the sheriff was allowed to make such new claimant a party to the rule. *Kirk v. Clark*, 4 id. 363. It seems the sheriff is entitled to the rule, though the claim be of an equitable nature. *Putney v. Tring*, 7 Dowl. 811; 5 Mee. & W. 425. In a prior case it was said the court will only interfere when a dispute as to the legal interest has arisen. *Holmes v. Mentze*, 5 Nev. & M. 563; 4 Dowl. P. C. 300; 4 Ad. & E. 127. At all events, an actual claim must have been made. *Isaac v. Spilbury*, 2 Dowl. P. C. 211; 10 Bing. 3; 2 M. & Scott. 341. A mere notice of bankruptcy will not do. *Bentley v. Hook*, 2 C. & M. 426; 2 Dowl. P. C. 339. *Tarleton v. Dumelow*, 5 Bing. N. S. 110; 6 Scott, 687.

The sheriff need not, however, in all cases wait until the claimant actually seize the goods, but the claim must have been actually made. *Lea v. Rossor*, 11 Ex. 13. *Day v. Carr*, 7 id. 883.

The claim must be one which a court of law can recognise. *Roach v. Wright*, 8 Mee. & W. 155; 1 Dowl. N. S. 56. And the goods in dispute must be in his hands. *Scott v. Lewis*, 2 C., M. & R. 289; 4 Dowl. 259. *Anderson v. Galloway*, 1 C. & M. 182; 1 Dowl. P. C. 636. Hence a sheriff who withdraws is not entitled to the interpleader rule. *Holton v. Guntrip*, 6 Dowl. P. C. 130; 3 Mee. & W. 145. *Chalon v. Anderson*, 3 Tyr. 237. The claim may be merely of a lien (*Forth v. Simpson*, 13 Q. B. 680), or by the judgment-debtor claiming in another character; for example, as executor or trustee. *Fenwick v. Laycock*, 2 Q. B. 108; 1 Gale & D. 532.

The court will not interfere if the sheriff has committed a trespass over and above, merely seizing the goods (*Abbott v. Richards*, 15 Mee. & W. 194; 3 D. & L. 487. *Hollier v. Laurie*, 3 C. B. 334); but the court or a judge under the act has power to stay an action brought against the sheriff in such cases. *Winter v. Bartholomew*, 11 Ex. 704. And the court will not interfere if the sheriff has exercised a discretion (*Crump v. Day*, 4 C. B. 760), as by withdrawing from the levy without a seizure when hearing of the claim (*Holton v. Guntrip*, 3 Mee. & W. 145; 6 Dowl. 130); or by trying to negotiate with the party. *Mullon v. Young*, 4 C. B. 371.

The circumstance that the under-sheriff acted as attorney for the claimant will not, unless he has so acted as to prejudice the execution-creditor, induce the court to refuse the sheriff relief under the Interpleader Act. *Holt v. Frost*, 3 H. & N. 821; 28 L. J. Ex. 55.

Where a sheriff has seized goods under a *fi. fa.*, and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution-creditor, but may obtain relief under the 1 & 2 Wm. 4, c. 58, s. 6. *Levy v. Champneys*, 2 Dowl. P. C. 454. And the circumstance of the goods seized being in the possession of a stranger, and not of the defendant against whom the execution issued, does not prevent the plaintiff applying under the act. *Allen v. Gibbon*, id. 292. But the statute does not apply to a struggle between two execution-creditors, each asserting a priority. *Day v. Waldock*, 1 id. 523.

[2] The application is made either to the court or a judge. If there are two writs of *fi. fa.* issuing from different courts, the application must be made to each court, for one court cannot interfere to relieve the sheriff where there are execution-creditors in suits in different courts. *Bragg v. Hopkins*, 2 Dowl. P. C. 151. The jurisdiction of the court is not at an end upon disposing of the sheriff's rule, but it may after the trial of the issues directed award the costs of the party appearing on the sheriff's rule, and of trying the issue. *Seaward v. Williams*, 1 id. 528. The court had no power under the 1 & 2 Wm. 4 to dispose summarily of the matter in dispute between the parties, without the consent of both plaintiff and claimant (*Curlewis v. Povock*, 5 id. 381); but this is no longer necessary. 23 & 24 Vic. c. 126, s. 14. On an application to a judge at chambers, under an Interpleader Act, an order was made, by consent of all parties, to refer the cause, on certain

(D) *When Application should be made.*[1] (E) *Of the Affidavit.*[2]
(F) *Bringing Money into Court, and Sale of Goods Seized.*[3]
(G) *Trial of.*[4] (H) *Judgment.*[5] (I) *Costs.*[6]

terms, to a barrister, instead of an issue being directed. The court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers. *Drake v. Brown*, 2 C., M. & R. 270.

On an interpleader order the judge at chambers has authority to restrain an action against the execution-creditor, as well as against the sheriff. *Carpenter v. Pearce*, 27 L. J. Ex. 143.

If the court or judge dispose of the claim in a summary way, with or without the consent, there can be no appeal against such decision. *Shortridge v. Young*, 12 Mee. & W. 5; 1 D. & L. 416. 23 & 24 Vic. c. 126. ss. 14, 17.

[1] The sheriff must apply promptly. *Skipper v. Lane*, 2 Dowl. 784; 4 M. & Scott, 283. *Beale v. Overton*, 2 Mee. & W. 534; 5 Dowl. 599. And where he had suffered an action to be brought, and kept possession of the goods for several months:—*Held*, that he had made his election, and the rule discharged with costs of all parties. *Devereux v. John*, 1 Dowl. P. C. 548. An execution-creditor appearing and taking an issue, does not thereby become liable for wrongful acts of the sheriff. *Wright v. Woollen*, 31 L. J. Ex. 513.

A *fi. fa.* was issued 10th December, the sheriff did not apply till the last day of Hilary Term:—*Held*, too late. *Cook v. Allen*, 1 C. & M. 542; 3 Tyr. 586; 2 Dowl. P. C. 11.

[2] The sheriff need not deny collusion in order to obtain relief under the Interpleader Act. *Dobbins v. Greene*, 2 Dowl. P. C. 509. *Donniger v. Hinxman*, id. 424. *Boond v. Woodhall*, 4 id. 351; 2 C., M. & R. 601; 1 Tyr. & G. 11.

[3] Where the money is brought into court and the claimant abandons his claim, the rule for taking it out by the execution-creditor is only *nisi*. *Stanley v. Perry*, 4 Dowl. P. C. 599. *Ostler v. Bower*, id. 605. The court or judge may direct a sale of the goods seized. 20 & 24 Vic. c. 126, s. 13. As to the sheriff's poundage, *see* Lush. Pr. 389.

[4] The issue must be in the form directed in the order, and care should be taken that it be so framed as not to exclude evidence of material points at the trial. See *Gadsden v. Barron*, 9 Ex. 511. *Linnett v. Chaffers*, 4 Q. B. 762. *Sott v. Melville*, 3 Man. & G. 40. *Carne v. Brice*, 7 Mee. & W. 183. *Belcher v. Patten*, 6 C. B. 608. *Rogers v. Kennedy*, 9 Q. B. 592. *Edwards v. Mathews*, 16 L. J. Ex. 291. *Coole v. Braham*, Ex. 183.

Where in an interpleader rule neither the plaintiff nor claimant appears, the court will discharge the sheriff from actions by either of those parties, and permit him to levy his poundage and expenses, and abandon the remainder of the levy. *Eveleigh v. Salsbury*, 5 Dowl. P. C. 369; 3 Bing. N. C. 298; 3 Scott, 674. *Ex-parte Wright*, 10 W. R. 841.

On the trial of an interpleader issue between the claimant under a bill of sale and the execution-creditor, the bill of sale, coupled with some evidence of a prior seizure, is *primâ facie* evidence of the title of the claimant. *Hornidge v. Cooper*, 27 L. J. Ex. 314.

Where an issue has been directed to try whether goods taken in execution were the goods of A. as against the execution-creditor, it is no ground for setting aside a verdict for A. that she was a married woman, and therefore incapable of having a property in the goods. *Shingler v. Holt*, 30 L. J. Ex. 322; 9 W. R. 871.

[5] If the claimant does not appear the judgment is final (*Lewis v. Eickey*, 2 C. & M. 321; 2 Dowl. 337; 4 Tyr. 157), if the court order that the party be barred. *Doble v. Cummins*, 7 Ad. & E. 580; 2 Nev. & P. 575.

Where, upon a rule obtained under the Interpleader Act, the execution-creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequent to the seizure, the court made an order that the execution-creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an action against the sheriff for misconduct, provided it should turn out that he had been guilty of any; and also, if there had been any misconduct in the execution-creditor in giving directions to the sheriff, to bring an action against him. *Lewis v. Jones*, 2 Mee. & W. 203. See *Wright v. Wooller*, 31 L. J. Ex. 513.

[6] The costs are not allowed in ordinary cases to the sheriff (*West v. Rotherham*, 2 Bing. 527; 2 Scott, 802); but costs were allowed the sheriff for keeping possession pending a reference to the master. *Underden v. Burgess*, 4 Dowl. P. C. 104. But where the execution-creditor does not appear, the court will not give the sheriff the costs of the rule, or the money for keeping possession. *Field v. Cope*, 2 Tyr. 458; 1 Dowl. P. C. 567.

If a claimant shows his title only to part, he is entitled to costs. *Staley v. Bedwell*, 10 Ad. & E. 145; 2 Per. & D. 309.

A plaintiff abandoning an execution should not appear, and if he does, he will not be entitled to his costs. *Glasier v. Cooke*, 5 Nev. & M. 680. If the sheriff amends the rule for his benefit, he is liable to the costs. *Tilliard v. Cane*, 6 Bing. 251.

With respect to costs, the court will act upon the interpleader rule, though it has not been continued. *Levy v. Champneys*, 4 Ad. & E. 365.

If the claimant has not appeared to show cause, the court or a judge cannot order him to pay the costs of the application. *Grazebrook v. Pickford*, 10 Mee. & W. 279; 2 Dowl. N. S. 249.

Before the sheriff applies to the court

INTERPRETATION of Contracts. *See* Ambiguity, vol. i. p. 319; Contract, vol. iii. p. 200; Foreign Law, vol. iv. p. 494.

INTERROGATORIES. *See* Inspection and Discovery of Documents, *ante*, p. 167.

I. Interrogatories may, by Leave, be Delivered with the Declaration or Plea, p. 231. *See* 13 Geo. 3, c. 65, as to India, or 1 Wm. 4, c. 22, as to the colonies.

II. The Application for Leave is made on Affidavit, p. 233.

III. In case Interrogated Party make Default, he may be Ordered to Submit to an Oral Examination, p. 233.

I. Interrogatories may, by Leave, be Delivered with the Declaration or Plea.

By 17 & 18 Vic. c. 125, s. 51, "in all causes[1] in the superior courts, by order of the court or a judge, the plaintiff may with the declaration, or the

The court or a judge may

under the Interpleader Act, he is bound to inquire into the nature of the claim set up; and, therefore, if he brings parties before the court in consequence of a claim which is clearly bad in point of law, the court will compel him to pay the costs. *Bishop v. Hinxman*, 2 Dowl. P. C. 166. And where, upon an application under the act, rent was ordered to be paid to the landlord, who had been brought before the court, upon giving security:—*Held*, that the sheriff must pay the expenses of such security. *Clarke v. Lord*, id. 227. And the court will, under 1 & 2 Wm. 4, c. 58, s. 6, make the party claiming adversely, but who does not appear to support his claim, pay the costs of the execution-creditor, but not of the sheriff; but it will allow him the costs of a second appearance, where the adverse claimant afterwards applied to open the rule. *Bowdler v. Smith*, id. 417. *Bryant v. Skey*, id. 428. And where the goods ere the goods taken in excution, and a claim was set up under a bill of sale, which bore date after the levy, the court discharged the sheriff's application for relief, and made him pay the costs of the execution-creditor. *Sheriff of Oxfordshire, In re*, 6 id. 136. So where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the court will make the sheriff pay the costs of appearing. *Clarke v. Lord*, 2 id. 55. So, if the sheriff be guilty of laches in making his application, he must pay the costs of both parties. *Beale v. Overton*, 5 id. 599; 2 Mee. & W. 534. If an order for an issue was made by consent at chambers by a single judge, for the relief of the sheriff, under sect. 6 of the Interpleader Act, it was necessary for the successful party to come to the court, to obtain an order for his costs. *Matthew v. Sims*, 5 Dowl. P. C. 234. Unless there is anything to show that the conduct of the parties is vexatious, the sheriff is not entitled to be paid his costs by the claimant of the goods, upon an arrangement being made between the parties. *Cox v. Fenn*, 7 id. 50. But where a claim is made by one on behalf of another, for goods seized by the sheriff in execution, and upon a rule being obtained under the Interpleader Act neither party appears to show cause, the plaintiff is not entitled to receive his costs from the sheriff; but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to show cause. *Philby v. Ikey*, 2 id. 222. And where the claimant of the goods taken in execution did not appear to the rule, ordered, that his claim should be barred, and that he should pay the costs of the execution-creditor of showing cause, unless cause shown against such payment of costs within six days. *Perkins v. Benton*, 3 Tyr. 52. So where an issue is directed, the party succeeding may apply for costs of the issue, interpleading rule, and of the application before the judgment is signed, on undertaking to sign it; but the court will not order the sheriff to pay costs unless misconduct be shown; and where he effects a sale, and pays the proceeds, by order, into court for the benefit of all parties, he will be allowed to deduct the expenses of the sale. *Bland v. Delano*, 6 Dowl. 293. So where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue, and of the application of those costs. *Scales v. Sargesson*, 4 Dowl. P. C. 231. Where the claimant did not appear, but the rule did not call upon him to show cause against the payment of costs, the court made the order only conditionally, on his not appearing within a certain time. *Shuttleworth v. Clark*, id. 561. Where no blame could be attached to the execution-creditor, the court refused to make any party pay costs. *Morland v. Chitty*, 1 id. 520.

The costs generally are stated by the statute to be in the discretion of the court or judge making the order. If a judge made the order, then the court has no jurisdiction as to costs. *Marks v. Ridgway*, 1 Ex. 8. *Burgh v. Schofield*, 9 Mee. & W. 478; 2 Dowl. N. S. 261. An excessive claim for possession-money is not extortion, but a ground for relief on taxation of costs. *Long v. Bray*, 10 W. R. 841.

[1] An interpleader issue is included. *White*

give leave to deliver interrogatories in writing, upon any matter as to which discovery may be sought.

defendant may with the plea, or either of them, by leave of the court or a judge, at any other time deliver to the opposite party, or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing, upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate, any of the officers of such body corporate, within ten days, to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any officer or party omitting, without just cause, sufficiently to answer all questions as to which discovery may be sought, within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly."[1]

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v. Watts, 6 L. T. (N. S.) 387; 31 L. J. C. P. 381.

[1] The rules observed are the same as in proceedings for discovery in equity. 27 L. J. Ex. 499; 28 L. J. C. P. 198; 31 id. 230. Either party may interrogate so as to elicit answers reasonably to be expected to advance his own case, though they may also disclose that of his opponent, if not exclusively so. *Whateley v. Crawford*, 26 L. T. 104. *Bayley v. Griffiths*, 31 L. J. Ex. 477; 13 W. R. 798; *see* 3 F. & F. 110. The plaintiff in an action against an attorney for negligence, may deliver interrogatories to the defendant, as to the steps he took in the business with respect to which negligence is imputed; and so in a similar action against a surveyor. *Carew v. Davis*, *Whately v. Crawford*, 5 E. & B. 709; 25 L. J. Q. B. 163.

Interrogatories may be delivered to the plaintiff by the defendant, where the plaintiff is a foreigner residing out of the jurisdiction. *Pohl v. Young*, 25 L. J. Q. B. 23; 19 Jur. 1139.

The court will, not in general, give leave to the defendant to deliver interrogatories before plea. *Martin v. Hemming*, 10 Ex. 478.

The defendant in ejectment is entitled to administer interrogatories to the claimant; and in these he may inquire in what character the plaintiff claims, and of the pedigree through which he claims; but not of the evidence by which he makes it out (*Flitcroft v. Fletcher*, 11 Ex. 543; 25 L. J. Ex. 94), nor to show a forfeiture. 3 F. & F. 154.

If it be shown *primâ facie* that a document is lost, the defendant may be examined upon interrogatories as to the contents of it; but the answers are not available at the trial unless it be shown in the usual way that the document cannot be then produced. *Wolverhampton New Waterworks Co. v. Hawksford*, 28 L. J. C. P. 198; 23 Jur. 736.

So the interrogatories may be administered to the officer of a banking company constituted under 7 Geo. 4, c. 46, in an action by or against the company. *M'Keward v. Rolt*, 7 W. R. 601; 23 Jur. 714; 28 L. J. Ex. 380.

The plaintiff has been allowed to interrogate the defendant, who had bought goods for him (according to the bought note), as from a principal, whether he acted in the transaction as principal or agent, and if as agent, to name the principal. *Thöl v. Leask*, 10 Ex. 704. So as to matters that would disclose the secrets of trade. 31 L. J. Adm. 205.

On a replication of fraud to a plea setting up a composition-deed, the plaintiff was allowed to deliver interrogatories to the defendant, directed to disprove the *bona fides* of the deed, and to show that it was colourable. *Bailey v. Griffiths*, 10 W. R. 798.

The court refused to allow interrogatories to be administered in a case where it was doubtful whether, on the facts suggested in the plaintiff's affidavit, there would be any cause of action, and it was evident that the application was merely speculative, in the hope of possibly finding from the defendant's answers that the plaintiff had a cause of action, of which the plaintiff himself had no assurance. *Atter v. Willison*, 7 id. 265.

Interrogatories asking whether the plaintiff has had a correspondence relating to the subject in dispute, and asking for the dates and names of the places, and the names of the correspondents, have been allowed. And it is no objection to interrogatories that they seek to obtain from the plaintiff admissions of conversations relating to the subject-matter of the action with a servant or agent of the defendant. *Reid v. Hutchins*, 10 C. B. (N. S.) 829.

Where interrogatories have not been sufficiently answered, and they require to be amended, or an oral examination is desired, the proper course is to apply at chambers, in the first instance, as to the sufficiency of the answers. *Meadows v. Kirkman*, 36 L. T. 251. *Bender v. Zimmerman*, 29 L. J. Ex. 244.

The court will not make absolute a rule for an attachment where the party in fault has had no intention to disobey the court, and the answers, although not in due time, are ready for delivery. *Windle v. Lane*, 29 L. J. Ex. 245.

As a general rule, the court will allow any interrogatories to be administered which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness-box. *Zychlinski v. Maltby*, 10 C. B. (N. S.) 838.

Where the action was on a bill of exchange by an indorsee against the acceptor, and after declaration, but before plea, the defendant applied for leave to deliver cer-

II. The Application for Leave is made on Affidavit.[1]

By sect. 52, "the application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks; that there is a good cause of action or defence upon the merits; and if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay: Provided, that where it shall happen from unavoidable circumstances that the plaintiff or defendant cannot join in such affidavit, that the court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit."

The affidavit should be made by the party proposing to interrogate, and his attorney.[2]

III. In case Interrogated Party make Default, he may be Ordered to Submit to an Oral Examination.

By sect. 53, "in case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge,

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tain interrogatories, the court refused the application, upon the ground that, although they had the power to order the delivery before plea, yet they would not exercise it except under special circumstances; as, for instance, where the defendant makes out a case of urgent necessity, and no such case of urgent necessity was established in the case before the court. *Martin v. Hemming*, 10 Ex. 478.

It is a valid objection to the allowance of the interrogatories, upon the application to the court for the rule to administer them, that they are directly pointed to requiring the party to answer whether he has committed an indictable offence. On this ground, the Court of Exchequer refused to allow the plaintiff to administer interrogatories directed to extract from the defendant whether he was the author or publisher of a publication imputing an offence to the plaintiff; for, in such a case, it would not be fair to submit to the defendant questions, which he clearly was not bound to answer at all; the object being of putting on him either the answering certain questions which he was not bound to answer, or the refusing to answer, which would create a prejudice against him. *Tupling v. Ward*, 30 L. J. Ex. 222; 9 W. R. 482); but he cannot excuse answering by swearing to some matter of fact involved in the action, but not answering the question. *Geary v. Buxton*, 29 L. J. Ex. 280.

But the court may, if it deem it expedient, allow interrogatories which have a tendency to exact criminatory answers to be put, leaving to the party interrogated to avail himself of his privilege. *Bartlett v. Lewis*, 6 L. T. (N. S.) 388.

If the witness objects to answer an interrogatory on the ground of its tendency to criminate himself, the objection must be made by himself, and not by his attorney. *Osborne v. the London Dock Co.* 10 Ex. 698.

If any considerable proportion of the proposed interrogatories are objectionable, either in substance or in the manner in which they are drawn, the court will not eliminate such as are proper, or amend their defects, but will reject them altogether, and not allow any of them to be put.

"I do not wish," said *Pollock, C.B.*, "to introduce any practice with respect to interrogatories having all the vices of special demurrers; nor, on the other hand, do I wish to sanction the evil practice of drawing interrogatories of such latitude in time and place as these, and then calling upon the court or a judge to cut them down to their proper limits. If there is only a slight objection to the interrogatories, which may easily be removed, then there is no reason why we should not make the necessary amendment; but I protest against a judge, and, still more, I protest against this court, being called upon to settle the interrogatories. The plaintiff is not entitled to say, 'Here is a list of questions. I am entitled to put some of them. Which are they?' I think we ought rather to reject them altogether." *Robson v. Cooke*, 6 W. R. 260; 2 H. & N. 766; 27 L. J. Ex. 151.

Although a party may admit, in answer to interrogatories, the possession of documents, the opposite party cannot compel an inspection of them without applying to a court or a judge under the 50th section. *Scott v. Zygomalas*, 24 L. J. Q. B. 129.

[1] If the application be made by the plaintiff before declaration, the affidavit must show what his claim in the action is. *Crews v. Morrison*, 20 Jur. 163.

Leave to deliver interrogatories to defendant after plea has been conceded without any special affidavit. *James v. Barnes*, 17 C. B. 596; 25 L. J. C. P. 182. An attachment may be obtained for not answering. 5 L. T. (N. S.) 674.

[2] The affidavit must state that there is a good cause of action or defence on the merits (*Thöl v. Leask*, 10 Ex. 704), and that the party will derive a benefit from the discovery he seeks. 12 C. B. 350.

at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct, before a judge or master; and the court or judge may, by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application and of the proceedings thereon, and otherwise, as to such court or judge shall seem just." [1]

By sect. 54, "such rule and order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the hereinbefore-mentioned act, 1 Wm. 4, c. 22."

INTERROGATORIES to Witness before Trial under 1 Wm. 4, c. 22. *See post*, Witness.

INTERRUPTION.[2]

INTOXICATION. *See* vol. iv. p. 144.

INTRUSION. *See post*, Right, Writ of.

INUENDO. *See post*, Slander; and 15 & 16 Vic. c. 96, s. 61.

I O U.

(A) *Need not be Stamped.*[3] (B) *Evidence of an Account Stated.*[4]

IRELAND.[5]

IRREGULARITY.[6] *See post*, Setting Aside Proceedings.

[1] The application for a *viva voce* examination must be made promptly. *Chester v. Wortley*, 18 C. B. 239.

The rule is only *nisi* in the first instance. *Turk v. Syne*, 27 L. J. Ex. 54.

[2] The word "interruption" in a statute was held to mean an obstruction to the exercise of a right; not to the person. *Flight v. Thomas*, 11 Ad. & E. 701. *See* Easements, vol. iv. p. 149; *post*, Way, &c.

[3] An I O U is an acknowledgment of a debt, and if not containing any terms of agreement, as to pay by instalments, or the like, does not require an agreement-stamp. *Fisher v. Leslie*, 1 Esp. 426. *Payne v. Jenkins*, 4 C. & P. 324. *Israel v. Israel*, 1 Camp. 499. *Beechny v. Westbrook*, 8 Mee. & W. 412.

The introduction of the words "for value received," does not render the I O U liable to stamp-duty (*Gould v. Coombs*, 1 C. B. 543); but if it contain the words "to be paid on such a day," it requires a stamp. *Brooks v. Elkins*, 2 Mee. & W. 74; *see* 9 C. & P. 270.

[4] The production by the plaintiff of an I O U is *primâ facie* evidence that an account has been stated by the defendant with him, although not addressed to, or name mentioned in, the instrument. *Fesenmayer v. Adcock*, 16 Mee. & W. 449. *Curtis v. Rickards*, 1 Scott, N. R. 155. *Douglas v. Holme*, 12 Ad. & E. 641.

An I O U given for the amount of a note, which was afterwards altered in a material particular, is admissible to prove an account stated. *Gould v. Coombs*, *supra*.

It seems that an I O U is not evidence of money lent by the holder to the party signing it. *Fesenmayer v. Adcock*, *supra*. But see *Douglas v. Holme*, 12 Ad. & E. 641.

It has been suggested that a mere I O U, given as surety for another, is void by the Statute of Frauds. Byles, 24.

[5] Under the words, in a local act, "of parts beyond the seas," Ireland is excluded. *Battersby v. Kish*, 2 Bing. N. S. 585.

Upon the question upon the Statute of Limitations beginning to run against a party absent in Ireland at the time of the cause of action accruing, whether Ireland was a place beyond seas within 4 Anne, c. 16, s. 19:—*Held*, that the 3 & 4 Wm. 4, cannot be construed to extend to the 4 Anne, c. 16, and that Ireland is not by the Act of Union constructively brought within those limits. *Lane v. Bennett*, 1 Mee. & W. 70; 1 Tyr. & G. 441. *See post*, Limitation, Statute of.

[6] An important distinction exists between a nullity and a mere irregularity. Where any particular proceeding is prescribed by the practice of the court, and some mistake has been made in the manner of taking or conducting it, this is called an irregularity, and it stands till it is set aside by the court, and may always be waived by the negligence or subsequent conduct of the opposite party. Where, however, the mistake consists not in the mere manner, but in the substance of the thing done, this is a nullity, and cannot be waived (1 Dowl. P.C. 28; 3 id. 551) by the subsequent conduct of the opposite party, for the law treats the act done as if it had not been done at all, except as regards the remedy of those who are prejudiced by it; for example, the issuing of a writ of summons, bearing date on a Sunday, or serving it on

ISSUE.

(A) *What it is, and how made up.*[1] (B) *Form of Issue.*[2]

that day, is a nullity. *Hanson v. Shackleton*, 4 Dowl. 48. *Taylor v. Phillips*, 3 East, 155.

[1] The issue is a transcript of the pleadings, concluding with an award of the *venire facias*, which is shortly expressed by the words, "Therefore let a jury come," &c. The pleadings are entered in the order in which they have been pleaded, with their dates and numbers, and in separate paragraphs.

The issue cannot be made up until there has been a joinder of issue upon all the pleadings pleaded in the cause. When the pleadings on both sides are concluded, the plaintiff's attorney makes up and delivers the issue to the opposite party, for the purpose of proceeding to trial. In replevin, prohibition, and *quare impedit*, in which both parties are said to be actors in the suit, the attorney for the plaintiff or defendant may make up and deliver the issue. Where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder in issue for the defendant. 15 & 16 Vic. c. 76, s. 79. This he may do as part of the issue, and may then at once deliver it. No time is limited for making up the issue, but if the plaintiff will not do so, nor proceed to trial within the time limited by the practice of the courts, the defendant may make it up, and deliver it to the plaintiff's attorney, in order that he may carry down the record to trial by proviso. *See* Reg. Gen. (Pr.) H. T. 1853, r. 42.

The issue should in general be delivered before or at the time of giving notice of trial, and at least ten days before the assizes or sittings at which the cause is to be tried.

By Reg. Gen. (Pr.) H. T. 1853, r. 40, in all cases in which the plaintiff's pleading is in denial of the defendant's, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading, and in case issue be afterwards joined, such notice shall be available.

In case several defendants appear by different attorneys, a copy of the issue should be delivered to each of them.

No entry of continuance by way of *imparlance, curia advisari vult, vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings. As to the entry of suggestions, *see post*, Suggestion.

If there should be an irregularity in the issue, or the delivery of it, the defendant may have it amended, or in some cases set aside, if he apply promptly for the purpose, and before taking any further step in the cause. He cannot, it seems, take advantage of an irregularity by merely returning the issue. *Iken v. Plevin*, 5 Dowl. 594. See *Cooze v. Neumegen*, 1 Dowl. N. S. 429. An informal issue is aided after verdict by 32 Hen. 8, c. 30.

After delivery of a defective issue the plaintiff should not deliver a fresh one, but obtain a judge's order to amend that which has been delivered. See *Ethersey v. Jackson*, 8 T. R. 255.

The defendant may, within four days after the delivery of the issue, strike out the *similiter* which the plaintiff may have added for him, and demur to the replication or other last pleading of the plaintiff, and this although the defendant was under terms of rejoining gratis (*Adkins v. Anderson*, 1 Dowl. N. S. 877), giving notice to the plaintiff of his having struck out the *similiter* and demurred, and that he will not accept the issue as such, but only as a replication. After this notice the plaintiff cannot proceed to trial, although a demurrer or rejoinder has not been delivered in due time, but in such case the plaintiff may sign judgment. *Twycross v. King*, 14 L. J. Q. B. 49. See *Poole v. Pain*, 15 Jur. 1197. If the demurrer delivered be frivolous, it will be set aside, and the plaintiff will be allowed to sign judgment, or it will be ordered that the issue delivered shall stand, and the cause be tried accordingly. *Heginbotham v. South-Eastern &c. Steam-Packet Co.* 8 C. B. 338.

[2] Reg. Gen. (Pr.) H. T. 1853, schedule, Form 1, prescribes the following

Form of an Issue.

In the Q. B. [Exch. of Pleas, *or* Common Pleas.]

The day of in the year of our Lord 18 [*date of declaration*].

The Venue. } A. B., by P. A., his attorney
—— } [*or* in person, *as the case may be, and as in the declaration*], sues C. D., who has been summoned to answer the said A. B., by virtue of a writ issued on the day of in the year of our Lord 18 [*the date of the first writ*], out of her majesty's Court of Queen's Bench [*or* Exchequer of Pleas, *or* Common Pleas, *as the case may be*], for [*&c. Copy the declaration from these words to the end, and all the pleadings, with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, and conclude thus:*—] Therefore, let a jury come, &c.

Reg. Gen., Mich. Vac., 1854, schedule 1, prescribes the

Form of Issue where it is to be tried by a Judge without a Jury.

[*Proceed as in an issue to be tried by a jury as in ordinary cases, until the joinder of issue, and then thus:*—] And the parties aforesaid having, by consent in writing duly signed, left the decision of the said issue [*or* issues] to the court, it was, on the day of 18 [*date of rule or order for allowance of trial*], by a rule of this court [*or* by an order of the Honourable Sir Knight, one of her majesty's judges of her Court of Queen's Bench, *or* Common Pleas, *or* one

ISSUE, Feigned.[1] *See* Feigned Issue, vol. iv. p. 447.

Joinder of.[2]

of Fact without Pleadings.

(A) *Where Parties agreed upon the Question of Fact, they may by Order of a Judge state it without Pleadings.*[3]

(B) *Form of Affidavit.*[4]

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of the barons of her majesty's Exchequer, *as the case may be*], ordered that such trial should be allowed: Therefore let the same be had accordingly.

[1] Courts of equity may now determine every question of law and fact incident to the relief sought. 25 & 26 Vic. c. 42. And its provisions are obligatory, and not optional. *In re Hooper*, 32 L. J. Ch. 55.

[2] By the Common-Law Procedure Act, 1852 (15 & 16 Vic. c. 76, s. 79), "either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, which joinder of issue may be as follows, or to the like effect:—

The plaintiff joins issue upon the defendant's first [*&c., specifying what or what part*] plea.

The defendant joins issue upon the plaintiff's replication to the first [*&c., specifying what*] plea.

And such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant.

Omission to insert in, or indorse on the writ of summons, the various matters required by the Common-Law Procedure Act, 1852, would constitute an irregularity, but would not justify the defendant in treating the writ as null and void. The general rule is that every application to set aside process or proceedings, on the ground of irregularity, must be made within a reasonable time, *i. e.* promptly (*Claridge v. Mackenzie*, 2 Dowl. N. S. 898), or within the first four days of the ensuing term (*Parker v. Bayley*, 2 D. & L. 91), and before the party applying has taken any fresh step with knowledge (*Anderson v. Harrison*, id. 296), or the means of knowledge (*Seymour v. Maddox*, 1 L., M. & P. 543) of such irregularity. The summons to set aside must state the several objections intended to be insisted on. Reg. Gen. (Pr.) H. T. 1853, r. 136.

In setting aside proceedings for irregularity, the court always has a discretion to disallow costs. *Cash v. Wells*, 1 B. & Adol. 375. *Lorimer v. Lule*, 1 Chit. R. 134. *Marshall v. Davison*, 2 Tyr. 315.

[3] By the Common-Law Procedure Act, 1852 (15 & 16 Vic. c. 76, s. 42), "where the parties to an action are agreed as to the question or questions of fact to be decided between them, they may, after writ issued and before judgment, by consent and order of a judge (which order any judge shall have power to make upon being satisfied that the parties have a *bonâ fide* interest in the decision of such question or questions, and that the same is or are fit to be tried) proceed to the trial of any question or questions of fact without formal pleadings, and such question or questions may be stated for trial in an issue in the form contained in the schedule annexed, and such issue may be entered for trial, and tried accordingly, in the same manner as any issue joined in an ordinary action; and the proceedings in such action and issue shall be under and subject to the ordinary control and jurisdiction of the court, as in other actions."

By sect. 43, "the parties may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp-duty, and which shall be embodied in the said or subsequent order, that, upon the finding of the jury in the affirmative or negative of such issue or issues, a sum of money, fixed by the parties, or to be ascertained by the jury, upon a question inserted in the issue for that purpose, shall be paid by one of the parties to the other of them, either with or without the costs of the action."

By sect. 44, "upon the finding of the jury in any such issue judgment may be entered for such sum as shall be so agreed or ascertained as aforesaid, with or without costs as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless the court or a judge shall otherwise order, for the purpose of giving either party an opportunity for moving to set aside the verdict, or for a new trial. The proceedings upon such issue may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment on a contested action."

By sect. 48, "in case no agreement shall be entered into as to the costs of such action, the costs shall follow the event, and be recovered by the successful party."

[4] *Form of Affidavit to obtain Trial of Issue without Pleadings.*

In the Q. B. [C. P. *or* Exch. of Pleas.]
Between A. B. Plaintiff,
and
C. D. Defendant.

I, P. A., of attorney for the above-named plaintiff in this cause, make oath and say,—

(C) *Form of Issue.*[1]

(D) *Agreement as to the Result of Issue.*[2]

(E) *Postea and Judgment.*[3]

ISSUABLY, Pleading.[4] *See post*, Pleading; Pleas.

1. That this action was commenced by a writ of summons issued out of this honourable court, and tested the day of and that judgment has not yet been signed thereon.

2. The said action is brought to recover [*state the object of the action, and the matter of fact which the plaintiff alleges, and which the defendant denies*].

3. And I further say, that the said plaintiff and defendant have agreed and consented that the said question whether [*here state precisely the question or issue to be tried*] shall be decided between them, and tried by a jury without pleadings.

4. And I further say, that by an agreement in writing, made and entered into on by me, on behalf of the above-named plaintiff, as his attorney, and with his authority, and by D. A. of [*or* by (me) the said plaintiff, and C. D. the said defendant, and signed by (me *or*) them] respectively, it has been agreed that [*state what agreement*) *has been made as to the debt or damages to be found by the jury, and the costs*].

4. And I further say, that I am informed and verily believe that the said plaintiff and defendant have a *bonâ fide* interest in the decision of the said question of fact, and that the same is fit to be tried by a jury.

Sworn, &c. P. A.

[1] *Form of an Issue where Question is raised by Consent of Parties without Pleading.*

In the Queen's Bench [*or* Exch. of Pleas, *or* Common Pleas].

The day of in the year of our Lord, 18

Venue } Whereas A. B. has sued C. D.,
to wit. } and affirms and denies [*here state the question or questions of fact to be tried.*] And it has been ordered by the Honourable Mr. Justice [*or* Baron] according to the Common-Law Procedure Act, 1852, that the said question shall be tried by a jury: Therefore, let the same be tried accordingly.

[2] *Form of Agreement by the Parties as to the result of Issue.*

[*Title of court and cause.*]

We, the above-named parties [*or* we, P. A., of attorney for, &c., and D. A., of attorney for] do hereby agree that the question of fact now pending between us [*or* the said A. B. and C. D.] in this cause; to wit, whether, &c. [*state the question*], and wherefore I, the said plaintiff, maintain the affirmation, and I, the said C. D., maintain the negative, shall be decided by a jury without any formal pleadings; and we consent to a judge's order being made for the trial of the same, pursuant to the Common-Law Procedure Act, 1852; and we further agree that, upon the finding of the said jury in the affirmative, &c. [*for the payment of the debt or damages, the costs, and when execution is to issue*].

A. B. [*or* P. A.] Plaintiff's Attorney.
C. D. [*or* D. A.] Defendant's Attorney.

[3] *Postea and Judgment on a Question of Fact without Pleadings.*

Afterwards, on the day [*first day of sittings or commission day*] before, &c. [i.e. *the judge who tried the cause, as in other cases*] come the parties within mentioned by their respective attorneys within-mentioned, and a jury of the within county [*or* city] being summoned, also come, who, being sworn to try the matter in question between the said parties, upon their oath say that [*here state the affirmative or negative of the issue as found by the jury, and if they are required to ascertain the sum to be paid by one party to another, say*, "And the jury aforesaid, on their oath aforesaid, do ascertain that £ is the amount of the damages sustained by the within-named plaintiff by reason of, &c., and to be paid by the defendant to the plaintiff over and above the plaintiff's costs of suit"]: Therefore, it is considered that the plaintiff do recover against the defendant the said £ and £ for costs of suit.

The like where the Parties have agreed upon a Sum.

[*After finding of the jury, as in the preceding form*]: And the parties in the said action having entered into an agreement in writing, before the trial of the said issue, that upon the finding of the jury in the affirmative [*or* negative] of the said issue, the sum of £ should be paid by the said defendant to the said plaintiff, with the costs of the said action, and the said agreement having been embodied in any order made herein by the Honourable : Therefore, it is considered that the plaintiff do recover against the defendant the said £ and £ for costs of suit.

[4] The meaning of "pleading issuably" is, that the plea should go to the merits of the action, or, in other words, that it should be one on which an issue in fact or in law may be taken, so that the case may be decided on the merits. *Humphreys v. Earl Waldegrave*, 6 Mee. & W. 622: *per Parke, B.* See *Zulueta v. Miller*, 4 D. & L. 186. *Steele v. Harmer*, 14 Mee. & W. 136. Therefore, any dilatory or sham plea, or one clearly bad on general demurrer, is a non-issuable plea. See *Beauclerk v. Hook*, 20 L. J. Q. B. 485.

J.

JACTITATION of Marriage. *See post*, Marriage.

JETSAM. *See* Flotsam and Jetsam, vol. iv. p. 484.

JOINT-STOCK COMPANIES.[1]

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[1] At common law, these companies were subject to all the rules of ordinary partnerships. This rendered the intervention of the legislature necessary, and a variety of acts for their regulation have been passed. The statute of 1862 substantially repeals the prior acts, and embodies the whole law, and is equally applicable to insurance companies and joint-stock banks as to all other companies.

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I. Of Joint-Stock Companies under 25 & 26 Vic. c. 89.

(A) *Of the Constitution and Incorporation of Joint-Stock Companies.*[1]

[1] The prior acts applicable to the registration, &c. of joint-stock companies are repealed by the 25 & 26 Vic. c. 89. That act applies to existing companies in the same manner, in the case of a limited company, as if such company had been formed and registered under this act as a company limited by shares; and in the case of a company other than a limited company, as if such company had been formed and registered as an unlimited company under this act. Sects. 176–8. (*See* further, parts vi. vii. of the act.) Existing joint-stock companies were required to register under the 25 & 26 Vic. c. 89, before the expiration of thirty-one days from the commencement of that act. (Sects. 209, 210.)

By the 25 & 26 Vic. c. 89, s. 4, "no company, association, or partnership, consisting of more than ten persons, shall be formed after the commencement of this act for the purpose of carrying on the business of banking, unless it be registered as a company under this act, or is formed in pursuance of some other act of parliament, or of letters patent; and no company, association, or partnership, consisting of more than twenty persons, shall be formed after the commencement of this act for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this act, or is formed in pursuance of some other act of parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the stannaries."

No banking company claiming to issue notes in the United Kingdom is entitled to limited liability in respect of such issue, but continues liable to unlimited liability in respect thereof, and, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue in addition to the sum for which they would be liable as members of a limited company. (Sect. 182.) Notice must be given by a banking company, to every person and partnership-firm who have a banking account with the firm, of its intention to register as a limited company. (Sect. 183.)

Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of associa-

(B) *Distribution of the Capital.*[1]

(C) *Liability of the Members.*[2]

tion, and otherwise complying with the requisitions of the act in respect of registration, form an incorporated company, with or without limited liability. (Sect. 6. *See* further, part vii. of the act.) The liability of the members of the company may, according to the memorandum of association, be limited either to the amount of any amount unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company, in the event of its being wound up. (Sects. 7–10.) The memorandum of association must bear the same stamp as if it were a deed, and when registered it binds the company and the members to the same extent as if each member had subscribed his name and affixed his seal, and there were in the memorandum contained on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act. (Sect. 11.) Where the company is limited by shares, the conditions of the memorandum of association may be afterwards modified by an increase of capital in the issue of new shares (sect. 12); and with the approval of the Board of Trade, a company may afterwards change its name. (Sect. 13.) The memorandum of association may, in the case of a company limited by shares, and must, in the case of a company limited by guarantee or unlimited, be accompanied when registered by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. (Sects. 14, 16.) Where there are no articles of association in the case of a company limited by shares, certain regulations prescribed by the statute apply. (Sect. 15.) The memorandum of association, and articles of association, are delivered to the Registrar of Joint-Stock Companies, who retains and registers the same (sect. 17), and certifies that the company is incorporated; and in the case of a limited company, that the company is limited. "The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, and with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned: A certificate of the incorporation of any company given by the registrar, shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with." 25 & 26 Vic. c. 89, s. 18. The name of the company must not be identical with that of another, or so like it as to deceive. (Sect. 20.) The company have power, as we have seen, after incorporation, to hold lands; but as formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company, or by the individual members, cannot hold more than two acres of land, unless the sanction of the Board of Trade be obtained. (Sect. 21.)

[1] The shares are personal estate, capable of being transferred in manner provided by the regulations of the company, and are expressly declared not to be real estate. (Sect. 22.) There is a register of members (sect. 25), and every person who has agreed to become a member, and whose name is entered on the register, is deemed a member. (Sect. 23.) Transfers may be made by the personal representatives of deceased members. (Sect. 24.) A list of members must annually be forwarded to the registrar. (Sects. 26, 27.) And notice must be given to the registrar of any consolidation of capital into shares of a larger amount, or of any conversion into stock (sects. 28, 29), and of any increase of capital or members. (Sect. 34.) No notice of any trust expressed, implied, or constructive, can be entered on the register, or be received by the registrar. (Sect. 30.) A certificate under the common seal of the company, specifying any share or shares, or stock, held by any member, is *primâ facie* evidence of his title. (Sect. 31.) The register of members is open to the inspection of every member gratis, and to other persons on payment of one shilling. (Sects. 32, 33.)

The register of members is *primâ facie* evidence of any matters by the act directed or authorised to be inserted therein. (Sect. 37.)

[2] In the event of a company formed under the 25 & 26 Vic. c. 89, being wound up, the liability of the members is thus defined by the act:—"Every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following: (that is to say,) 1. No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up. 2. No past member shall be

(D) *Provisions of the Act for the Protection of Creditors.*[1]

liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. 3. No past member shall be liable to contribute to the assets of the company, unless it appear to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act. 4. In the case of a company limited by shares, no contributions shall be required from any member exceeding the amount, if any, unpaid on the shares, in respect of which he is liable as a present or past member. 5. In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association. 6. Nothing in this act contained shall invalidate any provision contained in any policy of insurance or other contract, whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract. 7. No sum due to any member of a company in his character of a member, by way of dividends, profit, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves.

All the questions as to the liability of contributories to inchoate railways and parliamentary works under the winding-up acts, resolve themselves into two simple questions of fact: first, Did the alleged contributory make, or authorise to be made, the contract in respect of which he is called upon to contribute on his own account, or jointly with others? or, secondly, If any one or more entered into the contract on his or their own behalf, did he agree to indemnify the person or persons contracting, in part or in all, against the consequences of that contract? They are liable as contributories who have become responsible for the debts incurred in the attempt to form the company, either by giving the orders, or having concurred in giving them: No one can lawfully be put on the list of contributories merely by reason of his having agreed to take, or having accepted and become an allottee of shares, and paid a deposit. *Ex-parte Capper*, 20 L. J. Ch. 151. *Ex-parte Carrick*, id. 671. *Ex-parte Maudsley*, id. 9. *Ex-parte Barber*, id. 146. *Ex-parte Beardshaw*, 22 id. 18. Merely being a member of the provisional committee does not render such person responsible for an order in which he did not concur. *Ex-parte Cottle*, 2 Mac. & G. 190. *Bright v. Hutton*, 3 H. of L. C. 341; 16 Jur. 695. *Ex-parte Carmichael*, 20 L. J. Ch. 12. *Ex-parte Clarke*, id. 14. If the provisional committee appoint a managing committee to act under the orders of the provisional committee as their servants and agents, all members of the provisional committee who have concurred in the proceedings, and authorised debts to be incurred by the managing committee, will be liable to be made contributories to those debts. *Ex-parte Tanner*, 21 L. J. Ch. 214. *Spottiswoode's case*, 6 De Gex, Man. & G. 371. *See* further, *Ex-parte Roberts*, 2 Mac. & G. 194. *Pearson's Executors*, 3 De Gex, Man. & G. 252. *Norbury's case*, 5 De Gex & S. 423. *Ex-parte Londesborough*, 23 L. J. Ch. 743. *Ex-parte Bowen*, 22 id. 857. *In re Warwick, &c. Railway Co.* 27 id. 735.

[1] The company must have a registered office, to which all communications and notices may be addressed. (25 & 26 Vic. c. 87, ss. 39, 40.) Every limited company, whether limited by shares or by guarantee, are required, under a penalty, to paint or affix, and keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and to have its name engraven in legible characters on its seal, and its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company. (Sects. 41, 42.) And if any director, manager, or officer of such company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven, or issues or authorises the issue of any notice, advertisement, or other official publication of such company, or signs or authorises to be signed on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he is liable to a penalty of 50*l.*; and further, is personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company. (Sect. 42.) A limited company is bound to keep a register of all mortgages and charges specifically affecting property of the company, which is open to the inspection of any creditor or member of the company. (Sect. 43.) Limited banking companies, insurance companies, and deposit, provident, or benefit societies, are bound to make a statement annually in a form prescribed by the act, specifying the capital, liabilities,

(E) *Provisions for the Protection of Members.*[1] (G) *Legal Proceedings.*[3]
(F) *Service of Notices, &c.*[2] (H) *Reference to Arbitration.*[4]

and assets of the company, a copy of which must be put in a conspicuous place in the registered office, and in every branch office or place where the business of the company is carried on. (Sect. 44.) Companies not having a capital divided into shares, must keep at its registered office a register containing the names, addresses, and occupations of the directors. (Sects. 45, 46.) If any company carries on business when the number of its members is less than seven, for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognisant of the fact that it is so carrying on business with fewer than seven members, is severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member. (Sect. 48.)

[1] A general meeting must be held once, at least, in each year. (25 & 26 Vic. c. 87, s. 49.) The regulations of the company may be altered at such meeting by special resolution. (Sects. 50, 51, 52, 53, 54.) *See* 8 Ad. & E. 356; 11 id. 15; 12 id. 139. The Board of Trade may appoint one or more competent inspectors to examine into the affairs of the company, and to report thereon, in such manner as the Board may direct, upon the application of shareholders holding not less than one-fifth of the shares, or if there are no shares, being not less than one-fifth in number: in the case of a banking company the requisitionists must hold not less than one-third of the shares. The requisition must be supported by such evidence as the Board of Trade may require. The inspectors have power to examine upon oath the officers and agents of the company, and to require the production of books and documents. The expenses of the examination are defrayed by the members upon whose application the inspectors were appointed, unless the Board of Trade direct the same to be paid out of the assets of the company. (Sects. 56, 57, 58, 59.) Further, the company may, by special resolution, appoint inspectors, with like powers as inspectors appointed by the Board of Trade, to inquire and report to the company. (Sects. 60, 61.)

[2] Any summons, notice, order, or other document, required to be served upon the company, may be served by leaving the same, or sending it through the post in a prepaid letter, addressed to the company at their registered office. (25 & 26 Vic. c. 87, s. 62.) This seems not to apply to a writ of summons, which must be served pursuant to 15 & 16 Vic. c. 76, s. 16. *See* 28 L. J. C. P. 217. Any document to be served by post on the company must be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the delivery thereof. It is sufficient proof of service that the letter was properly directed and put as a prepaid letter into the post-office. (Sect. 63.) *See* 7 Mee. & W. 515; 3 M. & Scott, 789. A summons, notice, order, or proceeding, requiring authentication by the company, may be signed by director, secretary, or other authorised officer, and need not be under the common seal. (Sect. 64.)

[3] Offenders under the 25 & 26 Vic. c. 87, made punishable by penalty, may be prosecuted summarily before two or more justices, in manner directed by 11 & & 12 Vic. c. 43. (Sect. 65). As to the application of penalties, *see* sect. 66.

Minutes of resolutions, and proceedings of general meetings of the company, and of the directors or managers, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, are received as evidence in all legal proceedings, "and until the contrary is proved, every general meeting of the company, or meeting of directors or managers, in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications. 25 & 26 Vic. c. 89, s. 67. *See* 3 Q. B. 873; 5 H. & N. 428; 29 L. J. Ex. 157.

In the case of companies working mines within the jurisdiction of the Stannaries, that court has jurisdiction over such companies, so far as the same is consistent with the act and the constitution of the company. (Sect. 68.)

[4] By the 25 & 26 Vic. c. 87, s. 72, "any company under this act may, from time to time by writing under its common seal, agree to refer, and may refer to arbitration, in accordance with the Railway Companies' Act, 1859, any existing or future difference, questions, or other matters whatsoever in dispute between itself or any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made, power to settle any terms, or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies." All the provisions of the act referred apply to these arbitrations. (Sect. 73.) *See* Arbitration, vol. i. p. 427.

(I) *Winding up of the Company.*[1]

(*a*) *By the Court.*

[1] A company may be wound up by the court upon the application of the company, creditors, or contributories, if unable to pay its debts, and upon certain other contingencies.

As to the Contributories. — The term "contributory" is defined by the act to mean, "Every person liable to contribute to the assets of a company under this act, in the event of the same being wound up; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory." 25 & 26 Vic. c. 87, s. 74. The liability to contribute to the assets is deemed to create a debt (of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made as hereinafter mentioned for enforcing such liability: in the case of the bankruptcy of any contributory, the estimated value of his liability on future calls, as well as calls already made, may be proved against his estate. (Sect. 75.) The personal representatives, heirs, and devisees of a deceased contributoress, are deemed contributories, and liable in a due course of administration to contribute to the assets of the company, in discharge of such liability. (Sect. 76.) So if he become bankrupt, his assignees are liable in like manner. (Sect. 77.) And in case a female contributory marries, her husband is liable to contribute the same sum as she would have been liable to contribute if she had not married. (Sect. 78.) Shareholders who have sold or forfeited their shares may apply. *Times Fire Insurance Co.* 31 L. J. Ch. 478; 18 id. 261; 27 id. 669.

As to the Winding up by the Court. — The company may be wound up by the court under the following circumstances: — 1. Whenever the company has passed a special resolution requiring the company to be wound up by the court. 2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year. 3. Whenever the members are reduced in number to less than seven. 4. Whenever the company is unable to pay its debts. 5. Whenever the court is of opinion that it is just and equitable that the company should be wound up. (Sect. 79.) *See* 1 M'N. & G. 170; 3 De Gex & Sm. 604; 15 Bac. 74.

A company is deemed to be unable to pay its debts — 1. Whenever a creditor by assignment or otherwise, to whom the company is indebted at law or in equity in a sum exceeding 50*l.* then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor. 2. Whenever, in England or Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part. 3. Whenever, in Scotland, the *inducia* of a charge for payment on an extract-decree, or an extract-registered bond, or an extract-registered process, have expired without payment being made. 4. Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts. (Sect. 80.)

In England and Ireland the proceedings are in the Court of Chancery, which has power to transfer them to the Court of Bankruptcy; and in mining companies within the jurisdiction of the Stannaries Court, the proceedings are taken in that court, unless the vice-warden certify that in his opinion the company would be more advantageously wound up in the Court of Chancery. (Sects. 81, 83–86.)

The application is by petition, and it may be presented "by the company, or by any one or more creditor or creditors, contributory or contributories, of the company, or by all or any of the above parties, together or separately;" and every order which may be made on any such petition operates in favour of all the creditors, and all the contributories, in the same manner as if it had been made on the joint petition of a creditor and a contributory. (Sect. 82.) The court may, at any time after the presentation of the petition, restrain further proceedings (*see* 23 & 24 Vic. c. 126, s. 34) in any action, suit, or proceeding against the company; and it may appoint provisionally an official liquidator. (Sect. 85.) When an order has been made for winding up a company, no suit, action, or other proceeding can be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose. (Sect. 87.) The court may stay the proceedings on the order for winding up. (Sect. 89.) Where the company is limited by guarantee, and has a capital divided into shares, any share capital that may not have been called up is deemed to be assets of the company, and to be a debt (of the nature of a specialty) due to the company from each member, to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the court. (Sect. 90.) The court may, as to all matters relating to the winding up, have regard to the wishes of the creditors and contributories. (Sect. 91.)

The powers of the court, and provisions relative to appeals, are specified in sects. 98–128.

(*b*) *Voluntary Winding up.*[1]

As to the Official Liquidators.—The court may appoint a person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator, or official liquidators, for the purpose of conducting the proceedings in winding up the company and assisting the court therein. (Sects. 92, 93.) This person is styled official liquidator of the particular company, and not by his individual name, and he takes into his custody, or under his control, all the property, effects, and things in action, to which the company is and appears to be entitled, and performs such duties in reference to the winding up of the company as may be imposed by the court. (Sect. 94.) He has power to bring or defend actions in the name of the company; to carry on its business, so far as may be necessary for the beneficial winding up of the same; to sell the property of the company; to execute deeds, &c., on behalf of the company; to prove claims in bankruptcy; to draw, accept, make, and indorse bills and notes in the name and on the behalf of the company; to raise money on security of the assets; to take out letters of administration to a deceased contributory; and to do and execute all such other things as may be necessary for winding up the affairs of the company, and distributing its assets. (Sects. 95, 96.) He may appoint a solicitor to assist him. (Sect. 97.)

The court has power to make rules. (Sects. 170–3.

Where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding up, shall be void to all intents. (Sect. 163.)

[1] *As to the Voluntary Winding up of a Company.*—A company may be wound up voluntarily: 1. Whenever the period, if any, fixed for the duration of the company by the articles of association, expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily. 2. Whenever the company has passed a special resolution requiring the company to be wound up voluntarily. 3. Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same. A resolution is deemed extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution. 25 & 26 Vic. c. 87, s. 129.

The voluntary winding up is deemed to commence at the time of passing the resolution. (Sect. 130.) And the company ceases to carry on its business from that time, except so far as may be required for the beneficial winding up; and all transfers of shares, except made with the sanction of the liquidators, or alteration of the *status* of members, thereafter are void; but its corporate state and powers continue until its affairs are wound up. (Sect. 131.) Notice must be given of the special resolution by advertisement in the *Gazette*. (Sect. 132.)

The Consequences of Voluntary Winding up are these—1. The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed among its members according to their rights and interests in the company. 2. Liquidators shall be appointed for the purpose of winding up the affairs of the company, and distributing the property. 3. The company, in general meeting, shall appoint such person or persons as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him. 4. If one person only is appointed, all the provisions of the act in reference to several liquidators shall apply to him. 5. Upon the appointment of liquidators all the powers of the directors shall cease, except in so far as the company, in general meeting, or the liquidators, may sanction the continuance of such powers. 6. When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two. 7. The liquidators may, without the sanction of the court, exercise all powers by this act given to the official liquidator. 8. The liquidators may exercise the powers heretofore given to the court of settling the list of contributories of the company, and any list so settled shall be *primâ facie* evidence of the liability of the persons named therein to be contributories. *See* 30 L. J. Ch. 38. 9. The liquidators may, at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being, entered on the list of contributories, to the extent of their liability, to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of contributories amongst themselves; and the liquidators may, in making a call, take into consideration the probability that some of the contributories, upon whom the same is made, may partly or wholly fail to pay their respective portions of the same. 10. The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves. (Sect. 133.)

Where a company, limited by guarantee,

(*c*) *Winding up subject to the Supervision of the Court.*[1]
(*d*) ,, *of Unregistered Companies.*[2]

and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and shall be a specialty debt due from each member of the company, to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators. (Sect. 134.) The company may delegate to its creditors the power of appointing liquidators, or may enter into an arrangement with them as to the powers of the liquidators. (Sects. 135–7.) The liquidators, or any contributory, may apply to the court to determine expenses arising in the matter of the winding up. (Sect. 138.) The liquidators are empowered to summon general meetings of the company, for the purpose of obtaining their sanction; and if the winding up continue more than a year, they are bound to summon annually a general meeting of the company, and lay before it their accounts and acts and dealings during the preceding year. (Sect. 139.) The company may fill up vacancies in the liquidators (sect. 140); and the court may, if no liquidator is appointed, appoint one, or on due cause shown, may remove a liquidator, and appoint another. (Sect. 141.) The liquidators must, so soon as the company is wound up, call a general meeting, and submit their accounts thereto (sect. 142), and make a return thereof to the Registrar. (Sect. 143.) All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, are payable out of the assets of the company, in priority to all other claims. (Sect. 144.) The voluntary winding up of a company is no bar to the right of a creditor to have it wound up by the court, if the court think his rights would be prejudiced. (Sects. 145, 146.)

[1] *As to the Winding up, subject to the Supervision of the Court.*—When a resolution has been passed by a company to wind up voluntarily, the court may make an order directing that the voluntary winding up should continue, but subject to such supervision of the court, and with such liberty for creditors, contributories or others, to apply to the court, and generally upon such terms, and subject to such conditions, as the court thinks just. (Sects. 147–149.) The court, where it makes such order, may appoint any additional liquidator or liquidators (sect. 150), who, subject to any restrictions imposed by the court, exercise the same powers as if the company were being wound up voluntarily without the sanction or intervention of the court; but with this exception such an order "shall, for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the court for winding up the company by the court, and shall confer full authority on the court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the court;" and in the construction of the provisions, whereby the court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression "official liquidators" shall be deemed to mean the liquidators conducting the winding up, subject to the supervision of the court. (Sect. 151. *See* sect. 152.) *See* supplemental provisions, sects. 153–169.

[2] *As to Unregistered Companies.*—By 25 & 26 Vic. c. 89, s. 190, "any partnership, association, or company, except railway companies incorporated by act of parliament, consisting of more than seven members, and not registered under this act, and hereinafter included under the term 'unregistered company,' may be wound up under this act, and all the provisions of this act with respect to winding up shall apply to such company, with the following exceptions and additions:—1. An unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover, the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall, for all the purposes of the winding up of such company, be deemed to be the registered office of the company. 2. No unregistered company shall be wound up under this act voluntarily or subject to the supervision of the court. 3. The circumstances under which an unregistered company may be wound up are as follows; (that is to say):—*a*. Where the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs. *b*. Whenever the company is unable to pay its debts. *c*. Whenever the court is of opinion that it is just and equitable that the company should be wound up. 4. An unregistered company shall, for the purposes of this act, be deemed to be unable to pay its debts—(*a*.) Whenever a creditor, to whom the company is indebted in law or in equity, by assignment or otherwise, in a sum exceeding 50*l*. then due, has served on the company, by leaving the same at the prin-

II. Of the Contracts of Joint-Stock Companies.

(A) *Liability of Committeemen and Members before Incorporation.*[1]

cipal place of business of the company, or by delivering to the secretary, or some director or principal officer of the company, or by otherwise serving the same, in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or compound for the same to the satisfaction of the creditor. (*b.*) Whenever any action, suit, or other proceeding has been instituted against any member of the company, for any debt or demand due, or claimed to be due from the company, or from him in his character of member of the company, and notice in writing of the institution of such action, suit, or other legal proceeding, having been served upon the company, by leaving the same at the principal place of business of the company, or delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, the company has not, within ten days after service of such notice, paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same. (*c.*) Whenever, in England or Ireland, execution or other process issued on a judgment-decree or order obtained in any court in favour of any creditor, in any proceeding at law or in equity against the company, or any member thereof as such, or against any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied. (*d.*) Whenever, in the case of an unregistered company engaged in working mines, within and subject to the jurisdiction of the Stannaries, a customary decree, or order absolute, for the sale of the machinery, materials, and effects of such mine, has been made in a creditor's suit in the court of the vice-warden. (*e.*) Whenever, in Scotland, the *inducia* of a charge for payment on an extract-decree, or an extract-registered bond, or an extract-registered process, have expired without payment being made. (*f.*) Whenever it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts. *See*, further, sects. 200–204.

[1] The liability of a member commences with the commencement of the company, and he is not responsible for contracts made before that period by its intended members or directors, while preliminaries on the accomplishment of which he had agreed to join the company are unaccomplished. *Dickinson v. Valpy*, 10 B. & C. 142. *Fox v. Clifton*, 6 Bing. 776. *Bourne v. Freeth*, 9 B. & C. 632. *Pitchford v. Davis*, 5 Mee. & W. 2. *Barnett v. Lambert*, 15 id. 489. *Reynell v. Lewis*, id. 517. *Hutton v. Thompson*, 3 H. of L. C. 161. *Ellis v. Schmæck*, 5 Bing. 521. *Lawler v. Kershaw*, M. & M. 93. *Doubleday v. Muskett*, 7 Bing. 110; 4 M. & P. 750. *Hutt v. Giles*, 12 Mee. & W. 492. Where a prospectus is issued and shares collected for a speculation, to be carried on by means of a certain capital to be raised on a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled; but if it be shown that he knows the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts. *Pitchford v. Davies, supra: per Lord Abinger, Steingenberger v. Carr*, 3 Man. & G. 191. But when the partnership has once begun every member is liable in respect of a contract made by the directors or agents in the usual course of business, though contrary to the original stipulations. *Hawken v. Bourne*, 8 Mee. & W. 703.

Persons permitting their names to be on the list of provisional committeemen of a projected company, do not by reason thereof authorise the members of the managing committee to pledge their credit, even for things necessary to establish the company; and they are not necessarily liable merely on that account, although they may further have accepted shares, and paid a deposit. *Bright v. Hutton*, 3 H. of L. C. 341. *Reynell v. Lewis*, and *Wyld v. Hopkins*, 15 Mee. & W. 517. *Bailey v. Macaulay*, 15 Q. B. 533. *See* also *Cook v. Tonkin*, 3 id. 936. *Lake v. the Duke of Argyle*, 6 id. 477. *Wood v. Duke of Argyle*, 6 Man. & G. 928. *Hutton v. Upfill*, 2 H. of L. C. 674. *Norris v. Cottle*, 2 id. 647. But these, and any other acts they may have done, raise a question of fact for the jury, whether they authorised the pledging of their credit for matters necessary to the formation of the company. Their permitting their names to be inserted in a prospectus, which represented certain persons as the agents of the committee—*e. g.* solicitors and secretaries—should be submitted to the jury, and it is for them to judge whether by so doing they did not intend to authorise those agents to do all such things on their behalf as are usually done by them in similar cases. *Barnett v. Lambert*, 15 Mee. & W. 489. *Whitehead v. Barron*, 2 M. & Rob. 248. *Beale v. Mouls*, 10 Q. B. 976. If there be both a provisional committee and a managing committee co-existing, the members of the latter are not in general the agents of the former, and their contracts do not bind the members of the provisional committee in the absence of express proof of agency (*Williams v. Piggott*, 2 Ex. 201. *Dawson v.*

(B) *In case Projected Company Abandoned.*[1]

(C) *While Provisionally Registered.*[2]

(D) *After Incorporation.*[3]

Morrison, 16 L. J. C. P. 240); but with such proof of agency the liability will be established. *Ex-parte Tanner*, 21 L. J. Ch. 214.

If all the members of a provisional committee have not joined in authorising the same contract, the contribution is confined to those who incurred the joint liability, which has been discharged, and in respect of which the action is brought; and to determine the share that each has to pay regard must be had to the number of the original co-contractors, so that if twelve originally authorised the contract, and two are dead at the time the claim for contribution arises, the survivors can only be called upon for one-twelfth part each, the personal representatives of the deceased co-contractors being responsible for the residue of the contributory demand. *Batard v. Hawes*, 2 E. & B. 298. *See* vol. iii. p. 126, n. [2].

[1] Where a projected company has never been brought into actual operation, the persons who have advanced money on the faith of the completion of the undertaking may maintain an action to recover it. *Kempson v. Saunders*, 4 Bing. 5; 2 Moore, 44. *Johnson v. Goslett*, 18 C. B. 728. *Nockles v. Crosby*, 3 B. & C. 814. *Watkins v. Huntley*, 2 C. & P. 410. *Walstab v. Spottiswoode*, 15 Mee. & W. 501. *Chaplin v. Clarke*, 4 Ex. 403. *Ashpitel v. Sercombe*, 5 id. 147. See *Mowatt v. Lord Londesborough*, 4 E. & B. 1. *Hutton v. Thompson*, 3 H. of L. C. 161. *Garwood v. Ede*, 1 Ex. 264. *Clement v. Todd*, id. 268. *Willey v. Parratt*, 3 id. 211. *Watts v. Salter*, 10 C. B. 477. And a court of equity will grant relief if the scheme turns out a mere bubble concocted in fraud. *Colt v. Woollaston*, 2 P. Wms. 154. *Green v. Barrett*, 1 Sim. 45. *Blain v. Agar*, 2 id. 289. *Harvey v. Collett*, 15 Sim. 332.

If the managers have by parol agreed to return the deposits in case an act of incorporation is not obtained, and a parliamentary contract and subscribers' agreement is afterwards executed authorising the directors to expend the deposits in defraying the necessary expenses, the first agreement is not extinguished by the subsequent contract, if the two contracts have not been entered into by and between the same parties. *Mowatt v. Lord Londesborough*, 4 E. & B. 9.

[2] Where a joint-stock company is provisionally registered under 25 & 26 Vic. c. 89, it will always be a matter of evidence with whom a contract on behalf of the common adventure was entered into, and who, therefore, ought to be joined as plaintiffs in an action for its breach. In *Duke v. Forbes*, 1 Ex. 356; 5 D. & L. 198; 17 L. J. Ex. 37, it was held on demurrer that a declaration against an allottee for payment of the deposit-money was good which stated the contract as having been made with the plaintiffs, being the members of the managing committee of the company; and it was observed in answer to the objection, that the contract declared upon ought to have been treated as a contract with *all* the members of the company, and not merely with the managing committee alone; that a contract might well be made between the managing committee of such a company and an allottee, to enure to the benefit of the company, in which case the managing committee would be the proper parties to sue; and that if, in fact, the contract were with the company, and not with the managing committee, the objection should have been taken at the trial. As, for instance, if it were proved to have been made with the provisional committee, and not with the committee of management. *Woolmer v. Toby*, 10 Q. B. 69. In an action by the provisional committee of a railway company, the court will not set aside a plea *puis darrein continuance* of a release by one of the plaintiffs, if the releasor has any interest in the concern, however small, unless a clear case of fraud be made out. *Rawsthorne v. Gandell*, 3 D. & L. 682; 15 L. J. Ex. 291.

[3] Any company under the 25 & 26 Vic. c. 89, may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds in its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company. (Sect. 55.)

The power the directors have to carry on the business of the company must, almost universally, be exercised at a board duly convened, at which the prescribed number are present, and concur. See *Bosanquet v. Shortridge*, 4 Ex. 699. *Homesham v. Wolverhampton Waterworks Co.* 6 id. 137. Even a deed under a seal of the company, executed at a meeting at which the required number are not present, will not bind the body. *Kirk v. Bell*, 16 Q. B. 290. Mere acceptance of goods under a contract, entered into in a mode which is not sanctioned by the deed of settlement, will not bind the body. *Ridley v. the Plymouth, &c. Baking Co.* 2 Ex. 711. *Homesham v. Wolverhampton Waterworks Co. supra. Kirk v. Bell*, 16 Q. B. 290.

Although it is established that all the world must be presumed to have notice before any negotiation begins with the directors of a registered company of the contents of the articles of association, yet, although the articles, goods, or the deed of settlement, or act of parliament, under which a particular trading company is incorporated, may require

the observance of certain formalities in the making of deeds on behalf of the company, and the directors neglect to comply with these formalities, there is a breach of duty on the part of the directors, in respect of which they are responsible to the shareholders, it does not follow, if *bonâ fide* entered into, that the contract is void as against the company. *Agar v. Athenæum Life Assurance Co.* 3 C. B. (N. S.) 756. *Prince of Wales Insurance Co. v. Harding*, 1 Ell. Bl. & Ell. 216. Whenever, however, a party dealing with a joint-stock company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, the shareholders may very fairly deny their liability. *Prince of Wales Insurance Co. v. Harding*, *supra*.

An action cannot be maintained against a company completely registered for services rendered before registration, although the services were rendered during provisional registration. *Hutchinson v. Surrey, &c. Association*, 11 C. B. 689. *Ex-parte Terrell*, 21 L. J. Ch. 222. *Payne v. the New S. W. C. & I. N. Co.* 10 Ex. 283.

In the case of joint-stock companies under 25 & 26 Vic. c. 89, a promissory-note or bill of exchange is deemed to have been made, accepted, or indorsed on behalf of the company, if made, accepted, or indorsed in the name of the company, by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company, by any person acting under the authority of the company. The name of the company must be mentioned in the bill or note of the company as limited; otherwise the director, manager, or officer of the company, or other person who signed, or authorised to be signed, the bill or note on behalf of the company, in addition to incurring a penalty, is personally liable to the holder for the amount thereof, unless it is duly paid by the company. (Id. s. 42.)

One member of a joint-stock company cannot bind the others by negotiable instruments. The right of one director to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others, so as to make those others liable, is not a right or power implied by law, as like that which belongs to one member of an ordinary partnership in trade with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter, or deed or agreement, under which the company is established or constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect. *Dickinson v. Valpy*, 10 B. & C. 142. *Bramah v. Roberts*, 3 Bing. N. C. 963. See *Steele v. Harmer*, 14 Mee. & W. 831. So, unless it be part of the ordinary business of the company, *e. g.* a banking company (*Bank of Australasia v. Breillat*, 6 Moore, P. C. 152), or express power be given them by deed, the directors have no authority to pledge the credit of the shareholders by borrowing money, even though it be necessary to enable them to carry on the affairs of the company. *Burmester v. Norris* 6 Ex. 796. *Bosanquet v. Shortridge*, 4 id. 699. *Ricketts v. Bennett*, 4 C. B. 686.

As to the acceptance, &c. of bills and notes by or on behalf of joint-stock companies, *see* vol. ii. p. 421.

If the directors are by the deed of settlement or articles of association absolutely prohibited from borrowing money or issuing bills of exchange or promissory notes, the company cannot in general be made responsible upon bills or notes issued in defiance of the prohibition. *Balfour v. Ernest*, 5 C. B. (N. S.) 601; 28 L. J. C. P. 170.

If the directors of a registered joint-stock company are empowered to borrow money, the power to be exercised in accordance with certain prescribed formalities, and the directors borrow money without complying with the formalities, this is a matter between them and the shareholders, and does not deprive the lender of his rights against the company. *Agar v. Athenæum Assurance Co.* 3 C. B. (N. S.) 753. *Royal British Bank v. Turquand*, 6 E. & B. 332. And if the money borrowed has been applied in furtherance of the general objects of the company, and the shareholders have the benefit of the loan, they will not in general be allowed to retain the money and repudiate the agency by which it was obtained, by alleging that the directors had no power to borrow. *In re Electric Telegraph Co.* 29 Beav. 353. Further, although the managers of a company raise money for purposes unauthorised by the deed of settlement or articles of association; yet if the shareholders, with full knowledge of these transactions, take no steps to ascertain whether the capital has been properly increased or not, but reap the benefit derived from the increase, they will not afterwards be heard to say that the money was not advanced for the general use and purposes of the partnership. *Re Magdalena Steam Navigation Co.* 29 L. J. Ch. 667.

The City of London Gas-Light and Coke Company may maintain *assumpsit* for gas supplied to the occupiers of a wharf, and it is not necessary in such a case that there should have been any contract by deed executed by the company. *Gas-Light Co. v. Nicholls*, 2 C. & P. 365. In an action by the solicitor of an intended company for preparing their copartnership-deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitor in preparing the deed. *Bell v. Francis*, 9 C. & P. 66.

Where the jury found that the defendant was not a member of a projected joint-stock company when the order for the goods for which the action was brought was given, although they were delivered after his becoming so: — *Held*, that he could not be made liable for what was supplied on the credit of

III. Of the Liability of the Company for Torts.[1] *See* vol. iii. p. 266.

IV. „ Calls.

(A) *Liability of Shareholder for, and Proceedings to Recover.*[2]

others. *Whitehead v. Barron*, 2 M. & Rob. 248. And where the defendant was not a member of the local committee at the time the plaintiff was first engaged as secretary, but became, &c., while the plaintiff continued secretary, it will be for the jury to say whether the defendant did not continue to employ the plaintiff on the same terms on which he was originally engaged. *Kerridge v. Hesse*, 9 C. & P. 200. So where the defendants, being four directors of a company, and liable individually on a bill, and being unwilling to make a call, applied to the plaintiff to advance them the amount, which he agreed to do if they would pay his bill for goods supplied to the company:—*Held*, that it was for the jury to say whether the advance was made on the credit of the company or of the individual directors, to relieve them from a personal liability. *Colley v. Smith*, 2 M. & Rob. 96. *See* further, vol. iii. p. 263, *et seq.*

[1] The directors of a gas company are answerable for an act done by their superintendent and engineer under a general authority to manage works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued. *Rex v. Medley*, 6 C. & P. 292. *See post*, p. 252, n. [2], as to false representation.

[2] *The Companies' Clauses Consolidation Act*, 8 & 9 Vic. c. 16, s. 21, provides "that the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company; and with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder."

Sect. 25 enacts, that "if at the time appointed by the company for the payment of any call any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof in any court of law or equity having competent jurisdiction, and to recover the same, with lawful interest from the day on which such call was payable."

By sect. 26, "in any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act."

The concluding words are material. *Moore v. Metropolitan Sewage Manure Co.* 18 L. J. Ex. 164. The allegation that the defendant is the holder of shares, means that he was the holder at the time the calls were made. *Belfast and County Down Railway Co. v. Strange*, 1 Ex. 739. See *Aylesbury Railway Co. v. Morrat*, 4 Man. & G. 651.

For forms of declaration see *Smith v. Goldsworthy*, 4 Q. B. 430. *M'Intyre v. Miller*, 13 Mee. & W. 725; B. & P. Pl. 13–82.

As to the Evidence.—It is enacted by the 8 & 9 Vic. c. 16, s. 27, that "on the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this and the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period." And by sect. 28, "the production of the register of shareholders shall be *primâ facie* evidence of such defendant being a shareholder, and of the number and amount of his shares."

The Joint-Stock Companies' Act enacts, that "in any action or suit brought by the company against any member to recover any call or other monies due from such member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made, or other monies due, whereby an action or suit hath accrued to the company." 25 & 26 Vic. c. 89, s. 70. *See* sects. 81–83, 108.

The power of the directors to make calls must be strictly followed. *Meigh v. Clinton*, 11 Ad. & E. 428. Persons whose names are entered on the register of members, are deemed to be members. 25 & 26 Vic. c. 89, s. 23. This being an exceptional privilege, the condition should be strictly complied with; but if substantially pursued, a merely nominal deviation will not prevent

its being evidence. *Birmingham, Bristol, and Thames Railway Co. v. Lock*, 1 Q.B. 256. *Bain v. Whitehaven, &c. Railway Co.* 3 H. of L. C. 1. *Birkenhead, &c. Railway Co. v. Brownrigg*, 4 Ex. 426. *Sheffield and Manchester Railway Co. v. Woodcock*, 7 Mee. & W. 580. *West Cornwall Railway Co. v. Morratt*, 15 Q. B. 521.

The defendant, under a traverse of his being a shareholder, may not only dispute that he is such *de facto*, but may show that he is not a shareholder, *de jure* so as to be entitled to a share in the profits of the undertaking. *Shropshire Union Railway Co. v. Anderson*, 18 L. J. Ex. 232.

It is a good plea that the defendant was an infant, and repudiated the contract, to an action for calls in the statutable form against an original shareholder (*Newry and Enniskillen Railway Co. v. Combe*, 18 L. J. Ex. 325); but a plea of infancy at the time the calls were made, without showing either that the infant became a shareholder by contract, or that he ever repudiated his interest in the shares, is no defence; for he may have received the shares by will, or by devolution upon him by operation of law, or have purchased them from the original contractor, and he cannot be assumed to have repudiated them. *Leeds and Thirsk Railway Co. v. Fearnley*, 18 L. J. Ex. 330. See *Cork and Bandon Railway Co. v. Cazenove*, 11 Jur. 802.

Where the special act for the incorporation of a railway company provided that the Companies' Clauses Consolidation Act should be incorporated with it, and further provided that every one who should have subscribed to the undertaking, or should be otherwise entitled to a share, and whose name should be entered on the register, should be a shareholder, it was held that an allottee who had executed the subscribers' agreement, and sold his scrip before the act of parliament was obtained, and whose name had been entered on the register without his consent, was liable for calls until the name of the purchaser of the shares in question had been inserted. *Midland Great Western Railway Co. v. Gordon*, 16 Mee. & W. 804; 16 L. J. Ex. 166.

If the defendant covenanted to subscribe a certain sum of money towards the capital of a company, which is to be started with a certain amount of capital, and upon certain terms and conditions, he is not liable to an action for calls if the company is started with less capital, and not upon the terms and conditions agreed upon. *Galvanised Iron Co. v. Westoby*, 8 Ex. 17. *Norwich, &c. Co. v. Theobald*, 1 Mee. & W. 121. *Howbeach Coal Co. v. Teague*, 5 H. & N. 157. But he is responsible on an unconditional contract to pay a specified sum, whether the whole capital has or has not been subscribed for or raised, and whether the other shareholders have or have not paid up their calls and subscriptions. *London and County Assurance Co. v. Redgrave*, 4 C. B. (N. S.) 535.

Calls may, in the absence of any prohibition in the act or regulations of the company, be made payable by instalments, or to take effect in future; and the time and mode of payment may be fixed by an act subsequent to the resolution making the call. *Ambergate, &c. Railway Co. v. Coulthard*, 5 Ex. 459. *London and North-Western Railway Co. v. M'Michael*, 6 id. 273.

The liability for a call attaches when the resolution to make the call is passed, though it be payable at a future day. *North American C. A. of I. v. Bentley*, 19 L. J. Q. B. 427. *Ex-parte Tooke*, 18 id. 343.

Where there is a power to declare the shares forfeited on default in payment of calls (see *Van Dieman's Land Co. v. Cockrell*, 1 C. B. (N. S.) 732), the circumstance of notice to pay within a specified time, otherwise forfeiture, having been given to the shareholder, does not afford a defence in an action for the calls. *Birmingham, &c. Railway Co. v. Lock*, 1 Q. B. 256. *Edinburgh and Leith Railway Co. v. Hebblewhite*, 6 Mee. & W. 707. *Great Northern Railway Co. Kennedy*, 4 Ex. 417. In some instances, the company has power both to forfeit the shares and recover the calls (*Great Northern Railway Co. v. Kennedy*, 4 Ex. 417); in others, it has merely an election, either to proceed for the calls or declare the shares forfeited. *Giles v. Hull*, 3 Ex. 18.

A court of equity will not, under ordinary circumstances, grant relief against the exercise of the power of forfeiture. *Prendergast v. Turton*, 1 You. & C. C. C. 98.

If the company, by their own negligence or default, have treated a wrong person as the owner of shares, and have made calls upon him, and on his failure to pay have declared the shares forfeited, and have sold them to another party, the company is responsible in damages to the true owner. *Catchpole v. Ambergate, &c. Junction Railway Co.* 1 E. & B. 111; 22 L. J. Q. B. 38.

The minute of the meeting at which the resolution for the call was passed, and which contains that resolution, should be produced, duly signed by the chairman. *Cornwall Mining Co. v. Bennett*, 5 H. & N. 428; 29 L. J. Ex. 157.

It must be shown, in order to subject the defendant, an original allottee, to the statutory liability, that he accepted the shares, in writing under his hand, in conformity with the statute. *New Brunswick, &c. Railway Co. v. Muggeridge*, 4 H. & N. 167; 28 L. J. Ex. 305.

The fact that his name is on the register of shareholders is not sufficient, if it appear that shares were not allotted to him in conformity with the statute. If he is not a shareholder, but has executed the subscription contract, he may be liable on his contract for payment of his agreed subscription, but he cannot be subjected to the statutory remedy for calls. *Wolverhampton New Waterworks Co. v. Hawksford*, 6 C. B. (N. S.) 355.

Where it appeared that the defendant was not an original subscriber, but had purchased scrip certificates of the shares, and that before the call was made the defend-

V. Of the Transfer of Shares, and Action for not Transferring.[1]

VI. Remedy of Shareholder for Improper Entry, or Omission of Entry in Register.[2]

ant had sent the scrip to the company, with a claim to be entered on the books as the holder thereof; the defendant's name was accordingly entered in a draft register-book of shares, and a receipt for the scrip sent him, but his name was not entered on the sealed register of the company until after the call had been made:—*Held*, that the defendant was not liable. *Newry and Enniskillen Railway Co. v. Edmunds*, 2 Ex. 118; 17 L. J. Ex. 102.

Where the company issued a prospectus offering shares to the public on their filling up a printed form of application for shares, and paying a deposit, and the defendant paid the deposit and filled up the printed form of application, agreeing to accept such shares as might be allotted to him, and the company after that sent him their prescribed form of acceptance of shares, and consent to be a shareholder, which he refused to sign, it was held that he had not become a shareholder, and was not liable to the calls. *New Brunswick and Canada Railway Co. v. Muggeridge*, 4 H. & N. 160; 28 L. J. Ex. 365. But where no form of acceptance of shares had been provided by the company other than the acceptance by anticipation contained in the letter of allotment, it was held that the signature of the letter of application and agreement to accept the shares was a sufficient acceptance in writing under hand to satisfy the requirements of the statute. *Bog Lead Mining Co. v. Montague*, 30 L. J. C. P. 380.

[1] Though a joint-stock company be seised of land, yet its shares are, in the absence of any enactment, personal property, and transferable by parol. *Bradley v. Holdsworth*, 3 Mee. & W. 422. *Hibblewhite v. M'Morine*, 6 id. 200. *Humble v. Mitchell*, 11 Ad. & E. 205. *Watson v. Spratley*, 10 Ex. 222. *Duncroft v. Albrecht*, 12 Sim. 189. *Bligh v. Brent*, 2 You. & C. 298. *Myers v. Perigall*, 11 C. B. 90. *Ware v. Cumberlege*, 24 L. J. Ch. 630. *Knight v. Barber*, 16 Mee. & W. 66. *Walker v. Bartlett*, 18 C. B. 845.

An action for not accepting shares may be maintained by the vendor on a verbal agreement to purchase them. *Tempest v. Kilner*, 2 C. B. 300.

Until the production of the transfer at the company's office, and, indeed, until the entry of it on the register of members, the purchaser cannot recover any profits, or in any wise act as a shareholder; and the vendor continues liable as a shareholder to the debts and engagements of the company. *Sayles v. Blane*, 14 Q. B. 205. If, however, the purchaser has agreed to take them in the usual form, subject to the same rules and regulations on which the vendor held them, a promise will be implied on his part to indemnify the vendor against such claims. *Wynne v. Price*, 3 De Gex & S. 310. *Walker v. Bartlett*, 18 C. B. 845. *See contra, Humble v. Langston*, 7 Mee. & W. 517. *Sayles v. Blane*, 14 Q. B. 205.

Where the private act of the company required that the proprietors should be registered, this was held not to prevent a valid transfer prior to the formation of the register. *Sheffield and Manchester Railway Co. v. Woodcock*, 7 Mee. & W. 574.

Where an act directed that the subscribers should constitute the company, and it appeared that the subscription was by signing the parliamentary contract, on which a scrip certificate was handed to the person signing, the transferee of such a person having been registered was held to have become a proprietor, the enactment being that the proprietors of shares might sell them. *Birmingham, &c. Railway Co. v. Lock*, 1 Q. B. 256. *London Grand Junction Railway Co. v. Graham*, id. 284.

If the approbation of the directors be required as a preliminary to the transfer, the vendor is bound to obtain such approbation; and in case it is refused by the directors, though improperly, the purchaser is justified in rescinding the contract. *Wilkinson v. Lloyd*, 7 Q. B. 27.

If a deed be rendered necessary by the act, the purchaser must render a conveyance to the seller for execution before he can sue for not transferring the shares, notwithstanding they are declared by the act to be personal property. *Stephens v. De Medina*, 4 Q. B. 422. *Bowlby v. Bell*, 3 C. B. 284.

A sealed instrument of transfer, having the name of the vendee in blank at the time when it was sealed and delivered, was held invalid. *Hibblewhite v. M'Morine*, *supra*. *Ex-parte Swan*, 7 C. B. 400; 30 L. J. C. P. 113; 31 id. Ex. 425. *Green's Patent*, 24 Hare, 145.

If the defendant admits his inability to transfer shares, the price need not be tendered. *Jackson v. Jacob*, 3 Bing. N. S. 869.

[2] By 24 & 25 Vic. c. 89, s. 35, "if the name of any person is, without sufficient cause, entered in or omitted from the register of members of the company under this act, or if default is made, or unnecessary delay take place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of her majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the Stannaries, in case of courts subject to his jurisdiction, and as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the ap-

VII. Powers of Directors.[1]

VIII. Responsibility of Directors for False Statement.

(A) *Liable to Action at Suit of Party Damaged.*[2]

(B) *Guilty of a Misdemeanor.*[3]

IX. Actions by and against Companies.[4]

(A) *Companies Registered under the 25 & 26 Vic. c. 89.*[5]

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plicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or over the form in the register, whether such question arises between two or more members, or alleged members, and the company, and generally the court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register: Provided that the court, if a court of common law, may direct an issue to be tried in which any question of law may be raised, and a writ of error and appeal, in the manner directed by the Common-Law Procedure Act, 1854, shall lie." *Re Swan*, *ante*, p. 251, n.[1]. *See* 27 L. J. Q. B. 115; 29 id. 177; 28 id. Ch. 285.

[1] If the directors exceed their powers, and appropriate the funds of the company in a way not authorised by the articles of association or the deed of settlement, they are bound to make good out of their own pockets the full amount of money misappropriated. *Grimes v. Harrison*, 28 L. J. Ch. 827. See *Simpson v. Westminster Palace Hotel Co.* 8 H. L. C. 712. *In re Troup*, 29 Bac. 353; and 30 id. 225, as to borrowing money.

It is competent for any single shareholder to apply for and obtain an injunction for the purpose of preventing the directors from entering into contracts for the carrying on a trade or business, and the accomplishment of objects not warranted by the articles of association. *Simpson v. Westminster Palace Hotel Co.* 29 L. J. Ch. 561; 6 Jur. N. S. 985. *See* 23 & 24 Vic. c. 126.

[2] The directors of a joint-stock company, deceitfully publishing a false report as to the financial condition of the company, are responsible to a person who, relying upon that statement, becomes a shareholder, and suffers loss or damage in consequence; and they are so responsible, notwithstanding the representation were not made directly to the person who has been so induced by it to take shares. *Scott v. Dixon*, 29 L. J. Ex. 62, n. *Bedford v. Bagshaw*, 4 H. & N. 538; 29 L. J. Ex. 59. *Pontifex v. Bignold*, 9 Dowl. 860; 3 Man. & G. 63.

It was held, in an action against directors of a joint-stock company for a false representation, that they had authority to bind the company by their acceptance of a bill of exchange drawn on the company, that it was incumbent on the plaintiff to show that he had sustained damage, and that such an action was not therefore maintainable by the indorsee of the bill, unless it were shown that he gave value for it, or was otherwise damnified. *Eastwood v. Bain*, 28 L. J. Ex. 74; 7 W. R. 90. *See* Deceit, vol. iii. p. 561; and *see* 31 L. J. Ch. 297; 6 L. T. (N. S.) 109, 870.

[3] By 24 & 25 Vic. c. 96, s. 34, "a director, manager, or officer of any public company making, circulating, or publishing, or concurring in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor."

[4] Where there is no act or letters patent, and the deed of settlement is silent, the general law of partnership prevails, and supplies its omissions. Thus, one member cannot maintain an action against the rest, or the rest against him, on a contract made with the company. *Holmes v. Higgins*, 1 B. & C. 74. *Wilson v. Curzon*, 15 Mec. & W. 532. *Chadwick v. Clark*, 1 C. B. 700. *Neale v. Turton*, 4 Bing. 149; 12 Moore, 365. *Teague v. Hubbard*, 8 B. & C. 345; 1 M. & R. 369. *Moneypenny v. Hartland*, 1 C. & P. 352. *Parkin v. Fry*, 2 id. 311. *Milburn v. Codd*, 7 B. & C. 419; 1 M. & Rob. 238. *Goddard v. Hodges*, 3 Tyr. 209; 1 C. & M. 33. *Perring v. Hone*, 4 Bing. 28. As in case of an ordinary partnership, a member may recover from the company for work done previously to his having become interested in it. *Lucas v. Beach*, 1 Man. & G. 417.

[5] A company registered under the Joint-Stock Companies' Act being incorporated, actions may be maintained both by and against its members, upon transactions with the company, and also actions for calls may be maintained by the company against its members. *See* 25 & 26 Vic. c. 89, s. 18. An insurance company not registered as required by sect. 209, is by sect. 210 incapacitated from suing. *Waterloo Life Insurance Co.* 11 W. R. 134; but *see* id. 152; 7 L. T. (N. S.) 550.

The official liquidator, in case the company is being wound up, is empowered by the sanction of the court "to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in

(*a*) *Service of Summonses, Notices, &c.*[1]

(*b*) *Security for Costs where Company Limited.*[2]

(B) *Actions by and against Companies under the Companies Clauses Consolidation Act.*[3]

(*a*) *Of the Service of the Writ, &c.*[4]

(*b*) *Execution against Company.*[5]

(*c*) *Application for* Scire Facias *against Shareholder.*[6]

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the name and on behalf of the company." 25 & 26 Vic. c. 89, s. 95.

By the 157th sect. of the same act, "any person to whom anything in action belonging to the company is assigned, in pursuance of this act, may bring or defend any action or suit relating to such thing in action in his own name." *See*, further, the provisions of the statute, *ante*.

[1] By 25 & 26 Vic. c. 89, s. 62, any summons, notice, order, or other document required to be served upon the company, may be served by leaving the same, or sending it through the post in a prepaid letter, addressed to the company at the registered office, provided it be posted in time to admit of its delivery within the prescribed period in due course of delivery. (Sect. 63.) As to notices by the company, *see* sect. 64. *See* 31 L. J. Ex. 335, as to inspection of documents.

[2] Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given. 25 & 26 Vic. c. 89, s. 69.

[3] This act is unaffected by the Joint-Stock Companies' Acts.

[4] The company sues or is sued in its corporate name. *See* vol. iii. p. 263. If they have their works abroad they may be required to give security for costs. *Kilkenny Railway Co. v. Fielden*, 6 Ex. 81.

By 8 & 9 Vic. c. 16, s. 135, "any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post to, the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company. See *Pilbrow v. Pilbrow's Atmospheric Railway Co.* 3 C. B. 730. In ejectment against the company, personal service on the secretary is good. *Doe d. Bayes v. Roe*, 16 Mee. & W. 98.

[5] By 8 & 9 Vic. c. 16, s. 36, if any execution, either in law or in equity, shall have been issued against the property and effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders, to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid up on their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders, without fee."

[6] The only means of obtaining execution against a shareholder is by motion for a *scire facias*. The court will not grant a rule for execution against him. *Hitchins v. Kilkenny, &c. Railway Co.* 10 C. B. 160; 1 L., M. & P. 712. Notice in writing must be previously given to the shareholder (sect. 36), which, it seems, need not be personally served. *Turner v. Metropolitan Live-Stock Co.* 2 Ex. 507; 6 D. & L. 59. An affidavit must be made of the facts, for which purpose the register may be inspected. (Sect. 36.) The affidavit must state that the shareholder's name is on the register (*Turner v. Metropolitan Live-Stock Co. supra*), or show in some other way that he is a shareholder. *Rastrick v. Derbyshire, &c. Railway Co.* 9 Ex. 149; 23 L. J. Ex. 2. It must state the number of his shares, the amount of the judgment, how much is due thereon, and that due diligence has been used in issuing execution against the company. *Thompson v. Universal Salvage Co.* 3 Ex. 310. *Hichins v. Kilkenny, &c. Railway Co. supra.* A return of *nulla bona* to a *fi. fa.* against the company is not sufficient evidence that there are no funds. *Hichins v. Kilkenny, &c. Railway Co.* 15 C. B. 459; 1 L., M. & P. 712. The shareholder's admission that the company had no funds is evidence. *Devereux v. Kilkenny, &c. Railway Co. supra.* The affidavit must also state that the notice was served. It seems that, if an insufficient notice has been served, a fresh notice may be served, and a new application made. *Corder v. Universal Light Co.* 6 C. B. 554.

In allowing a *scire facias* against a shareholder the court exercises a discretion, and it must be satisfied not only that the company have no funds, but that the plaintiff has used due diligence to discover them. Whether he has used such due diligence is a preliminary matter decided by the court in giving leave to issue

(*d*) *The* Scire Facias.[1]

(*e*) *Tender of Amends in Action for Act done in Execution of the Statute.*[2]

(C) *Actions by and against Banking Companies under* 7 *Geo.* 4, *c.* 46.[3]

(*a*) *How to Sue or be Sued.*[4]

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execution. When the *scire facias* issues, such due diligence is stated in the writ, and may be traversed. *Devereux v. Kilkenny, &c. Railway Co.* 5 Ex. 834. No suggestion is requisite. (Id.) *Hitching v. Kilkenny, &c. Railway Co.* 10 C. B. 166.

Where an *elegit* had been sued out against the company, but it was insufficient to satisfy the debt, there being nothing but a small future rent to receive when it accrued, and the plaintiff had never taken actual possession of the lands under the *elegit*, he was allowed to sue out a *scire facias* against a shareholder for the whole amount. *Addison v. Tate*, 11 Ex. 250. *R. v. Derbyshire, &c. Railway Co.* 3 E. & B. 784.

Where the company was in process of being wound up, and a sum of money belonging to the company was in the hands of the official manager, but not available for the satisfaction of the judgment, the creditor was held entitled to a *scire facias* against a shareholder. *Mackenzie v. Sligo, &c. Railway Co.* 4 E. & B. 119.

As to the Persons against whom the Scire Facias *may issue.*—A shareholder is a person, we have seen, who has subscribed to the capital, or is entitled to a share, and whose name is on the register (8 & 9 Vic. c. 16, s. 8), or who has contracted to subscribe (*Newry & Enniskillen Railway Co. v. Coombe*, 3 Ex. 565), and who is a shareholder at the time of the sheriff's return of *nulla bona*. *Nixon v. Green*, 11 id. 550. A purchaser of scrip may be registered. *London Grand Junction Railway Co. v. Freeman*, 2 Scott, N. R. 705.

[1] The *scire facias* should state that execution has issued against the company, and been insufficient, and that the party is a shareholder and is possessed of shares, which latter averments are traversible. *Devereux v. Kilkenny, &c. Railway Co. supra.* The defendant cannot plead to the *scire facias* that due efforts have not been used to obtain satisfaction against the company (Id.), or that no leave to issue the *scire facias* was given. *Marson v. Lund*, 16 Q. B. 345.

[2] By 8 & 9 Vic. c. 16, s. 141, "if any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made, it shall be lawful for the defendant, by leave of the court where such action shall be pending, at any time before issue joined, to pay into court such sum of money as he shall think fit; and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into court."

[3] The 3d sched. part ii. 25 & 26 Vic. c. 89, expressly exempts from its provisions banking companies existing on the 6th May, 1844, and gives powers to form banking partnerships of not more than ten persons.

The stat. 9 Geo. 4, c. 46, s. 9, enables copartnerships of bankers to commence or institute, and prosecute, all actions and suits, and all other proceedings at law or in equity, in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership. In like manner he may be the nominal defendant on behalf of the company; and his death, resignation, or removal, shall not abate or prejudice the action, but it may be continued in the name of any other public officer for the time being. Any shareholder in a banking copartnership carrying on business under the 7 Geo. 4, c. 46, and 6 Geo. 4, c. 32, may sue or be sued by the public officer as representing the company, as if they were respectively strangers. 1 & 2 Vic. c. 96, continued by 5 & 6 Vic. c. 85. Thus they may sue for the price of shares in their company. *Davidson v. Bower*, 5 Scott, N. R. 539. So banking companies, which are not within 7 & 8 Vic. c. 113, are authorised to sue and be sued in like manner. 7 & 8 Vic. c. 113, s. 47. The company, under 7 Geo. 4, c. 46, must sue and be sued by their public officer, and not in the name of those directors who made the contract (*Chapman v. Milvain*, 5 Ex. 61; 1 L., M. & P. 209); and they may be compelled to appoint an officer for that purpose. *Davidson v. Farmer*, 6 Ex. 242. *Steward v. Greaves*, 10 Mee. & W. 716; 2 Dowl. N. S. 485. See *Beech v. Eyre*, 5 Man. & G. 415; 6 Scott, N. R. 327. *Blewitt v. Gordon*, 1 Dowl. N. S. 815.

The delivery of a return to the Stamp Office under 7 Geo. 4, c. 67, s. 2, is not a condition precedent to their so suing. *Bonar v. Mitchell*, 5 Ex. 415. See *Wills v. Murray*, 4 id. 843. They may so sue on a guarantee given to them before their name was changed (*Wilson v. Craven*, 8 Mee. & W. 584), or they may sue even after stopping payment. *Davidson v. Cooper*, 11 id. 778. See *Lyon v. Haynes*, 6 Scott, N. R. 371. *See* also cases where they were authorised by statute to sue through their secretary (*Smith v. Goldworthy*, 4 Q. B. 430. *Skinner v. Lambart*, 4 Man. & G. 477; 5 Scott, N. R. 197. *Wills v. Sutherland*, 7 D. & L. 89); or through their chairman, *Bank of Australia v. Harding*, 9 C. B. 661.

[4] A banking company within 7 Geo. 4, c. 46 (*Chapman v. Milvain*, 5 Ex. 61) must

(*b*) *Execution against Company.*[1]

(*c*) Scire Facias *against Shareholder.*[2]

sue and be sued in the name of their public officer. It is usual to describe in the writ of summons the character in which the defendant is sued. In the declaration it should be stated that the defendant was the public officer at the time of the action brought. *Esdaile v. Maclean*, 15 Mee. & W. 277. *M'Intyre v. Miller*, 13 id. 725; 2 D. & L. 708. If the officer die or be changed, there should be a suggestion of the fact, for which purpose the leave of the court must be obtained. *Barnewall v. Sutherland*, 9 C. B. 381. And the suggestion may, it seems, be traversed. (Id.) *Webb v. Taylor*, 1 D. & L. 676. *Todd v. Wright*, 16 L. J. Q. B. 311; Grant on Bankers, 474.

The court will amend a judgment entered up in the name of a public officer since changed. (Id.) The bankruptcy of the public officer does not affect the liability of the company. 7 Geo. 4, c. 46, s. 13. See *Steward v. Dunn*, 12 Mee. & W. 655; 1 D. & L. 642. If a mistake is made in the public officer, the judgment binds the company till it is set aside (*Bradley v. Eyre*, 1 D. & L. 260), unless the judgment was obtained by collusion, in which case a motion may be made to set it aside. (Id.) *Phillipson v. Earl of Egremont*, 6 Q. B. 587. *Fowler v. Rickerby*, 2 Man. & G. 760.

[1] A judgment against a public officer is a judgment against the company. 7 Geo. 4, c. 46, s. 12. Execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership, and in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained, was or were entered into (see *Bank of England v. Johnson*, 3 Ex. 598. *Harvey v. Scott*, 11 Q. B. 92. *Field v. Mackenzie*, 4 C. B. 705), or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: Provided always, that no such execution as last-mentioned shall be issued without leave first granted on motion in open court by the court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership. 7 Geo. 4, c. 46, s. 13. The public officer or shareholder against whom execution has issued is entitled to be reimbursed out of the funds of the company, or, in failure thereof, by contribution from the other shareholders. (Id. s. 14.) In order to reach a shareholder, a *scire facias*, and not a suggestion, is necessary (*Clowes v. Brettell*, 10 Mee. & W. 506; 2 Dowl. N. S. 528. *Wingfield v. Barton*, 2 Dowl. N. S. 355. *Ransford v. Bosanquet*, 2 Q. B. 972), which may issue against a member for the time being without leave of the court (*Bank of Scotland v. Fenwick*, 1 Ex. 792. *Harrison v. Tyson*, 1 Bro. C. C. 111. *Ricketts v. Bowhay*, 3 C. B. 889), and the writs may issue concurrently (*Nunn v. Lomer*, 3 Ex. 471. *Burmester v. Cropton*, id. 397); but in the case of the public officer, no *scire facias* is necessary. *Harwood v. Law*, 7 Mee. & W. 203; 8 Dowl. 899. See, where a shareholder pleaded, he was not made a member through his wife, *Dodgson v. Bell*, 5 Ex. 967. *Ness v. Angas*, 3 id. 805. So as to an executor of a shareholder. *Ness v. Armstrong*, 4 id. 21. *Ness v. Bertram*, id. 195. So as to a director. *Scott v. Berkeley*, 3 C. B. 925. As to the effect of directors not complying with form of deed as to a transfer, *Bosanquet v. Shortbridge*, 4 Ex. 699; 5 H. of L. C. As to stamp-office returns being evidence of a proprietorship, *Presscott v. Buffery*, 1 C. B. 41.

In order to reach a *former* shareholder, the application must show he has made *bonâ fide* and substantial endeavours to render execution available against members for the time being, though, it seems, it need not be shown that execution should first be issued against all the members for the time being. *Field v. Mackenzie, supra. Harvey v. Scott, supra. Bank of England v. Johnson, supra.*

[2] The motion for a *scire facias* is made in open court (7 Geo. 4, c. 46, s. 13. *Wingfield v. Barton*, 2 Dowl. N. S. 355), and it is for a rule *nisi* only. The court will not allow the time for showing cause to be shortened because of the limitation of the period by the statute. *Field v. Mackenzie*, 6 C. B. 384. A second application on fresh affidavits may sometimes be allowed. *Dodgson v. Scott*, 2 Ex. 457. And it was allowed where the rule had dropped inadvertently. *Field v. Mackenzie, supra. See* the substance of an affidavit on this application in *Harvey v. Scott, supra.*

On showing cause against the rule, it is no answer that a solvent party had been allowed collusively to transfer his shares and get rid of liability, or that a shareholder not proceeded against is indemnified, or that the

(D) *Actions by and against Companies established by Charter or Letters Patent.*[1]

JOINT-TENANTS.[2]

one proceeded against is not liable on all the causes of action in respect of which the judgment was entered up. *Harvey v. Scott*, *ante*, p. 255. If there is a doubt whether the party is a shareholder, the court will leave that to be tried under the *sci. fa. Bank of England v. Johnson*, 3 Ex. 598. *Clowes v. Brettell*, 11 Mee. & W. 461; 2 Dowl. N.S. 1020. And the same where the question is raised whether the judgment was fraudulently obtained. *Dodson v. Scott*, 2 Ex. 57; 6 D. & L. 27.

The Writ of Scire Facias (see *Ricketts v. Bowhay*, *supra*. *Fowler v. Rickerby*, 2 Man. & G. 760. *Ness v. Fenwick*, 2 Ex. 598. *Nunn v. Lomer*, 3 id. 471) is tested, directed, and proceeded upon like a writ of revivor. 15 & 16 Vic. c. 76, s. 132. *See post*, *Scire Facias*. If it is issued without leave, where leave is necessary, it may be quashed on prompt application. *Bank of Scotland v. Fenwick*, 1 Ex. 792; 5 D. & L. 377. *Ricketts v. Bowhay*, *supra*. So it may be quashed if it allege that the defendant was a "member for the time being," that phrase being ambiguous. (Id.) But it will not be quashed merely because the plaintiff has a collateral security from the company not being made available. *Field v. Mackenzie*, 4 C. B. 105; 5 D. & L. 348. The affidavits on an application to set aside the judgment and the *sci. fa.* may be entitled in both rules. *Bosanquet v. Woodford*, 5 Q. B. 310; 5 Jur. 831. As to the amendment of the *scire facias*, see *Esdaile v. Trustwell*, 11 Ex. 371; 5 D. 219.

The Declaration in Scire Facias should allege that the debt on the judgment is due to the plaintiff (*Ness v. Fenwick*, 2 Ex. 598), but need not allege that the company were actually carrying on business when the action was brought. *Ness v. Bertram*, 4 Ex. 195. A declaration has been held sufficient which alleged that the defendant was "now a member of the said copartnership." *Nunn v. Claxton*, 3 Ex. 712; 6 D. & L. 637.

As to the Plea.— It is not a fit subject of a plea that the *sci. fa.* issued without leave of the court. *Bradley v. Warburg*, 11 Mee. & W. 452. *Marson v. Lund*, 16 Q. B. 345. Nor of a demurrer that the declaration varies from the writ in the number of defendants, as this may be taken advantage of on motion; and non-joinder of other shareholders cannot be pleaded in abatement (*Fowler v. Rickerby*, 2 Man. & G. 760; 3 Scott, N. R. 138); but the defendant may plead fraud in the judgment. *Dodason v. Scott*, 2 Ex. 457; 6 D. & L. 27. *Phillipson v. Earl of Egremont*, 6 Q. B. 587. It is no answer to a *sci. fa.* against a member for the time being that the plaintiff had previously issued another *sci. fa.* against another member for the time being of the same copartnership. *Burmester v. Cropton*, 3 Ex. 397. See a plea in abatement that a concurrent writ of *sci. fa.* had issued against another, *Nunn v. Lomer*, id. 471. *Esdaile v. Lund*, 12 Mee. & W. 607.

[1] A company may be established, and the liability of its members qualified, by letters patent from the Crown, granted under 7 Wm. 4, and 1 Vic. c. 73. In such cases the company may sue and be sued in the name of one of its public officers; and no action is to abate by the death, removal, or bankruptcy of such officer. (Sects. 2, 22, 25.) When it may be necessary to serve any summons, demand, notice, or writ on the company, such service may be made on the clerk of the company or body, or by leaving the same at the head office or at the place of abode of some agent or officer employed by the company. (Sect. 26.) All judgments against such officer have the same effect against the property and effects of the company as if all the members were parties thereto: "Provided that where the extent per share of the liability of the individual members shall have been limited by any letters patent as aforesaid, no execution or diligence shall be issued against any such individual, existing and former member of such company or body as aforesaid, for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patent as aforesaid, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid to have been advanced and paid in respect of such shares, or any of them, by himself or herself, or any previous or subsequent holders of the shares, or any of them, or the representatives of any such holder, under or by virtue of any former execution or diligence, and not repaid at the time of issuing such subsequent execution or diligence. (Sect. 24.) The liability of the shareholder may be limited to the extent per share declared and limited in the letters patent. (Sect. 4.) It is for the defendant to plead the extent of his liability. *Phillipson v. Earl of Egremont*, 6 Q. B. 587. A shareholder continues liable till a return of his transfer is registered. (Sect. 21.)

[2] An estate or interest in joint-tenancy is a joint interest of two or more persons during their joint lives, with benefit of survivorship between or among them, created by a limitation of real or personal property for any estate to two or more persons as joint-tenants, or in joint-tenancy, or to them indefinitely, without any words importing a distinctness of interest in each. Smith, R. & P. P. 217, 2d ed. A gift of lands to two or more persons in joint-tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves,

JOINTURE.[1]

JUDGE, Action against, for Act done in Judicial Capacity.[2]

they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint-tenancy is accordingly said to be distinguished by unity of possession, unity of interest, unity of title, and unity of the time of the commencement of such title. Wms. Real Pr. 120; 2 Bl. Com. 180.

Joint-tenants must sue and be sued jointly (1 Co. Litt. 736, 777), and they must join in avowry. Bac. Abr. Replevin; Carth. 328. Broom's *Parties to Action*, 255. But one joint-tenant may, without the consent of his co-tenant, distrain for rent due to all the joint-tenants. 4 Bing. 562; Y. B. 15 Hen. 7, 17 a; 2 B. & B. 465; 5 Moore, 297; Bullen, 46. A notice to quit signed by one of several joint-tenants, though trustees, on behalf of the others, is sufficient to determine a tenancy from year to year. *Doe v. Summersett*, 1 B. & Adol. 135. And a notice given by a person authorised by one of several lessors who are joint-tenants, determines the tenancy as to all. *Doe d. Kindersley v. Hughes*, 7 Mee. & W. 139. See *Doe d. Bailey v. Foster*, 3 C. B. 215. Joint-tenants must all concur in presenting to a living; and if either one present, or they present severally, the ordinary may refuse the presentee, and after six months may present by lapse; and the same rule holds as to tenants in common of an advowson. Co. Litt. 186, b; 2 Inst. 365. If one joint-tenant in trade give a servant notice to quit employment and house of business, and the other desires the servant to stay, he may do so, and if the former remove him by force he may sustain trespass. *Donaldson v. Williams*, 3 Tyr. 371. The 3 & 4 Wm. 4, c. 27, s. 12, provides that the possession or receipt of rent by one joint-tenant shall not be deemed the possession or receipt of the other.

[1] Jointure is defined by Lord Coke to be "a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect presently in possession or profit, after the decease of her husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture. Co. Litt. 36, b. Modern jointures originated in the enactment of the Statute of Uses, that a certain provision made for the wife should operate as a bar of dower. As it was held before that enactment that a woman was not dowable of a use, estates were frequently conveyed to uses in order to bar dower. When the Statute of Uses was passed for the purpose of converting uses into legal estates, all women then married would have become dowable of such lands as had been held to the use of their husbands, and would also have been entitled to any lands that were settled on them in jointure. A clause was therefore inserted, enacting that a certain provision made for the wife should operate as a bar of dower. Smith, R. & P. P. 186. As this statute contradicts the common law, it has always been construed strictly, and no estate is a good jointure and a bar to dower at law under this act unless it is attended with the following circumstances:—1. It must commence and take effect, in possession or profit, immediately on the death of the husband, for otherwise it is not so beneficial as dower. 2. It must be for the wife's life, or for some greater estate, and not for the life or lives of another person or any number of other persons, or for any number of years, however many. But although the statute recites five kinds of estates, which may be limited by way of jointure, yet those are only mentioned as examples, and do not exclude any other estate consistent with the intention of the act. 3. The estate must be limited to the wife herself, and not to any other person in trust for her. 4. It must be made in satisfaction of the wife's whole dower. 5. It must be expressed or averred to be in satisfaction of her whole dower, or (which amounts to the same thing) of her dower indefinitely. 6. It must be made before marriage. 2 Bl. Com. 138; Smith, R. & P. P. 189.

If by the terms of the marriage settlement the wife is to be absolutely entitled to jointure, she does not forfeit it by adultery. *Sidney v. Sidney*, 3 P. Wms. 277. *Jee v. Thurlow*, 2 B. & C. 547; 8 Bing. 256. *See* further, *post*, Marriage Settlement.

[2] An action does not lie against a judge, civil (*Dicas v. Lord Brougham*, 6 C. & P. 249) or ecclesiastical (*Ackerley v. Parkinson*, 3 M. & S. 411. *Beaurain v. Scott*, 3 Camp. 388), acting judicially in a matter within the scope of his jurisdiction. *Wingate v. Waite*, 6 Mee. & W. 739. Nor can a suit be maintained against persons so acting with a more limited authority, as commissioners of bankruptcy (*Doswell v. Impey*, 1 B. & C. 163: *per Abbott, C. J.*) the steward of a court baron (*Holroyd v. Breare*, 2 B. & A. 473), or commissioners of a court of request. *Carratt v. Morley*, 1 Q. B. 18. *Andrews v. Morris*, id. 3.

The judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court, wrongfully done, not in pursuance of, though under colour of a judgment of the court: *per Patteson, J.*, 14 Q. B. 852. There is, however, no authority for saying that he is not answerable in an action for an act done by his command and authority where he has no jurisdiction. Accordingly, if an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have jurisdiction or not; and if they decide

JUDGE Advocate.[1]

JUDGES' Clerks.[2]

Orders. *See* as to jurisdiction, Chambers, Judge's, vol. iii. p. 71.

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(B) *Attendance on Summons and Making of Order*, p. 259.
(C) *Costs of Order*, p. 260.
(D) *Service of Order*, p. 260.
(E) *Rescinding or Setting Aside Order*, p. 260.
(F) *Making Order Rule of Court*, p. 261.

II. To Sign Judgment by Consent, p. 261.

I. In General.

(A) *Summons, how Obtained and Served, and Operation of.*[3]

that they have jurisdiction in a case where they clearly have no pretence for it, and give judgment against the defendant, all the members of the court present and taking part in the judgment may render themselves liable to an action. *Wingate v. Waite*, 6 Mee. & W. 746.

The judge of a court of record in a borough was held not responsible as a trespasser for the imprisonment of a defendant, where he had no means of knowing, except through the plaintiff or defendant, and did not know, that the cause of action arose without the limits of the borough. *Gwynne v. Poole*, Lutw. App. 1566. *Calder v. Halket*, 3 Moore, P. C. C. 77. *Kemp v. Neville*, 10 C. B. 523; 31 L. J. C. P. 158; 7 Jur. 913. So, if the facts of a case before a county-court judge were such as, if true, would have given the judge jurisdiction, the judge is not responsible for his judgment and order in the matter; but if the facts show that the judge has no jurisdiction, he cannot, by mistaking the law and deciding he has jurisdiction, give himself jurisdiction, and he will be answerable in an action for an imprisonment that may ensue thereon. *Houlden v. Smith*, 14 Q. B. 841. A judge of assize may commit for contempt, and the warrant need not set out the particulars. 10 C. B. 3; 30 L. J. C. P. 321; 7 Jur. 529; 2 F. & F. 236.

"By the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as a judge of record, and that will be a complete justification. So, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet, sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded." *Per Cur. Mostyn v. Fabrigas*, Cowp. 172. See *Milward v. Thatcher*, 2 T. R. 87. *Doswell v. Impey*, 1 B. & C. 169. *Gahan v. Laffitte*, 5 Moore, P. C. C. 382. *Ferguson v. Earl Kinnoul*, 9 Clark & Fin. 290.

If an action be brought against a judge as such, he may plead that what he did was in that capacity, even though he be the judge of a court in a foreign country under the dominion of the Crown. *Mostyn v. Fabrigas, supra.* And if he be a judge *de facto* only, his judgment, whether in a criminal or civil proceeding, cannot be impugned. *Milward v. Thatcher, supra.* So if a magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation: *per Tindal, C. J., Cave v. Mountain*, 1 Man. & G. 257. *See* further, as to Justices, *post*, Justices of the Peace, p. 285.

[1] An officer of a court martial, who combines the character of adviser to the court with that of public prosecutor. *See* M'Arthur, 233.

[2] The judges' clerks are appointed by the judges. 15 & 16 Vic. c. 73, s. 8. They are paid by salaries instead of fees (id. sect. 12), and are prohibited from acting as barristers, attorneys, or solicitors, or as agents of attorneys or solicitors. (Sect. 11.)

[3] The mode in which a judge at chambers generally exercises his jurisdiction is by summons, and an order thereupon. In some cases the judge grants an order *ex parte* without a summons, as to hold the defendant to bail, to sue *in formâ pauperis*, &c.: the order in such cases is made upon affidavit, and if wrongly granted the other party may apply to the court to have it rescinded. *Clark v. Stocken*, 2 Bing. N. S. 651. In some cases an order *nisi* will be granted, which will make itself absolute if no cause be shown within a certain time. *Spicer*

(B) *Attendance on Summons and Making of Order.*[1]

v. Bond, 2 Dowl. N. S. 955. *Humphreys v. Jones*, 6 Mee. & W. 418; 8 Dowl. 408.

By 1 & 2 Vic. c. 45, it is enacted, "that every judge of the Courts of Queen's Bench, Common Pleas, or Exchequer, shall have equal jurisdiction, power, and authority to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common Pleas, or on the common-law or revenue side of the said Court of Exchequer, or relating to the granting writs of *certiorari* or *habeas corpus*, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no common jurisdiction therein, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs."

A judge at chambers cannot alter a rule of court unless by direction of the court or consent of the parties (*Joseph v. Perry*, 3 Dowl. 699); but he may set aside a side-bar rule, or other rule obtained as of course. *Darrington v. Price*, 6 C. B. 309.

The summons is obtained by application to the judge's clerk at the judge's chambers. If counsel are to attend the hearing, it should be stated in the body of the summons, or, at least, notice should be given so that the other side may have the same advantage: and if this be omitted the judge will, at the request of the other party, adjourn the hearing. And by Reg. Gen. (Pr.) H. T. 1853, r. 136, "where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated therein." The summons should be correctly entitled in the cause. It ought to be dated. *Jeves v. Hay*, 1 Scott, N. R. 399; but see *Solomon v. Nainby*, 5 Mee. & W. 389; 7 Dowl. 459. It should state the place where the opposite party or his attorney is to attend, which is generally at the Judge's Chambers, Rolls Garden, Chancery Lane; in urgent cases it may be at Westminster, in the morning of Term time (see *Bebb v. Wales*, 5 Dowl. 458), or at the judge's private house, or at the sittings on circuit in the judge's private room, before the sitting of the court. The summons may be made returnable at any time the judge thinks fit. See *Byles v. Walter*, 5 id. 233. *Bebb v. Wales*, *supra*. *Spencley v. Shouls*, id. 562. Uusually it is made returnable on the following day, at three o'clock in the afternoon during term, or eleven o'clock forenoon during vacation; or if served in the country, on the second day during those hours.

A copy of the summons should be served immediately after it is obtained, or before seven o'clock p.m., or two p.m. on Saturday, in the same manner as a rule *nisi*: the person who serves it should be able to swear as to its being a correct copy, and when and where served.

A summons does not operate as a stay of proceedings unless it expressly state so, or unless the party obtaining it has to take the next step, or it is necessarily implied that there is to be a stay of proceedings (*Phillips v. Birch*, 2 Dowl. N. S. 97; 5 Scott, N. R. 537. *Redford v. Edie*, 6 Taunt. 240. *Hodgson v. Caley*, 8 Dowl. 318), nor where obtained for vexatious delay (*Bebb v. Wales*, *supra*), or served after judgment signed. *Phillips v. Birch*, 5 Scott, N. R. 178; 4 Man. & G. 403. Where it operates as a stay, it does not have that effect until the time at which it is attendable. *Abernethy v. Paton*, 6 Scott, 586. *Wells v. Secret*, 2 Dowl. 447. *Morris v. Hunt*, 2 B. & A. 355. *Glover v. Watmore*, 5 B. & C. 769. *Trego v. Tatham*, 2 Man. & G. 509. *Byles v. Walter*, 5 Dowl. 232. *Sarjent v. Brown*, 2 Dowl. N. S. 985. The stay continues if the parties, by consent, adjourn the summons. *Sarjent v. Brown*, *supra*. During the suspension the parties can take no step. *Trego v. Tatham*, 9 Dowl. 379. *Abbott v. Hooper*, 8 id. 19.

Where a defendant served a summons to stay, but before it was returnable he delivered a plea, he was held to have abandoned the summons. *Barton v. Warren*, 3 D. & L. 142.

[1] By Reg. Gen. (Pr.) H. T. 1853, r. 145, "an attendance on a summons, or on an appointment before the master, for half-an-hour next immediately following the return thereof, shall be deemed a sufficient attendance." And by r. 153, "it shall not be necessary to issue more than one summons for attendance before a judge upon the same matter, and the party taking out such summons shall be entitled to an order on the return thereof, unless cause is shown to the contrary." At the expiration of the half-hour, if no one has attended on behalf of the party served, the party who obtained the summons is entitled, upon an affidavit of service to the order, a copy of which ought to be served forthwith. If the party served with the summons has no objection to the order being made, he may indorse his consent on the summons, which will render his attendance unnecessary, and the order will be then immediately made as a matter of course; and it should accordingly be drawn up and served forthwith, to operate as a stay of proceedings. *Wood v. Harding*, 3 C. B. 968. *Joddrel v.* ——, 4 Taunt. 253. If, however, the party served has not appeared by attorney, and he is not an attorney, barrister, conveyancer, or special pleader, he must appear in person before the judge to give his written consent to an order for signing judgment against him. Reg. Gen. (Pr.) H. T. 153, r. 157.

The judge, on disposing of the summons, marks the conclusion he comes to on the back of it, and the clerk draws up the order. If the judge refuse altogether to make any order or decision, he generally refers the

(C) *Costs of Order.*[1]

(D) *Service of Order.*[2]

(E) *Rescinding or Setting Aside Order.*[3]

applicant to the court, in which case, if in term, the application to the court must be made promptly; if in vacation, then at the beginning of the next term. *Bate v. Lawrence*, 2 D. & L. 83. *King v. Birch*, 3 Q. B. 425. *Warren v. Haddon*, 9 Dowl. 960. *Butterworth v. Williams*, 1 Bro. C. C. 168.

If the judge refuse the order, the party cannot, in general, apply to another judge (*Thompson v. Becke*, 4 Q. B. 759. *Steer v. Smith*, 1 Chit. R. 80. *Wright v. Stevenson*, 5 Taunt. 850); but must, within a reasonable time (*Chapman v. King*, 4 D. & L. 311), apply to the court. *Morse v. Apperley*, 6 Mee. & W. 145. *Peterson v. Davis*, 6 C. B. 235. *Johnston v. Knowles*, 1 Dowl. N. S. 30. See *Slack v. Clifton*, 8 Q. B. 524. The proceedings at chambers need not be set forth upon applying to the court (*Hallett v. Cresswell*, 1 B. C. R. 1.); and, in general, additional affidavits may be used. *Sanderson v. Proctor*, 10 Ex. 189. *Hawkins v. Ackrill*, 1 L. M. & P. 242. *See post*, 261.

A plaintiff who obtains an order to be at liberty to amend his writ, is not obliged to draw it up; and if he gives notice of abandoning the order and the writ, and the defendant afterwards appears, a judgment of *non pros.* for not declaring is irregular. *Solly v. Richardson*, 6 Dowl. P. C. 774.

A judge's order is proved by mere production (*Davis v. Parsons*, 2 Dowl. N. S. 934): if made a rule of court, then by production of the rule. *Berney v. Read*, 7 Q. B. 97. *Still v. Halford*, 4 Camp. 17.

[1] In some instances the legislature has expressly enacted that the costs of proceedings, with reference to which jurisdiction is given to a judge at chambers, shall be in his discretion, as in the case of orders for interpleader issues. In such a case, if the order has been made by a judge, the party must apply to a judge for costs, and not to the court. *Burgh v. Schofield*, 9 Mee. & W. 478. But the decision of the judge on the question of costs is subject to review by the court. *Teggin v. Langford*, 10 id. 556.

In general, applications of an interlocutory nature ought, and indeed, in many cases, must be made to a judge at chambers, where they are disposed of with greater speed, equal satisfaction, and infinitely less cost, than if made to the court. If made to the court in a case where an application at chambers would have equally answered the purpose, the court will, in general, either not give any costs, or only such as the party would have got if the application had been made to a judge at chambers. Where a trifling irregularity is discovered in any part of the proceedings, which may be amended on the payment of costs, it is constantly the practice to point it out to the adverse party, and allow him to amend it without the intervention of the court or judge. If this course is not considered advisable, and the irregularity complained of is of a trifling nature, and such as ought to be disposed of by a judge at chambers, the application should, whether in term or vacation, be made to a judge at chambers. Marshall on Costs, p. 46.

The costs of attendance by counsel or special pleader, before a judge at chambers, are in no case allowed, as between party and party, unless the judge certifies for such allowance. Reg. Gen. H. T. 1853: Directions to Taxing Masters.

[2] *Service of the Order* should be effected the same night, or next morning before the office opens. *Belcher v. Goodered*, 4 C. B. 472. *Kenney v. Hutchinson*, 6 Mee. & W. 134; 8 Dowl. 171. *Normanby v. Jones*, 3 D. & L. 143. But service two days after was, in one case, held sufficient, where no steps could have been taken in the interval. *Sandford v. Alcock*, 10 Mee. & W. 689; 2 Dowl. N. S. 463.

If the order is not served forthwith, it may be treated as abandoned (*Kenney v. Hutchinson, supra. Normanby v. Jones, supra*), even though the party delayed to consult his client. *Churge v. Farrell*, 4 B. & C. 865; 7 D. & R. 422. *Edensor v. Hoffman*, 2 C. & J. 140. *Wright v. Stevenson*, 5 Taunt. 850.

If the successful party does not draw up the order, and his opponent wishes this to be done, the course for him to pursue is to apply for another summons of the same description. *Wright v. Skinner*, 4 Dowl. 727. *Macdougall v. Nicholls*, 3 Ad. & E. 813; 5 N. & M. 366; Lush. Pr. 673.

[3] The judge who granted the order may, in some cases, rescind or amend his own order, if made under a mistake, or in an irregular way (*Clark v. Manns*, 1 Dowl. 656. *Hall v. West*, 1 D. & L. 412); as to strike out the words "by consent," improperly inserted. *Wade v. Simeon*, 3 id. 658. *Hall v. West, supra.* But another judge will not entertain the application, unless under very special circumstances; although he may grant a summons to attend before the same judge. *Thompson v. Becke*, 4 Q. B. 759. *Wright v. Stevenson*, 5 Taunt. 850; 2 Chit. Rep. 83. The party may appeal to the court, notwithstanding an application to the judge for a re-hearing. *Re Stretton*, 3 D. & L. 278; 14 Mee. & W. 806. *Thomas v. Evans*, 9 Mee. & W. 829. *Grandin v. Maddans*, 6 D. & L. 241.

A party dissatisfied with the judge's order has power to appeal to the court to rescind the order on the merits (*Pike v. Davis*, 8 Dowl. 387), unless some statute expressly vests the sole discretion in the judge. *Shortridge v. Young*, 1 D. & L. 416. *Smeeton v. Collier*, 1 Ex. 457. *Teggin v. Longford*, 10 Mee. & W. 556. *Fowler v. Churchill*, 2 Dowl. N. S. 562. *See* vol. iii. p. 71; and *Harrison v. Wright*, 13 Mee. & W. 816. A person

(F) *Making Order Rule of Court.*[1]

II. Judge's Order to Sign Judgment by Consent.[2]

taking the benefit of an order must take it in its entirety. *Hayward v. Duff*, 12 C. B. 364; 6 L. T. 433.

The application to the court is for a rule *nisi* to show cause why the order of the judge should not be set aside (see *South-Eastern Railway v. Sprot*, 11 Ad. & E. 167), and if any money has been paid under the order, to have the money returned. *Thompson v. Longridge*, 5 D. & L. 213.

It is not necessary to make the order a rule of court, before moving to set it aside. *Spicer v. Todd*, 1 Dowl. 306; 2 C. & J. 165. If it has been made a rule of court, then that also should be set aside. *Clement v. Weaver*, 4 Scott, N. P. 229.

The application to the court should be made within a reasonable time, to prevent the order being acted upon. *Thompson v. Becke*, 4 Q. B. 759. *Simmons v. King*, 2 D. & L. 786.

Where the order made during term was to sign judgment, five days were held too late, execution having in the meantime issued. *Shield v. Quick*, 8 Mee. & W. 289.

If the order were made in vacation, the application must be early in the ensuing term. *Collins v. Johnson*, 16 C. B. 612. *Orgill v. Bell*, 1 Ex. 466. *King v. Birch*, 3 Q. B. 425. *Griffin v. Bradley*, 6 C. B. 722. *Orchard v. Moxsey*, 2 E. & B. 206. *Jordan v. Wilcoxson*, 3 E. & B. 193. *Meredith v. Gittens*, 18 Q. B. 257.

The judge's order should be verified on affidavit (*Hoby v. Pritchard*, 5 Dowl. 300); but it has been held sufficient to state the substance of the order. *Shirley v. Jacobs*, 3 Dowl. 101. *Barrett Navigation Co. v. Shover*, 18 L. J. C. P. 145.

The same affidavits which were used at chambers may be employed (*Pickford v. Ewington*, 4 Dowl. 453), for the production of which notice should be given to the judge's clerk, who will hand them to the Rule Office for that purpose; and, in general, additional affidavits may be used. *Sanderson v. Procter*, 10 Ex. 189. *Gibbons v. Spalding*, 11 Mee. & W. 174; 2 Dowl. N. S. 746. *Peterson v. Davis*, 6 C. B. 235. They should state the grounds of the motion. *Pocock v. Pickering*, 21 L. J. Q. B. 365. *Heath v. Nesbitt*, 2 Dowl. N. S. 1041.

Except to excuse delay (*Sugars v. Concannen*, 5 Mee. & W. 30), it is not necessary they should set out a previous application at chambers to rescind the order (*Thomas v. Evans*, 9 id. 829), though it should be named to the court on moving.

[1] In order to enforce obedience to a judge's order, it is necessary to make it a rule of court.

Where a judge's order is made during vacation, it shall not be made a rule of court before the next term. Reg. Gen. (Pr.) H.T. 1853, r. 158.

Where the original order was lost, a duplicate was allowed to be made a rule of court. *Re Farrant*, 21 L. J. Q. B. 272; 1 Bro. C. C. 64. It is competent to make it part of an order obtained in an action in the Exchequer, that it should be made a rule of the court of Queen's Bench.

When the order is made a rule of court, it is enforceable either by execution under the 1 & 2 Vic. c. 110, s. 18 (*Baker v. Rye*, 1 Dowl. 689. *Jameson v. Raper*, 3 Moore, 65, n. *Hart v. Draper*, 7 Taunt. 43); or by attachment, if the order has been obtained by fraud; or where there is no jurisdiction, it seems to be null and void. *Lander v. Gordon*, 7 Mee. & W. 218. *Woosnan v. Price*, 1 C. & M. 352.

The 159th of Reg. Gen. H.T. 16 Vic. (Pr.) provides, "that when a judge's order or rule of *nisi prius* is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided that an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed." This rule applies, although the party against whom it is made is an infant. *Collins v. Johnson*, 16 C. B. 588. If the party against whom it is made has, in point of fact, not disobeyed the order, he is entitled to apply to the court that the part of the rule ordering that he should pay the costs may be set aside. *Re Farrant v. Goodrich*, 21 L. J. Q. B. 272.

No action lies for disobedience to a judge's order. *Hookpayton v. Bussell*, 23 L. J. Ex. 267; 10 Ex. 25. *Dent v. Baskeene*, 9 id. 469. *Wade v. Simeon*, 2 C. B. 548.

[2] Where the defendant has no defence, and an action has been commenced, he may, instead of giving a warrant of attorney or *cognovit*, consent to a judge's order to stay proceedings, on condition that final judgment should be signed if the debt and costs are not paid within a time specified. This order can be made only on the consent of both parties. *Norton v. Fraser*, 2 Man. & G. 916. *Reynolds v. Sherwood*, 8 Dowl. 183. *Kirby v. Ellison*, 2 id. 219. It does not require a stamp. *Baker v. Flower*, 8 Mee. & W. 670. *Bray v. Manson*, id. 688; 9 Dowl. 748. *Thorne v. Neale*, 2 Q. B. 726. The judge has power to set it aside, and will do so where there has been fraud (*Thorne v. Neale, supra*); or under special circumstances. *Wade v. Simeon*, 13 Mee. & W. 647; 2 D. & L. 658. It is not revoked by a female defendant marrying. *Thorpe v. Argles*, 1 D. & L. 831.

There is no implied authority, in the case of a partnership, for one partner to bind his co-partners by consenting to the order. *Hombridge v. De la Croulé*, 3 C. B. 472.

The order does not operate as a stay of proceedings, unless it is so expressed. *Michael v. Myers*, 6 Man. & G. 672. *Filmer v. Burnby*, 2 id. 720; 9 Dowl. 466.

By Reg. Gen. H. T. 1853, r. 155, "all written consents upon which orders for

JUDGMENT.[1]

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(A) *How Signed*, p. 263.

(*a*) *At what time Judgment may be Signed*, p. 264.

(B) *Entry of on the Roll*, p. 264.

(C) *Form of Judgment*, p. 264.

(D) *Amendment of Judgment. See* vol. i. p. 337.

(E) *Arrest of Judgment. See* id. p. 521.

(F) *Setting aside Judgment*, p. 266.

(G) *Interest on Judgment*, p. 266.

(H) *Set-off of Judgment. See* vol. ii. p. 60.

(I) *Execution on. See* vol. iv. p. 345.

(K) *As to* Scire Facias *on. See post*, Scire Facias.

(L) *Registering Judgment*, p. 267.

(M) *Effect of Judgment*, p. 269.

(*a*) *On Land*, p. 269.

(*b*) ,, *Government and other Stock*, p. 269.

(N) *Satisfaction of Judgment and Entry on Roll*, p. 271.

(*a*) *Form of Satisfaction-Piece*, p. 272.

(*b*) ,, *Entry of Satisfaction on Roll*, p. 272.

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(A) *Nature of Action, and on what Judgments it lies*, p. 273.

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signing judgment are obtained, shall be preserved in the chambers of the judges of the respective courts. In actions where the defendant has appeared by attorney no such order shall be made, unless the consent of the defendant be given, by his attorney or agent. Where the defendant has not appeared, or has appeared in person, no such order shall be made, unless the defendant attends the judge, and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf, except in a case where the defendant is a barrister, conveyancer, special pleader, or attorney."

A consent to a judge's order, given by a trader within two months of the filing of a petition for adjudication, collusively, and before any action is commenced, is null and void (12 & 13 Vic. c. 106, ss. 135, 137. *See* vol. ii. p. 236. *Bryan v. Child*, 5 Ex. 368. *Viner v. Hawkins*, 9 id. 266); and the same, or a copy thereof, must be filed within twenty-one days, in like manner as warrants of attorney and cognovits. (Sect. 137.)

The costs of filing a judge's order for judgment against a trader defendant, under the Bankrupt Act, shall not be allowed unless specially ordered by a judge. Reg. Gen. H. T. 1853, r. 28.

Judgment may be signed if there is default in paying the debt and costs, and the proceeding is the same as on a *cognovit*. See *Belt v. Bidgood*, 8 C. B. 763. *Andrews v. Diggs*, 4 Ex. 827. *See* vol. iii. p. 128.

If the defendant has not entered an appearance, the plaintiff must enter an appearance for him before signing judgment, otherwise it will be an irregularity. *Hawkins v. Hassells*, 12 Mee. & W. 776. *Grandin v. Maddins*, 6 D. & L. 241.

The costs are taxed in the usual way, unless agreed to at the time. See *Deacon v. Alison*, 6 C. B. 434. No declaration to ground judgment is necessary or allowed on the taxation. Directions to Taxing Masters, H. T. 1853, r. 5.

[1] The final proceeding in an action at law,

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(A) *Where Writ specially Indorsed*, p. 275.
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VII. Judgment of Non Pros. *See post*, Non Pros.
VIII. „ of Nonsuit. *See post*, Nonsuit.
IX. „ Recovered, Plea of, p. 276.

I. Of Superior Court.

(A) *How Signed.*[1]

by which the court applies the law to the particular case presented before it, and specifically grants or denies to the plaintiff the remedy which he has sought by the action. An award of execution on the record is not a judgment properly so called; that is, it is not a judgment to recover. 11 East, 516.

[1] Judgment after verdict is said to be signed when the costs are taxed and inserted in the master's book (*Butler v. Bulkeley*, 8 Moore, 104; 1 Bing. 233. *Robieson v. Rees*, 1 L. M. & P. 69. *Peirce v. Derry*, 4 Q. B. 635. *Salter v. Slade*, 3 Nev. & M. 717); and these operations are generally simultaneous. Final judgment is complete at the time of signing it. *Colbron v. Hall*, 5 Dowl. 534. *Fisher v. Dudding*, 9 id. 872; 3 Scott, N. R. 516. *Walter v. Richmond*, 6 Q. B. 544.

Where judgment is signed for want of a plea, it is complete at the time of signing it, though the costs are not taxed. *Walter v. De Richemont*, 6 Q. B. 544. See *Frewen v. Lethbridge*, 28 L. J. Ex. 243.

No execution can issue until the judgment is signed (*Finch v. Brook*, 5 Dowl. 59), except in feigned issues from a court of equity, as to which it was not usual to sign judgment.

The following is the mode of signing judgment. The party entitled to the *postea* goes to the associate and gets the *nisi prius* record. If the cause were tried at the assizes, and the *postea* is therefore not engrossed by the associate on the back of the record, the party must so engross it, and take it to the office of the court to be stamped. He gives one day's notice of taxation to the other party, where notice is necessary, and on the day appointed takes the *postea*, along with his affidavit of increased costs, to the master, who will tax the costs, and, at the same time, sign judgment under the *postea*. He also takes to the master an *incipitur* of the declaration written on paper, which is called the judgment paper, on which the master signs judgment as well as on the *postea*. 15 & 16 Vic. c. 76, s. 206. See *King v. Birch*, 3 Q. B. 425.

Judgment signed after the death of the defendant, but on the same day, is valid. *Wright v. Mills*, 28 L. J. Ex. 223. Where signing delayed by court, judgment by leave may be entered *nunc pro tunc*. 30 L. J. Ex. 189.

Though the taxation of costs is generally simultaneous with signing judgment, yet the attorney may, if he pleases, sign judgment without taxing the costs; in which case, it seems, he will waive them. *Field v. Partridge*, 7 Ex. 689. And the judgment cannot be set aside, even where the costs are taxed, without giving notice to the other side, the only remedy being a review of the taxation. (Id.) *See* 3 Mee. & W. 141; 13 id. 9.

If the judgment is irregularly signed, the same party who signed it may obtain a rule to set it aside, and sign it anew, or the opposite party may obtain a rule to set it aside. *Bennett v. Simmons*, 2 D. & L. 98.

Where judgment was signed contrary to the terms of an order made by consent at *nisi prius*, it was held to be an irregularity, as well as an act done in breach of faith. *Bikker v. Beeston*, 29 L. J. Ex. 121.

A pauper plaintiff is entitled to sign judgment without paying any fees, whether he has obtained a verdict exceeding 5*l.* or not. Reg. Gen. (Pr.) H. T. 1852, r. 121.

Where, by the practice, costs need not be taxed, as upon a *cognovit* for a given sum, &c., no notice of taxation is required to entitle the plaintiff to sign judgment. *Griffiths v. Liversedge*, 2 Dowl. P. C. 143. But where a *cognovit* was given for the debt, payable on a given day, and if not paid, the costs to be taxed and judgment signed: — *Held*, that judgment signed before costs taxed was irregular. *Wilson v. Northern*, 4 id. 212.

It is not necessary to apply for leave to sign judgment upon a judge's order, under 1 & 2 Vic. c. 110, s. 3; but it seems necessary to demand the costs before execution. *Wallis v. Sheffield*, 7 Dowl. P. C. 793. The fact of the judgment having been signed by an attorney not certificated does not make it irregular, although it may subject the parties to penalties. *Smith v. Wilson*, 1 id. 545.

(*a*) *At what time Judgment may be Signed.*[1]

(B) *Entry of on the Roll.*[2]

(C) *Form of Judgment.*[3]

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[1] No rule for judgment is necessary. Reg. Gen. (Pr.) H. T. 1853, r. 55.

"When the plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial, in or out of term, judgment may be signed, and execution issued thereon, in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms." (Id. 57.)

Where the judge certifies on the back of the record for speedy execution, under 1 Wm. 4, c. 7, s. 2, judgment may be signed, and costs taxed, the day after the trial; and so if the judge or the court order execution to issue forthwith under the Common-Law Procedure Act, 1852, s. 120.

If there is good ground for moving for a new trial, the proper course is to apply to the judge at the trial, or to a judge at chambers, to stay the execution until such new trial may be moved for, and if judgment has not been previously signed, the motion for a new trial stays judgment or execution until it is disposed of. *See post*, New Trial. But in all cases, whether judgment has been signed and execution has issued forthwith, or within fourteen or any other number of days, the right of a party to move for a new trial, or arrest of judgment, or judgment *non obstante veredicto*, within four days after the verdict, or before the expiration of the term, if the trial took place during term, or within the first four days of the ensuing term, if the trial took place during vacation, is not affected by the issuing of execution; and if any of these motions is successful, the judgment will be vacated, and execution set aside, and the party restored to all he may have lost thereby. 1 Wm. 4, c. 7, s. 2; Reg. Gen. (Pr.) H. T. 1853, r. 50.

The party entitled to sign judgment may postpone doing so as long as he pleases, but in some cases the opposite party may compel it. *Taylor v. Nesfield*, 4 E. & B. 432. And "the death of either party between the verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after such judgment." C. L. P. Act, 1852, s. 139. *See* vol. i. Abatement.

A month's notice previous to signing judgment, where no proceedings have been had for a year, seems unnecessary, as the rule of court (Reg. Gen. (Pr.) H. T. 1853, r. 176) applies only to proceedings before verdict. *May v. Wooding*, 3 M. & S. 500.

[2] By 15 & 16 Vic. c. 76, s. 206, "it shall not be necessary, before issuing execution on any judgment under the authority of the Common-Law Procedure Act, 1852, to enter the proceedings upon any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the judgment, according to the practice heretofore used, and judgment may thereupon be signed, and costs taxed, and execution issued, according to the practice heretofore used: Provided nevertheless, that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence or of bringing error, or the like." And by Reg. Gen. (Pr.) H. T. 1853, r. 70, "it shall not be necessary, before issuing execution upon any judgment whatever, to enter the proceedings upon any roll."

The judgment may be entered on the roll at any time (*Barrow v. Croft*, 4 B. & C. 388), but the opposite party may, if injured by delay, compel it by a judge's order (*Hopkins v. Francis*, 2 D. & L. 664; 13 Mee. & W. 668. *Newton v. Boodle*, 5 C. B. 206), or a third party may, if the plaintiffs act in bad faith. *Chubb v. Burrell*, 25 L. T. 98. The order of the judge will be made on the party, and not his attorney. *Engler v. Twisden*, 4 Bing. N. C. 714; 6 Scott, 580.

By 15 & 16 Vic. c. 76, s. 54, "every declaration and other pleading shall be entered on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge."

By Reg. Gen. (Pr.) H. T. 1853, r. 56, pl. 32, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*."

By r. 31, "no entry or continuances by way of imparlance, *curia advisari vult*, *vicomes*, *non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings."

The judgment-roll consists of a transcript of the *nisi prius* record, inclusive of the *postea* and judgment. The issue is first engrossed on the roll, which is the duty of the plaintiff, and the successful party then completes it, and takes it to the master, along with the *nisi prius* record, with the *postea* indorsed, and the master's *allocatur*, when the clerk will enter the proceedings. See *Newton v. Boodle*, *supra*.

As to Judgment nunc pro tunc.—It is competent for the court, in some instances, to order judgment to be entered up *nunc pro tunc;* but in all such cases the delay in signing judgment must have arisen from the act of the court, and not the neglect of the party. *Freeman v. Tranah*, 12 C. B. 411. *Miles v. Williams*, 9 Q. B. 47.

[3] The form of judgment used to vary according to the particular form of action; but now, by the 15 & 16 Vic. c. 76, s. 95, "in all actions where the plaintiff recovers

a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages." *See* 27 L. J. Ex. 391.

By sect. 96, "nothing in this act contained shall in any way affect the provisions of 8 & 9 Wm. 3, s. 11, intituled 'An Act for better Preventing Frivolous and Vexatious Suits, as to the Assignment or Suggestion of Breaches, or as to Judgment for a Penalty as a Security for Damages in respect of further Breaches.'"

The costs assessed by the jury ought to be included in the entry, and if the costs of increase are stated to be assessed by the jury instead of by the court, there will be ground of error. 2 Hull. 650. See *Guest v. Elwes*, 5 Ad. & E. 127.

1. *Form of a Judgment for Plaintiff on a Verdict in a Town Case.* (Reg. Gen. (Pr.) H. T. 1853, sched.)

[*Copy the* nisi prius *record, and then proceed thus:*—] Afterwards on the day of in the year of our Lord [*day of signing final judgment*], come the parties aforesaid, by their respective attorneys aforesaid [*or as the case may be, if they have not appeared by attorneys*], and the Right Honourable Sir Alexander Cockburn, Baronet, her Majesty's Chief Justice assigned to hold pleas in the court of our Lady the Queen, before the Queen herself [*or if in Common Pleas,* the Right Honourable Sir William Erle, Knight, her Majesty's Chief Justice assigned to hold pleas in her Majesty's Court of the Bench; *or if in the Exchequer,* the Right Honourable Sir Frederick Pollock, Knight, Chief Baron of her Majesty's Court of Exchequer, *or* Sir Knight, one of her Majesty's justices of her Court of *as the case may be*], before whom the said issue was [*or* issues were] tried in the absence of her Majesty's Chief Justice, &c. [*as the case may be*], hath sent hither his record, had before him in these words: Afterwards [*&c. Copy the postea*]: Therefore it is considered that the plaintiff do recover against the defendant the said moneys by the jurors aforesaid, in form aforesaid, assessed [*or if the action be in debt, and the jury do not assess the debt, but only the damages, and forty shillings costs, then say,* do recover against the defendant the said debt of £ and the moneys by the jurors aforesaid, in form aforesaid, assessed], and also £ for his costs of suit by the court here adjudged of increase to the plaintiff, which said moneys and costs [*or* debt, damages, and costs], in the whole amount to £

[*In the margin of the roll, opposite the words* "therefore it is considered," *write* "Judgment signed the day of A.D." [*stating the day of signing the judgment.*]

2. *The like in a cause tried at the Assizes.* (Reg. Gen. (Pr.) H. T. 1853, sched.)

[*Copy the* nisi prius *record, and then proceed thus:*—] Afterwards, on the day of in the year of our Lord [*day of signing final judgment*], come the parties aforesaid, by their respective attorneys aforesaid [*or as the case may be*], and Sir Knight, and Sir Knight, justices of our Lady the Queen assigned to take the assizes in and for the said county [*or* city and county, &c., *as the case may be*], before whom the said issue was [*or* issues were] tried, have sent hither their record had before them in these words: Afterwards [*&c. Conclude as directed in the preceding form*].

3. *Form of Judgment for Plaintiff on one count, for Defendant on another count, and* Nolle prosequi *as to a third count.*

But because the jurors aforesaid have not assessed any damages, on occasion of the said premises in the last count of the declaration mentioned, the plaintiff saith that he will not further prosecute his suit in that behalf against the defendant. And hereupon the plaintiff prays the judgment of the court, upon the premises in the first count of the declaration mentioned: Therefore it is considered by the court here that the plaintiff do recover against the defendant the said moneys [*&c., as in No.* 1.]

And as to the premises in the second count of the declaration mentioned, let the defendant be acquitted and go thereof without delay.

4. *Form of Judgment for Plaintiff where Defendant's Costs of Issues exceed Plaintiff's Costs.*

[*Previous part as before.*] And because the defendant's costs of the said issues so found for the defendant by the said verdict as aforesaid exceed the plaintiff's costs of suit by £ Therefore it is considered that the defendant do recover against the plaintiff the said £ for his said costs of those issues.

5. *Form of Judgment where there are Issues in Fact tried before Issues of Law, and Plaintiff succeeds at the Trial, but fails on Demurrer.*

Whereupon all and singular the premises aforesaid, whereof the parties have put themselves upon the judgment of the court, being seen, and by the court here fully understood, and mature deliberation being thereupon had, it appears to the court here that the said plea of the defendant by him [secondly] within pleaded, is good in substance: Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant go thereof without day.

6. *Form of Judgment for Defendant.*

Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant do recover against the plaintiff £ for his costs and charges by him about his defence expended.

[*Insert marginal note as in No.* 1.]

[*The same as the form in nonsuit, and where a juror is withdrawn.*]

(D) *Amendment of Judgment.* *See* Amendment, vol. i. p. 337.

(E) *Arrest of.* *See* Arrest of Judgment, vol. i. p. 521.

(F) *Setting aside Judgment.*[1]

(G) *Interest on Judgment.*[2]

(H) *Set-off of Judgment.*[3] *See* Attorney, vol. ii. p. 60.

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[1] If the plaintiff has signed the judgment irregularly, and nothing has been done upon it, he may apply to have it set it aside, and for leave to sign it afresh. See *Bennett v. Simons*, 2 D. & L. 98. *Doe d. Petton v. Roe*, 4 C. B. 576. A judgment may, it seems, be set aside by the plaintiff, even after it has been satisfied, for the purpose of enabling him to correct a mistake in his particulars of demand, the defendant being put in the same position as if the mistake had not been made, and the application been made within a reasonable time. *Cannan v. Reynolds*, 26 L. J. Q. B. 62. Even a regular judgment may be set upon an affidavit of merits, and in ordinary cases it is almost a matter of course to grant the application for this purpose. 2 Chit. Arch. 978, 11th ed.

When a regular judgment is set aside, it is usually upon such terms as will place the plaintiff as nearly as possible in the same situation as though the action had proceeded in its regular course. The terms generally imposed are that the defendant shall pay the costs of the application, plead issuably *instanter*, and take short notice of trial, or such notice as the plaintiff can give. In some cases the defendant will be required to bring the money into court. (Id.)

An affidavit to set aside judgment by default must show that the judgment has been signed. *Classey v. Drayton*, 6 Mee. & W. 17.

The application may be made to set aside the judgment for irregularity the day after serving notice of executing a writ of inquiry. *Amoz v. Smith*, 7 Dowl. P. C. 866.

In *assumpsit* for work, &c. against three, one of whom suffers judgment by default, and the others plead general issues:— *Held*, that if the others succeed in showing that all were not jointly liable, it will prevent the plaintiff from succeeding against any, notwithstanding one has admitted on the record a joint contract. *Eliot v. Morgan*, 7 C. & P. 334.

The court will not stay a judgment merely because another trial is pending, in which the same question may be more fully tried. *Yates v. Dublin Steam-Packet Co.* 8 Dowl. 402; 3 Mee. & W. 77.

Upon a judgment being set aside with costs as irregularly signed, a judge may order a stay of proceedings until the costs be paid. *Wenham v. Downes*, 5 Nev. & M. 244; 3 Ad. & E. 540. A motion to set aside a judgment for want of notice to tax must be made promptly. *Routledge v. Giles*, 2 C. & J. 163; 2 Tyr. 169. An affidavit of merits to set aside a judgment must state a "good defence upon the merits." *Bower v. Kemp*, 1 C. & J. 287; 1 Tyr. 260. When set aside because signed contrary to good faith, the court cannot impose the terms of bringing no action. *Cash v. Wells*, 1 B. & Adol. 375.

It is improper for an attorney, where a judgment has been aside as irregular with costs, to strike it out and resign it, so as to avoid payment of costs. *Curling v. Bingham*, 10 W. R. 628.

If a defendant seeks to set aside an interlocutory judgment for irregularity, he must come to the court within a reasonable time from his knowing that it is signed, and cannot wait until a subsequent step is taken. *Grant v. Flower*, 5 Dowl. 419. Judgment signed on the 23d, summons to set aside on the 25th, dismissed on the 26th, application to the court not too late on the 29th. *King v. Myers*, id. 686. But where judgment was signed, and notice of inquiry given for the 4th, an application to set it aside for irregularity made on the 12th:— *Held*, too late. *Scott v. Cogger*, 3 Dowl. P. C. 212.

[2] By 1 & 2 Vic. c. 110, s. 17, every judgment-debt shall carry interest at the rate of 4*l.* per cent per annum from the time of the commencement of this act (*i. e.* 1st October, 1838), in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." This enactment extends to judgments for the defendant. *Pitcher v. Roberts*, 2 Dowl. N. S. 394. *Newton v. Conyngham*, 17 L. J. C. P. 288.

The entering up of the judgment means the time when the master taxes the costs and signs the *allocatur*, and also signs the judgment in his book; but where the taxation of costs was not completed till a motion to review the taxation had been disposed of, the court held that interest ran from the date of judgment being signed in the master's book. *Fisher v. Dudding*, 9 Dowl. 872; 3 Man. & G. 238. *Newton v. Grand Junc. Railway Co.* 16 Mee. & W. 139. It attaches as well to the costs as the subject-matter of the action. 2 Dowl. N. S. 394.

[3] The set-off of judgment, and in cross-suits, is subject to the attorney's lien. *See* Reg. Gen. H. T. 1853, r. 63, *ante*, vol. ii. p. 60.

Issuing execution on a judgment does not preclude its being set off. *Bridges v. Smyth*, 8 Bing. 29; 1 M. & Scott, 93. But a judgment cannot be set off where the plaintiff has sued the sheriff for a false return. *Hewitt v. Piggott*, 1 Dowl. P. C. 250; 8 Bing. 61; 1 M. & Scott, 122. *See* 31 L. J. Ch. 33.

(I) *Execution on.* *See* vol. iv. p. 345.

(K) *As to* Scire Facias *on Judgment.* *See post,* Scire Facias.

(L) *Registering Judgment.*[1]

[1] By 1 & 2 Vic. c. 110, s. 19, "no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall, by virtue of this act, affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last-known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account (*i. e.* amount) of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for such entry to the sum of five shillings; and all persons shall be at liberty to search the same book, on payment of the sum of one shilling." See *Benham v. Kean*, 31 L. J. Ch. 129; 8 Jur. 604; and 10 W. R. 312. This sect. gives no retrospective operation as against purchasers, mortgagees, or creditors, after it has been registered. *Hargrave v. Hargrave*, 23 Beav. 484.

By the 3 & 4 Vic. c. 82, s. 2, after reciting that certain doubts had been entertained whether a purchaser would be affected with notice, notwithstanding the above memorandum provides that no such judgment, decree, order, or rule as aforesaid, shall, by virtue of the said act, affect any lands, tenements, or hereditaments at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the senior master of the Court of Common Pleas, any notice of any such judgment, decree, order, or rule, to any such purchaser, or mortgagee, or creditor, in anywise notwithstanding."

Previous to the stat. 2 & 3 Vic. c. 11, all judgments were required to be docketed under 4 & 5 Wm. 3, c. 20, and 7 & 8 Wm. 3, c. 36, so as to affect purchasers; but that practice was abolished, and all docketed judgments were directed to be thenceforth registered under the above stat. 1 & 2 Vic. c. 110, s. 19.

The stat. 2 & 3 Vic. c. 11, s. 2, also provided that, in addition to the entry by 1 & 2 Vic. c. 110, and by this act required to be made, in a book by the senior master, of the particulars to be contained in every memorandum or minute left with him of any judgment, decree, rule, or order, he shall insert in such book the year, and the day of the month, when every such memorandum or minute is so left with him.

The same statute (sect. 4) made judgments, though registered under 1 & 2 Vic. c. 110, and 2 & 3 Vic. c. 11, void after five years from registration as against purchasers, mortgagees, and creditors, unless a fresh register be made within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years. *Simpson v. Morley*, 2 K. & J. 71; 5 L. T. 439.

The 5th sect. provides that as against purchasers, without notice of the judgment, &c., such judgment shall not bind or affect such lands, or any interests therein, further or otherwise, or more extensively in any respect, although duly registered, than a judgment could have done before 1 & 2 Vic. c. 110.

The 18 & 19 Vic. c. 15, s. 4, after reciting that whereas the protection afforded to purchasers, mortgagees, and creditors, by 3 & 4 Vic. c. 82, against judgments, decrees, orders or rules, not duly registered, is confined to judgments, decrees, orders, or rules, binding by virtue of 1 & 2 Vic. c. 110; and whereas the docket or register previously in use has been closed, and the said provision ought not be so restricted, enacts, "that no judgment, decree, order, or rule, which might be registered under 1 & 2 Vic. c. 110, shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minutes, as in the said act in that behalf mentioned, shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order, or rule, to any such purchaser, mortgagee, or creditor, in anywise notwithstanding."

Sect. 5 enacts, "and whereas it is expedient that certain doubts which have arisen upon some of the provisions for the protection of purchasers against judgments in the said acts contained should be removed, be it therefore declared and enacted as follows:—The provision contained in sect. 2 of the said 3 & 4 Vic. c. 82, extends, and shall be deemed to extend, as well to the act therein referred to as to sect. 4 of the said 1 & 2 Vic. c. 110, as explained by this act, so that notice of any judgment, decree, order, or rule, not duly registered, shall not avail against purchasers, mortgagees, or creditors, as to lands, tenements, or hereditaments."

And by section 6, "where, by the said act, 2 & 3 Vic. c. 11, re-registry of judg-

ments, decrees, orders, or rules, is required within such period of five years as is therein mentioned, in order to bind purchasers, mortgagees, and creditors, it shall be deemed sufficient to bind such purchasers, mortgagees, and creditors, if such a memorandum or minute, as was required in the first instance, is again left with the senior master of the Common Pleas within five years before the execution of the conveyance settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration; or as to creditors within five years before the right of such creditors accrued, as directed by the said last-mentioned act, although more than five years shall have expired by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left, and so *toties quoties* upon every re-registry."

Sect. 8 enacts, "nothing herein contained shall extend to revive or restore any judgment which shall be extinguished or barred, or to affect or prejudice any such judgment, or any decree, order, or rule, as between the parties thereto, or their representatives, or those deriving as volunteers under them."

Sect. 13 enacts, "the searches of the said several registers, by the said recited acts or by this act authorised to be made, for the sum of 1s., may be made by the parties themselves, under proper regulations, in the office, and the sum of 1s. only shall be payable on one search, although more names than one shall be searched for, where such names relate to the same purchase, mortgage, or other transaction."

After 31st Dec. 1859, provision as to registry in 2 & 3 Vic. c. 11, and 18 & 19 id. to apply to Crown debts.

Where the defendant has been taken in execution after the memorandum has been left and the particulars entered, the court will order the plaintiff's attorney, on payment of his costs, to attend the master, and make an entry that the defendant had been so taken under the *ca. sa.* *Lewis v. Dyson*, 1 Bail, C. C. 33. But the court of Common Pleas has no jurisdiction over the master, as to compelling him to make an entry; the only mode of so compelling him, it seems, would be by *mandamus*. *Ex-parte Ness*, 5 C. B. 155; 5 D. & L. 339.

As to Registering in Middlesex and Yorkshire.— Various statutes establish a registry of judgments in Middlesex and Yorkshire (5 Anne, c. 18, s. 4; 6 Anne, c. 35, s. 19; 7 Anne, c. 20, s. 18; 8 Geo. 2, c. 6, ss. 1, 18), and upon filing a memorial of the judgment in the registry of such counties respectively, any lands situated within the same may be affected; and a judgment registered under 1 & 2 Vic. c. 110, cannot affect lands in Middlesex, unless also registered under 7 Anne, c. 20, s. 18. *Westbrook v. Blyth*, 3 E. & B. 737. *Hughes v. Lumley*, 4 id. 274. *Benham v. Kean*, 1 Johns. & H. 685; 5 L. T. 439.

The memorial is engrossed on parchment, stamped with a half-crown stamp, and containing a certificate of judgment being signed. The form may be obtained at a law stationer's. This is taken to the master with the *postea*, *allocatur*, and judgment paper, when he will sign the certificate. An affidavit of such signature, stamped with a half-crown stamp, is then written on the memorial, and sworn before a judge of the court in which the judgment was signed. The memorial is then taken and filed with the registrar, at the office for the county of Middlesex, or at the local registries in the three ridings of Yorkshire respectively. The following is the

Form of Memorial.

A Memorial to be registered pursuant to the statute, &c. of a judgment of her majesty's court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], on the day of 18 for A. B., in an action between A. B., plaintiff, and C. D., defendant, for £ besides costs of increase, and for costs of increase, £ : in all, £

Roll.

Affidavit of Signature of Master.

I, P. A., of make oath and say, that I saw Esq., one of the masters of the court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], sign the certificate of the judgment in the memorial above mentioned. P. A.

Sworn, &c.

As to Registering Judgments in the Palatine Counties.—The stat. 18 & 19 Vic. c. 15, extends to provisions of the acts 1 & 2 Vic. c. 110, 2 & 3 Vic. c. 11, and 3 & 4 Vic. c. 82, to the counties palatine.

Sect. 1 provides, that any judgment of the court of Common Pleas at Lancaster, or of the Court of Pleas at Durham, obtained before 1 & 2 Vic. c. 110, and not already registered in the said courts respectively under the provisions of the same act, or not registered under this act on or before Nov. 1, 1855, shall not, after that day, affect any lands, tenements, or hereditaments in the said counties palatine respectively, as to purchasers, mortgagees, or creditors, unless or until such memorandum or minute of such judgment, as in the said act prescribed, shall be left with the prothonotary of the court in which the judgment has been obtained, who shall forthwith enter the same in manner by the same act, as amended by this act, directed in regard to judgments thereby authorised to be registered, and shall be entitled for every such entry to the sum of 2*s.* 6*d.*, and the provision for registration *toties quoties* hereinafter mentioned, as explained by this act, is hereby extended and applied, *mutatis mutandis*, to judgments registered under this present provision.

The 2d sect. extends the provisions of 1 & 2 Vic. c. 110, ss. 18–20, to the counties palatine, and then provides that no judgment, decree, order, or rule of any court, shall bind lands, tenements, and hereditaments, in the said counties palatine respectively, as against purchasers, mortgagees, or creditors, unless and until such memorandum, or minute thereof, as hereinbefore is mentioned, shall be left with the protho-

(M) *Effect of Judgment.*

(*a*) *On Land.*[1]

(*b*) „ *Government and other Stock.*[2]

notary of the palatine court, in which are situated the lands, tenements, and hereditaments, intended to be charged thereby.

The 3d sect. then extends to the counties palatine the 2 & 3 Vic. c. 11, ss. 3, 4, 5, and 7, and also the 3 & 4 Vic. c. 82, s. 2, respecting the particulars to be inserted in the register by the master, and respecting the registration of judgments, decrees, or orders, and rules, and respecting the registration and re-registration of *lis pendens*, and respecting the protection of purchasers, mortgagees, and creditors, as explained or amended by this act.

The 4th sect. provides that the prothonotary, or deputy-prothonotary, or other officer of the county palatine appointed for the purpose, shall perform all the duties done by the senior master of the Common Pleas at Westminster; and he shall be entitled to 2*s.* 6*d.* for registration, and 1*s.* for re-registration, and that any person may search all the books for 1*s.*

As to registering judgments as against heirs, executors, and administrators, *see* 23 & 24 Vic. c. 38, ss. 3–5. As to writs of execution, id. c. 38. ss. 1, 2.

[1] The 1 & 2 Vic. c. 110, s. 13, enacts, that a judgment entered up against any person in the courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time appointed for the commencement of this act, or until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this act; nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year, at least, before the bankruptcy: Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice." *Avison v. Holmes*, 1 J. & H. 530; 30 L. J. Ch. 564.

These provisions take effect only after registration.

A judgment duly registered is a charge on the benefice of the debtor, and the creditor is entitled to have a receiver appointed. *Hawkins v. Gathercole*, 1 Sim. N. S. 63.

The lien created by the judgment is not waived by an action being brought on the judgment. *Erby v. Erby*, 1 Salk. 80.

[2] By 1 & 2 Vic. c. 110, s. 14, it is enacted, that "if any person against whom any judgment shall have been entered up in any of the superior courts, shall have any government stocks, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stocks, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: Provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

The 3 & 4 Vic. c. 82, s. 1, enacts, "that the aforesaid provisions of the said act shall be deemed and taken to extend to the in-

terest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities or shares, and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in or out of any such stocks, funds, annuities, or shares as aforesaid, which now are, or shall hereafter be, standing in the name of the Accountant-general in the Court of Chancery, or the Accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stocks, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any judge as to any stocks, funds, annuities, or shares standing in the name of the Accountant-general of the Court of Chancery, or of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stocks, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in such order."

In order to prevent the debtor transferring the stock, the 2d sect. enacts, "that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company under this act, shall be made in the first instance *ex-parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged, and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall, in the like manner, restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations, to any authorised agents of such corporation, and before the same order shall be discharged, or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons, so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor, in the meantime, shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall, within a time to be mentioned in such order, show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: Provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs, upon such application as he may think fit."

The application for an order to charge government stock must be made, in the first instance, to a judge at chambers (*Brown v. Bamford*, 9 Mee. & W. 42); and is made *ex-parte* without notice to the other side. There should be an affidavit shortly stating the facts.

The judges make an order *nisi* in the first instance, which is a conditional order, charging the stock in the meantime, unless cause be shown to the contrary on a day appointed. The order is drawn up and served on the opposite party, and upon the bank or company in which the stock stands. The time appointed for showing cause is generally a week. *Robinson v. Burbridge*, 9 C. B. 289; 1 L. M. & P. 94. If the order does not give sufficient time to show cause, the opposite party may, within such time, apply to the judge to vary the order and enlarge the time (1 & 2 Vic. c. 110, s. 15), or he may appeal to the court against the order *nisi*, without waiting till it is made absolute. *Robinson v. Burbridge*, 1 L., M. & P. 103. *Fowler v. Churchill*, 11 Mee. & W. 57. *Morris v. Mancsty*, 7 Q. B. 675; but see *contra*, *Graham v. Connell*, 1 L. M. & P. 438. *Rogers v. Holloway*, 5 Man. & G. 292.

A judge of the Court of Chancery, it was suggested, could not make the order. *Miles v. Pressland*, 4 Man. & G. 431; 2 Beav. 300 (*Hulkes v. Day*, 10 Sim. 41), but he might make a stop order auxiliary to the charging order. *Hulkes v. Day*, *supra*. *Watts v. Jeffreys*, 3 Mac. & G. 372; but by 3 & 4 Vic. c. 82, s. 1, he is expressly authorised. *Hastings v. Beavan*, 10 W. R. 206; 5 L. T. 734. The opposite party cannot show cause until the time named in the order, if a particular day is fixed (*Robinson v. Burbridge*, 9 C. B. 289), and if at that time he do not show cause, or the cause is insufficient, the judges make the order absolute. The order can only charge the stock so far as the judgment-debtor has a disposing power. The effect of the charging order is to give the judgment-creditor the same right under the charging order as against prior incumbrancers,

(N) *Satisfaction of Judgment and Entry on Roll.*[1]

as he would have had under a valid and effectual charge made at the same moment by the debtor himself. *Watts v. Porter*, 3 E. & B. 743. *Warburton v. Hill*, 1 Kay, 470. The judgments have priority against the stock according to the date of registration. *Dolland v. Johnson*, 23 L. J. Ch. 637.

As to what Stock may be charged.—A pension granted by the East India Company, under a resolution of the directors, for services rendered, is not chargeable. *Morris v. Manesty, supra.* Shares in the Union Bank of London, which exists under a deed of settlement providing against the transfer of shares without consent of proprietors, and that in the event of their being charged they should be forfeited to the company, were allowed to be charged. *Graham v. Connell, supra.* Where the debtor's name stands in the register of a joint-stock company as the holder of shares, but he has executed a transfer by way of equitable mortgage to other parties, the stock may be well charged, for at law they are held by him in his own right. *Fuller v. Earle*, 7 Ex. 796. Stock standing in the name of the Accountant-General in Chancery to the separate account of the judgment-debtor may be charged (*Robinson v. Burbridge*, 1 L. M. & P. 94), though all that is charged being the interest of the debtor in the said stock, the right of prior incumbrances is not affected thereby. *Hulkes v. Day, supra.* So stock standing in the name of the accountant-general, in which the debtor is only tenant for life, may be charged, and the dividends may be thus intercepted. *Watts v. Jefferys, supra.* Or even where there are proceedings against trustees of the fund. *Smith v. Youde*, 2 F. & F. 376. See *Yescomb v. Landor*, 28 Beav. 80.

Where by the terms of a will it was doubtful whether the debtor took a beneficial interest in stock, the order was made charging the stock conditionally for so much of the dividends as were payable to the debtor himself for his own use and benefit. *Fowler v. Churchill*, 2 Dowl. N. S. 562. Where the stock was vested in trustees for the defendant under a deed, which the plaintiff had filed a bill in equity to set aside as fraudulent, the court refused to interfere, by setting aside an order charging such stock. *Rogers v. Holloway*, 5 Man. & G. 292. An order of the Court of Probate does not, by being registered, constitute a charge on land. *Pratt v. Bull*, 32 L. J. Ch. 21. Orders charging stock are not entered on the judgment-roll, being no part of the record. *Newton v. Boodle*, 18 L. J. C. P. 73; 6 C. B. 532.

[1] When judgment has been satisfied, whether by payment or execution, or by a release after the debtor was taken on a *ca. sa.*, the defendant is entitled to have satisfaction entered on the roll. See *Lambert v. Parnell*, 15 L. J. Q. B. 55. *Ward v. Broomhead*, 7 Ex. 726. Where the defendant offered to set off the amount of the judgment-debt *pro tanto* against another larger judgment obtained against the plaintiff in another court, the court ordered satisfaction to be entered up. *Simpson v. Hanley*, 1 M. & S. 696. But where a judgment was obtained for 500*l.* and the judgment-creditor lent the defendant 750*l.* more, the judgment to stand as security for payment, the court refused to order satisfaction to be entered on payment of the 500*l.* only. *Crafts v. Wilkinson*, 11 Mee. & W. 80.

The court has ordered satisfaction to be entered where the defendant in trover for title-deeds offered to deliver up the deeds and pay costs as between attorney and client, and place the plaintiff in the same situation otherwise as before. *Coomb v. Sanson*, 1 D. & R. 201. The court refused to order the lessor of the plaintiff in ejectment to tax his costs within a certain time, to allow satisfaction to be entered. *Doe v. Filliter*, 11 Mee. & W. 80.

By Reg. Gen. (Pr.) H. T. 1853, r. 80, "in order to acknowledge satisfaction of a judgment, it shall be requisite only to produce a satisfaction-piece in form as hereinafter mentioned, and such satisfaction-piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the courts at Westminster, expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction-piece before the same is signed, and which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, and state he is witness as such attorney: Provided that a judge at chambers may make an order dispensing with such signature under special circumstances, where he thinks fit, and in cases where the satisfaction-piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the master may direct."

The satisfaction-piece is written on parchment, and must be signed and attested as directed: it is taken to the Clerk of the Judgments (in the Queen's Bench, it must be first marked at the Treasury office), who will enter the satisfaction on the roll. A judge at chambers may, under special circumstances, dispense with the signature; but he will require clear proof of the satisfaction. It has been held, that in a case where the plaintiff was dead, and no administration had been taken out, that an affidavit of the defendant's attorney that the judgment debt had been paid in full was not enough. *Speach v. Slade*, 8 Moore, 461. And where the plaintiff was abroad, an affidavit of the sheriff's officer that he had levied the amount was held not sufficient, without an affidavit of the plaintiff's attorney to the same effect. *De Bastos v. Willmott*, 1 Hodg. 15. And where four out of five plaintiffs consented, but the fifth was abroad, and could not be found, the

(*a*) *Form of Satisfaction-Piece.*[1]
(*b*) ,, *Entry of Satisfaction on Roll.*[2]

II. Judgment of Inferior Court.[3]

III. ,, Foreign Court.[4]

application was refused. *Davis v. Jones*, 5 Dowl. 503.

[1] The following is the form of a

Satisfaction-Piece.

Reg. Gen. (Pr.) H. T. 1853, r. 80.

In the

Monday, the day of A.D. 18

—— } Satisfaction is acknowledged be-
to wit. } tween plaintiff, and defendant, in an action for And and do hereby expressly nominate and appoint attorney-at-law, to witness and attest execution of this acknowledgment of satisfaction.

Judgment entered on the day of in the year of our Lord 18

Roll, No.

Signed by the said in the presence of me one of the attorneys of the Court of at Westminster. And I do hereby declare myself to be attorney for and on behalf of the said expressly named by h , and attending at h request to inform h of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h). And I also declare that I subscribe my name hereto as such attorney.

(Signature) ————

The above-named

Date. plaintiff.

[2] Afterwards on in the year of our Lord comes here the said A. B. by P. A. his attorney in this behalf, and acknowledgeth himself to be satisfied by the said C. D. of the damages and costs aforesaid: Therefore let the said C. D. be acquitted.

An order may be obtained to enter satisfaction, and vacate the entry on the register. *Fish v. Tindal*, 10 W. R. 801.

[3] A court for the recovery of debts under 40*s.* may give judgment for the plaintiff, although it appears that the debt was above 40*s.*, if the plaintiff will waive so much of his debt as will bring his claim under the 40*s.*, provided there be nothing in the act of parliament constituting that court which prevents his so doing. The judgment of a court for the recovery of debt under 40*s.* is not conclusive; but proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits, is proper for the consideration of the jury. *Barnes v. Winkler*, 2 C. & P. 345. Where a judgment has been removed from an inferior jurisdiction pursuant to 1 & 2 Vic. c. 110, s. 22, the court will not inquire into the regularity of the proceedings of the court below previous to judgment. *Simons v. Count de Wints*, 8 Dowl. P. C. 646.

In an action on a judgment in an inferior court, the declaration must aver that the cause of action arose within the jurisdiction. *Read v. Pope*, 1 C., M. & R. 302; 4 Tyr. 403.

In order to be a bar, the proceedings in a court of limited jurisdiction must show on the face of them, expressly or by necessary intendment, that the court had jurisdiction in the matter. *Taylor v. Clemson*, 2 Q. B. 978; 11 Clark & Fin. 610.

The judgment of an inferior court of local jurisdiction may be avoided by showing that the defendant, the debtor, against whom the inferior court awarded process, did not reside within the district (*Corrall v. Morley*, 1 Q. B. 18), it not appearing that any proof of residence had been in fact given in the court below. *See* also *Huxham v. Smith*, 2 Camp. 19.

Where the court is limited only as to certain persons or causes, and not as to *locality*; or where, though the jurisdiction of the court is established for a limited district, yet the court can lawfully exercise powers out of it; or where the practice of the inferior court requires, and is warranted by law in requiring, that the defect of jurisdiction should be pointed out by plea or otherwise, and the defendant has waived the objection; — in such cases it would seem that the inquiry will be not simply where the cause of action arose, or where the parties reside, but whether the court had jurisdiction. Roscoe, *Evid.* 160, 9th ed. As to county-court judgments, *see* vol. iii. p. 330.

[4] A foreign judgment may be given in evidence, and made the subject of proceedings in another country, but the subject-matter of such judgment is liable to be inquired into; where, therefore, a decree in the Court of Chancery in England was made the ground of suit in the Irish Court of Chancery, and had been dismissed on a supposed want of jurisdiction, the decree of the latter reversed and sent back with a declaration that the propriety of the English decree might be examined, and, if sustainable in part, it might be so far executed by the aid of the Irish court, although other parts might be deemed erroneous. *Houlditch v. Marquis of Donegal*, 8 Bligh, 301; S. C. 2 Clark & Fin. 470.

A foreign judgment is impeachable here for fraud; where, therefore, to a bill for an account by a customer against the defendants (foreign bankers) for an account, and for an injunction to restrain them from suing on a foreign judgment, it appeared that, notwithstanding the judgment, the balance was still greatly in favour of the plaintiff, demurrer overruled. *Bowles v Orr*, 1 You. & C. 464.

Where there was a decree in Ireland against the validity of a will of lands in England and Ireland, such decree was held no bar to a suit between the same parties in the English Chancery respecting the land

IV. Effect of Judgment as an Estoppel. *See* Estoppel, vol. iv. p. 280.

V. Action on Judgment.

(A) *Nature of Action, and on what Judgments it lies.*[1]

(B) *The Venue.*[2] (C) *Form of Declaration.*[3]

in England devised by the same will. *Boyse v. Colclough*, 24 L. J. Ch. 7.

On a demurrer to a plea of judgment recovered in a British colony against the defendant, pleaded to a count on a simple contract, it was held that such a judgment was no merger in this country, though it might be so in the colony; and generally that a foreign judgment was only *primâ facie* evidence of a debt here. *Australasian Bank v. Harding*, 19 L. J. C. B. 345.

The pendency of a suit in a foreign court is no bar to a suit in this country for the same cause, but only a ground for an application to the court to stay proceedings if it should be thought fit. *Ostell v. Lepage*, 21 L. J. Ch. 501. See *Scott v. Pilkington*, *infra*. *See* further, vol. iv. p. 495; and as to actions on foreign judgment, *see infra*.

A judgment in a British consular court, together with payment of sum awarded, forms a good bar to an action in a court here for the same subject-matter. *Barber v. Lamb*, 6 Jur. 981; 29 L. J. C. P. 234. See *Routledge v. Hislop*, 29 L. J. M. C. 90. As to causes being identical, see *Howlet v. Taire*, 10 C. B. 813; 31 L. J. C. P. 146. *Hunter v. Stewart*, 31 L. J. Ch. 346.

[1] An action lies upon a judgment in a superior or inferior court of record (*Anon.* 2 Salk. 209), either generally or against an executor or administrator suggesting a *devastavit* (*Wheatley v. Lane*, 1 Saund. 216); and though the judgment were erroneous, yet debt lies until it has been reversed. *Prince v. Nicholson*, 1 Marsh. 284.

Where the defendant has been in execution on the judgment, and discharged with the plaintiff's concurrence, no action can be supported on the judgment (*Vigers v. Aldrick*, 4 Burr. 2483. *Tanner v. Hague*, 7 T. R. 420), or after the defendant has been in custody and superseded (*Gribble v. Abbott*, Cowp. 72), or properly pending a writ of error. *Benwell v. Black*, 3 T. R. 643. *Tuswell v. Stone*, 4 Burr. 2454. The action may be brought in a different court to that in which the judgment was obtained. Gelb. Debt. 392. Although, as we have seen, by the common law, an action lies on the judgment of an inferior court (*Reade v. Pope*, 1 C., M. & R, 302. *Williams v. Jones*, 13 Mee. & W. 628), yet no action can be sustained in the superior courts on a judgment of one of the county courts (*Berkeley v. Elderkin*, 1 E. & B. 805; 22 L. J. Q. B. 281. *Austin v. Mills*, 9 Ex. 288); neither can an action be brought on a judgment of a superior court in these tribunals. 19 & 20 Vic. c. 108, s. 27. An action will not, in general, lie on the decree of the Court of Chancery (*Carpenter v. Thornton*, 3 B. & A. 52), but it will on the decree of a colonial court of equity for a balance of an account. *Henley v. Soper*, 8 B. & C. 16. *Henderson v. Henderson*, 6 Q. B. 288.

No action can be brought on a rule of court or judge's order. *Sheehy v. Professional Life Assurance Co.* 2 C. B. (N. S.) 211; 26 L. J. C. P. 301. *Dent v. Basham*, 9 Ex. 469. *Hookpayton v. Bussell*, 10 id. 24.

An action lies on a foreign judgment, notwithstanding a stay of execution awarded thereon, or the pendency of an appeal (*Scott v. Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81), or the plaintiff may proceed on the original demand, at his election (*Hall v. Odber*, 11 East, 118. *Anon.* Lofft. 150, *contra*), or upon a decree in Jamaica for the payment of specific sums. *Sadler v. Robins*, 1 Camp. 253.

Indebitatus assumpsit will lie on the judgment of a foreign court, without declaring upon or proving the grounds and cause of action on which the judgment proceeded. *Crawford v. Whittal*, Dougl. 4. *Crawford v. Wetter*, Lofft. 154. *Henry v. Adey*, 3 East, 221.

The plaintiff, in whose favour a judgment in Ireland has been signed, may sue, although it be pleaded that he had become bankrupt, and an assignee appointed. *Guinness v. Carroll*, 1 B. & Adol. 459. An action lies upon a Scotch judgment. *Douglas v. Forrest*, 4 Bing. 686; 1 M. & P. 663. To an action on such a judgment, the defendant cannot plead a mere conclusion of law. *Cowan v. Braidwood*, 1 Dowl. P. C. 26; 2 Scott, N. S. 138.

In an action on a foreign judgment it should be shown that the defendant was within the jurisdiction of the court, and appeared. *Obicini v. Bligh*, 8 Bing. 335; 1 M. & Scott, 477. If this be done, it cannot be impugned on the ground that the court has mistaken the law. *Scott v. Pilkington*, *supra*.

In an action on a Jamaica judgment, it was held the sum recoverable is according to the rate of exchange. *Scott v. Bevan*, 2 B. & Adol. 78.

[2] The venue is local in an action upon a judgment of a court of record, and must be laid in the county where the record is. The venue must be laid in Middlesex in an action on a judgment of one of the superior courts. Chit. Plead. 281, 7th ed. But in a declaration on a writ of revivor, and it seems of *scire facias*, the venue may be laid in any county. C. L. P. Act, 1852, ss. 131, 132.

[3] *The following is a Count on a Judgment of a Superior Court.*

That the plaintiff on the day of A.D. in the Court of at Westminster, by the judgment of the said Court, recovered against the defendant £ together with £ for his costs of suit, whereof the defendant was convicted, and the plaintiff has not obtained any execution or satisfaction of the said judgment.

(D) *Of the Pleas.*[1] (E) *Of the Evidence.*[2]

[1] *Nul tiel record* is the proper plea to an action on a judgment when there is either no record, or where there is a variance in the statement of it. Com. Dig. Pl. 2 W. 13, and Record C.; 2 Stra. 1171; 1 Saund. 92, n. 3; 3 Mod. 41. *Nil debet* is insufficient; but even the former plea is only available when it is the defendant's intention to dispute the existence of the record, as stated in the declaration. Hence matters in discharge; as payment of debt, levied by *fieri facias*, by *elegit*, or defendant taken under a *capias ad satisfaciendum* (4 Leon. 194; Sac. 123; Cro. Car. 328; Clift, 675), or release (Bac. Abr. Release), must be pleaded specially.

No matter of defence which existed anterior to the judgment can be pleaded. *Moore v. Bowmaker*, 2 Marsh. 392. *Hayward v. Ribbans*, 4 East, 311. Neither the defendant or his bail can plead that the judgment was obtained against him by fraud, though (*Moore v. Bowmaker*, 4 Taunt. 379) it may be that a judgment against a third person was so obtained. Id.; 2 Saund. P. & Ev. 258.

A plea of *nul tiel record* cannot be pleaded to an action on a foreign or colonial judgment, even although the declaration conclude with *prout patet per recordum*. *Philpott v. Adams*, 7 H. & N. 888; 31 L. J. Ex. 421. *Walker v. Witter*, 1 Dougl. 1.

To an action on a foreign judgment the defendant may plead that the foreign court had no jurisdiction in the subject-matter of the suit, or that he was not served with process, or that the judgment was fraudulently obtained. *Bank of Australasia v. Nias*, 16 Q. B. 717. *Reynolds v. Fenton*, 3 C. B. 187. *Ricardo v. Garcias*, 12 Clark & Fin. 368. *Vallée v. Dumergue*, 18 L. J. Ex. 398. *Mecus v. Thellusson*, 8 Ex. 638. *Cowan v. Braidwood*, 1 Man. & G. 882. *Ferguson v. Mahon*, 11 Ad. & E. 179. *Sheehy v. Professional, &c. Assurance Co.* 3 C. B. (N. S.) 397; 26 L. J. C. P. 301; 27 id. 233. He may plead that by the foreign law the judgment sued on was not final. *Patrick v. Sheddon*, 2 E. & B. 14. But he cannot plead any matter where the judgment is final, which might have been pleaded in the original action. *Henderson v. Henderson*, 6 Q. B. 288. *Bank of Australasia v. Nias*, *supra*. *See* Foreign Law, vol. iv. p. 284.

[2] When the existence of a judgment is put in issue, upon a plea or replication of *nul tiel record*, it must be proved by the production of the record itself, which is inspected by the court wherein it is, if it be a record of the same court; or if of a different court, a *certiorari* must be sued out for bringing it in. And if it be a record of an inferior court, the *certiorari* may be issued out of the superior one; but if it be of a superior court, or court of equal jurisdiction, there is no way to have it but by *certiorari* and *mittimus* out of Chancery. When the existence of a judgment, however, is not denied, but it is merely stated by way of inducement to the action, or wanted to prove the fact of the recovery, a sworn copy of it will be sufficient evidence for a jury (*see* Peake's Evid. 2d ed. 29); and it may be proved, as other transcripts, by a witness who has compared the copy, line for line, with the original, or has examined the copy while another person read the original (*see* 1 Camp. 469, 471, n.; 2 Taunt. 52; Phil. Evid. 4th ed. 387); or by a certified copy pursuant to 1 & 2 Vic. c. 94, s. 13. And it is necessary that the record should be drawn up in form before a copy of it is given in evidence; for though, by the practice of the courts at Westminster, the party may take out execution immediately after the judgment is signed by the proper officer, yet it is not a perfect and permanent record till the roll is brought into court, and filed. Gilb. Evid. 22. A judgment-paper, therefore, signed by the officer, is not evidence of a judgment (*see* Bull. N. P. 228); and a verdict will not be admitted in evidence without also producing a copy of the judgment founded thereon. The production of the *postea* alone is not sufficient, for it may happen that the judgment was arrested, or a new trial granted. *See* Bull. N. P. 234; Willes, 367. But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such case, and therefore the decree of the court must be shown, which will be a sufficient proof that the verdict was satisfactory, and stands in force. Bull. N. P. 234; and *see* Phil. Evid. 389, 390. *Fagan v. Dawson*, 4 Man. & G. 711. And though the *nisi prius* record, with the *postea* indorsed thereon, is not evidence of the verdict, it is sufficient to prove that the cause came on to be tried (*see* 1 Stra. 162; Willes, 368) on the day of trial. 6 Esp. Rep. 80, 83; 9 Price, 359. It is also a rule that when, by the practice of the court, the minutes are considered as the judgment itself, and it is not usual to make any further entry, copies of such minutes may be given in evidence, as is always done in the case of minutes in the House of Lords, of the judgment given by them on an appeal from the Court of Chancery (Cowp. 17; Peake's Evid. 2d ed. 34); and though copies of judgment must, in general, be stamped, yet it has been holden that no stamp is necessary on a copy of the minutes of a judgment in the House of Lords. Cowp. 17. In order to prove the proceedings in a court-baron, or other inferior court not of record, the general practice has been to produce the book containing the original minutes of such proceedings, as well those previous to the judgment as the judgment itself (Com. Dig. Evidence, C.; and 2 Stark. N. P. b, 73); for in the case of all inferior jurisdictions it must be shown that the proceedings are regular. And as it is not usual to draw up such judgments in form, this evi-

(F) *Of the Costs.*[1]

VI. Of Judgment by Default.

(A) *Where Writ specially Indorsed.*[2]

dence has been deemed sufficient to support an action on a judgment of the county court before they were made of record (*Chandler v. Roberts*, cited Tidd. 978); or to prove the proceedings on a foreign attachment in the Mayor's Court of London. 2 Bl. Rep. 886; Peake's Evid. 2d ed. 74, 75. *See* further, vol. iv. p. 328.

In an action upon the judgment of a foreign country the sentence must be proved. *Henry v. Adey*, 3 East, 221. *Buchanan v. Rucker*, 1 Camp. 63. *Flindts v. Atkins*, 3 id. 215. *Alves v. Bunbury*, 4 id. 28.

The usual modes of authenticating the records and judicial proceedings of foreign and colonial courts, including those of Scotland and Ireland (4 Stark. R. 183; 4 Camp. 392), are either by exemplifications under the seal of the court (2 Ld. Raym. 893; 6 M. & S. 36), or at least under the great seal of the state or colony (*Anon.* 9 Mod. 66), which seals must, it seems, be respectively proved (3 East, 221; 1 Camp. 63; 9 East, 192; 1 C., M. & R. 281), or by examined copies. 6 M. & S. 36; 1 C., M. & R. 281; 1 Stark. 183; 4 Camp. 372. Office copies, or copies certified under the hand of an officer of the court, or even of the judge himself, cannot, in general, be received, although such copies be admissible in the foreign or colonial court, and although the certificate be duly authenticated by a notary public, whose acts are further certified by the minister of the foreign crown, or the governor of the colony, under the great seal, to be entitled to credit. *Appleton v. Lord Braybrooke*, 2 Stark. 6; 6 M. & S. 34. *Black v. Lord Braybrooke*, 2 Stark. R. 7; 6 M. & S. 39. *Henry v. Adey*, 3 East, 321. *Cavan v. Stewart*, 1 Stark. R. 525. *Flindt v. Atkins*, 3 Camp. 215, n. *Brown v. Thornton*, 6 Ad. & E. 185; Tayl. Evid. 1032. *See* 8 & 9 Vic. c. 113, ss. 1, 2, 3.

A judgment was proved by a witness swearing to the handwriting of the chief justice of the court, and saying he would have acted upon the seal appended to it as the seal of the court. *Buchanan v. Rucker*, 1 Camp. 63. If the court possess a seal, it must be used for the purpose of authenticating a judgment, although it is too much worn to make an impression. *Cavan v. Stewart*, 1 Stark. 525. A copy of the judgment purporting to be signed by the clerk of the court, and certified by him, accompanied by a notarial certificate and certificate of the governor, under the seal of the island, was held inadmissible. *Appleton v. Braybrooke*, 2 Stark. 6. It must in all cases be proved that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records were kept. *Adamthwaite v. Synge*, 1 Stark. 183; 4 Camp. 372.

[1] By the 43 Geo. 3, c. 46, s. 4, it is enacted, that "the plaintiff in an action brought upon any judgment recovered in any court in England or Ireland shall not recover or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same, shall otherwise order." This statute applies only to judgments recovered by plaintiffs; it is, therefore, inapplicable to a judgment of nonsuit. *Bennett v. Neale*, 14 East, 343.

The court will not interfere to stay proceedings in the action upon payment of the judgment-debt without costs. *Wood v. Silleto*, 1 Chit. R. 473. It is no ground for such an application that the debt originally sued for was under 20*l.* *Hopkins v. Freeman*, 13 Mee. & W. 372.

The court are guided by the particular circumstances of each case. *Slater v. Mackey*, 8 C. B. 559. They are not in the habit of giving the plaintiff his costs. *Mason v. Nicholls*, 14 Mee. & W. 118. If the plaintiff had a sufficient remedy on the first judgment, the court will not, because the defendant has pleaded a false plea of *nul tiel record*, order the plaintiff his costs. *Hanmer v. White*, 12 id. 519. *Hall v. Pierce*, 5 Dowl. 603. Neither, it seems, does it constitute a ground for such allowance that the first judgment was for a sum under 20*l.*, and that in order to have execution against the person of the defendant it was necessary to increase the amount, and that he had no property that could be taken in execution. *Adams v. Ready*, 6 H. & N. 261; 7 Jur. N. S. 267. *Beck v. Waldron*, 9 Jur. 510. *Contra*, *Slater v. Mackey*, *supra*. *Armstrong v. Fuller*, 1 Chit. R. 190. Bringing such action is an evasion of the 7 & 8 Vic. c. 96, s. 57, and should not be sanctioned. *Adams v. Ready*, *supra*.

The application for the plaintiff's costs under this statute ought to be made to a judge at chambers (*Claridge v. Wilson*, 26 L. J. Ex. 246), although the statute allows it to be made to the court. *Jones v. Lake*, 8 C. & P. 395. At chambers the application must be by summons. *Lomax v. Berry*, 21 Jur. 446. Where to the court, the rule is in the first instance a rule *nisi*. *Frazer v. Moses*, 1 Scott, N. R. 749.

[2] By the Common-Law Procedure Act, 1852, sect. 27, it is enacted, "in case of non-appearance by the defendant, where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the Schedule A. to this act annexed, marked No. 5, on which judgment

(B) *Where Writ not specially Indorsed.*[1]

(C) *Form of Judgment by Default.*[2]

VII. Judgment of Non-Pros. *See post*, Non-Pros.

VIII. „ of Nonsuit. *See post*, Nonsuit.

IX. „ Recovered, Plea of.[3]

JUDICIAL Committee of Privy Council. *See post*, Privy Council.

Notice. *See* Evidence, vol. iv. p. 293.

JUDICIS est jus dicere non dare. Lofft. 42. *It is for a judge to apply, not to make laws.*

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no proceeding in error shall lie, for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs (to be fixed by the masters, &c.), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and the plaintiff may, upon such judgment, issue execution at the expiration of eight days from the last day for appearance, and not before: Provided always, that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application, supported by satisfactory affidavits, accounting for the non-appearance and disclosing a defence."

Where there is a judge's order for leave to proceed, an application to set aside the order may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence on the merits; but if the order stands, it would seem that judgment signed in pursuance of it cannot be set aside without such affidavits as are mentioned in the section. *Hall v. Scotson*, 9 Ex. 238.

The rule of court excluding Sunday from the computation of legal time, when it is the last day for doing an act, does not apply to the above section, and therefore, if Sunday is the last of the eight days after which execution may issue, such execution may issue on the Monday following. *Rowberry v. Morgan*, 9 Ex. 730.

[1] By C. L. P. Act, 1852, sect. 28, "in case of such non-appearance, where the writ of summons is not indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, to file a declaration indorsed with an order to plead in eight days, and to sign judgment by default on expiration of the time to plead, so indorsed as aforesaid, and in the event of no plea being delivered where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ of summons hereinbefore provided, and the amount claimed is indorsed on the writ of summons, the judgment shall be final, and execution may issue for an amount not exceeding the amount indorsed on the writ of summons, with interest at the rate specified, if any, and the sum fixed by the master for costs as hereinbefore mentioned, unless the plaintiff claim more, in which case the costs shall be taxed in the ordinary way: Provided always, that in such case the plaintiff shall not be entitled to more costs than if he had made such special indorsement and signed judgment upon non-appearance."

[2] [C. L. P. Act, 1852, Sch. A., No. 5.]

In the Queen's Bench.

On the day of A.D. 18

[*Day of signing the judgment.*]

England } A. B., in his own person [*or* by
to wit. } his attorney], sued out a writ of summons against C. D., indorsed according to the Common-Law Procedure Act, 1852, as follows:—

[*Here copy special indorsement.*]

And the said C. D. has not appeared: Therefore it is considered that the said A. B. recover against the said C. D. £ together with £ for costs of suit.

[3] By Reg. Gen. H. T. 1853, rule 10, "where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll in which such proceedings are entered, if any, and in default of his doing so, or in case the same be falsely stated by the defendant, the plaintiff shall be at liberty to sign judgment as for want of a plea."

The above rule does not apply to judgments pleaded incidentally as a defence, *e.g.* a plea by an executor of an outstanding judgment, and no assets beyond (*Power v. Izod*, 1 Bing. N. C. 304); or a plea that the debt had been recovered as a set-off in a former action. *Brokenshir v. Monger*, 9 Mee. & W. 111.

A judgment recovered against the defendant operates as a merger of the original cause of action, and is pleaded in bar (*Smith v. Nicolls*, 5 Bing. N. C. 220); but a plea of judgment recovered against the plaintiff is a plea in estoppel, and should be so pleaded. *General Steam Navigation Co. v. Guillou*, 11 Mee. & W. 877. *Vooght v. Winch*, 2 B. & A. 662.

A plea of judgment recovered on a promissory note given for and on account of a debt, was held a bad plea to an action for the debt. *Drake v. Mitchell*, 3 East, 251.

JURA eodem modo destituuntur quo constituuntur. 2 Dwar. St. 672. *Laws are abrogated only by the same authority by which they were made.*[1]

JURAT. *See* Affidavit, vol. i. p. 245.

JURISDICTION.[2]

JURY[3] and **JURORS.**

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XIV. Misconduct of Jury, when Ground for a New Trial. *See post*, New Trial.

[1] Desuetude cannot abolish a statute; it remains in force till repealed by a subsequent act of the legislature. See *Ashford v. Thornton*, 1 B. & A. 405.

[2] Whenever jurisdiction vests as to the principal question, it applies to all incidental points connected with it. *Smart v. Wolf*, 3 T. R. 347. Submitting to a jurisdiction in general precludes the right of afterwards questioning it. *Wilson v. Hobday*, 4 M. & S. 120.

If the party means to dispute the jurisdiction it must be by plea (*Mostyn v. Fabrigas*, Cowp. 172), except where a statute directs that the proceedings shall be taken in a particular court; then, if the action be brought elsewhere, the statute may be given in evidence under the general issue. *Parker v. Elding*, 1 East, 352. A plea to the jurisdiction must show the proper tribunal. *Mostyn v. Fabrigas*, *supra*.

Where an indictment is taken before a court that hath no cognisance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged (2 Holt, 236); as, if a man be indicted for treason at the quarter sessions, for a rape at the sheriff's town, or the like (Id.); or if another court have exclusive jurisdiction of the offence. But although the defendant may plead to the jurisdiction in such a case, there are but few instances in which he is obliged to have recourse to such a plea. If the offence were committed out of the jurisdiction of the court, the defendant may take advantage of this matter under the general issue (6 East, 583); or if the objection appear on the face of the record, he may demur; or, it should seem, move in arrest of judgment, or bring a writ of error. If, on the other hand, the offence were committed within the jurisdiction of the court, but the court have not cognisance of it (which can occur only in the case of indictments in inferior courts, such as the court of quarter sessions), the defendant may have advantage of it upon general demurrer (1 T. R. 316), or the Court of Queen's Bench, upon the indictment being removed by *certiorari*, will quash it (2 Stra. 1088); or the court where the indictment is preferred will in general give the defendant advantage of the objection at the trial, under the general issue. As pleas to the jurisdiction, therefore, seldom occur, it is not necessary to treat of them at any length.

[3] A certain number of men selected and sworn to inquire of certain matters of fact, and to declare the truth upon evidence to be laid before them. A jury *ex vi termini* imports twelve men. 2 Burr. 113.

I. Who may be Jurors.[1] II. Of the Jury List.[2]

III. How Summoned.[3]

[1] All persons *sui juris* between the age of twenty and sixty, otherwise qualified, may be jurors, except persons outlawed or excommunicated; persons attainted of treason or felony, or of any infamous crime, unless they have obtained pardon; aliens, unless the jury is *de medietate linguæ*; but a special juror can only be challenged for alienage when he is being sworn, or the jury struck. *R. v. Despard*, 2 M. & Rob. 406.

Various classes of persons are exempted from serving on juries: as peers, judges of courts of record at Westminster, clergymen of the established church or dissenting clergymen, practising barristers at law, doctors of law, advocates, certificated attorneys, proctors, officers of the courts of law and equity, &c., coroners, gaolers, practising doctors of medicine, surgeons, apothecaries, officers of the army and navy on full pay, licensed pilots, and masters of ships in the buoy and light service, her majesty's household servants, officers of the customs or excise, sheriffs' officers, high constables, and parish clerks (6 Geo. 4, c. 50, s. 2); also officers in bankruptcy (12 & 13 Vic. c. 71, s. 4), in metropolitan police courts (2 & 3 Vic. c. 71, s. 4), and post-office (sect. 40). So by 25 & 26 Vic. c. 107, s. 2, all registered pharmaceutical chemists, managing clerks to attorneys and proctors, officers in gaols and houses of correction, Quakers, Moravians, and Separatists, may be jurors. 3 & 4 Wm. 4, cc. 44, 82.

In Middlesex, no person ought to be returned to serve who has served in the preceding two terms or vacations; in Yorkshire, none who served at the assizes within four years; in Hereford, Cambridge, Huntingdon, and Rutland, within one year, or in any other county within two years; and the sheriff is bound to give every common juror a certificate of having so served. 6 Geo. 4, c. 50, and 2 & 3 Vic. c. 71, s. 42. The court may fine the sheriff for neglecting the above rules. 2 & 3 Vic. c. 71, s. 40. *Ex-parte Atkinson*, 10 Bing. 399.

Where a person is exempted he may either attend the court and claim the privilege, or obtain some one to attend for him.

As to the Qualification of Jurors. — In London, every householder or occupier of a shop, warehouse, chambers, &c., for the purpose of trade or commerce, and having lands, tenements, or personal estate of the value of 100*l.*, is liable to be a common juror (6 Geo. 4, c. 50, s. 50); elsewhere every person having 10*l.* a-year issuing out of lands, or having 20*l.* a-year in leasehold, for twenty-one years or for life, or being a householder assessed to the poor-rate at not less than 30*l.*, or occupying a house with not less than fifteen windows, is qualified. (Sect. 1.) The act is not affected by 25 & 26 Vic. *infra*.

Special jurors consist of those who are esquires, or persons of higher degree, or bankers or merchants. The sheriff is bound to keep a list of these in alphabetical order.

Where one of the jurymen is unqualified, the proper course is to challenge him. The verdict cannot afterwards be set aside on that ground. *Re Chelsea Waterworks Co.* 10 Ex. 232.

[2] By 25 & 26 Vic. c. 107, s. 4, repealing parts and amending 6 Geo. 4, c. 50, therein referred to as "the principal act," the clerk of the peace in every county, riding, and division in England and Wales shall, on or before the 20th of May in every year, issue his precept (in the form set forth in the schedule, or as near thereto as may be) to the churchwardens and overseers of the poor of the several parishes, and to the overseers of the poor of several townships within the county, riding, &c. of which he acts, requiring them to make out before the 1st September then next ensuing a true list of all men residing within their respective parishes, &c. qualified and liable to serve on juries, according to the principal act, and also to perform and comply with all other requisitions in the said precepts contained, and shall forward the same, together with a competent number of printed forms of returns for the use of the respective persons, by whom such returns are to be made, by post in a registered letter, having the words "Jury Precept" legibly written or printed on the outside thereof, and addressed to the churchwardens and overseers as aforesaid.

By sect. 3, provisions as to high constables repealed.

By sect. 5, precepts, &c. to be printed at the expense of the county, &c.

By sect. 6, duties and liabilities of parish officers to continue.

By sect. 7, as to notices of special petty sessions.

By sect. 8, justices to adjourn petty sessions for the production of list.

By sect. 9, justice's clerk to send jury-lists to clerk of the peace.

By sect. 10, clerk of the peace to deal with the jury-lists as before.

By sect. 11, all juries may be summoned by post.

By sect. 13, sheriffs to be allowed costs of summonses.

By sect. 14, extent of act: not to extend to Scotland or Ireland. Jury-lists to be made, &c., in the city of London, as before.

These lists are produced at a special petty sessions, held in the last week in September, when the justices may correct them by striking out the names of any persons not qualified, or unable to act from infirmity, and inserting the names of those omitted. Sect. 10, 6 Geo. 4, c. 50.

A churchwarden who continues in office after his year has expired, where his successor has been elected, but not sworn, is bound to sign the jury lists. *Bray v. Somes*, 2 B. & S. 374; 31 L. J. M. C. 135.

[3] The parties have now nothing to do

(A) *Summoning of Common Jurors for the Assizes.*[1]
(B) „ „ *in London and Middlesex.*[2]
(C) „ *Special Jurors for the Assizes.*[3]

with the suing out of the jury-process, as the sheriff, in obedience to a precept from the judge, summons the jurors, and has them in attendance at the proper time. C. L. P. Act, 1852, s. 104, *et seq.*

The 15th sect. of 15 & 16 Vic. c. 76, abolishes the several precepts formerly used, and the entry on the record, *jurat ponitur in respectu*, &c.

[1] The several courts, or any judge thereof, may make all such rules or orders upon the sheriff or other person as may be necessary to produce the attendance of a special or common jury for the trial of any cause or matter depending in such courts, at such time and place, and in such manner, as they may think fit. C. L. P. Act, 1854, s. 59.

The judges of assize issue a precept to the sheriff to summon jurors for the assizes, which precept directs that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes. Id. 1852, s. 105. The sheriff, accordingly, summons not less than forty-eight, nor more than seventy-two persons qualified, unless the judge order a greater number; and the judges of assize may direct him to summon two sets of jurors, not exceeding 144 in all, the one to attend for a certain number of days at the beginning of the assizes, and the other for the residue of the assizes. 6 Geo. 4, c. 50, ss. 15, 22. The jurors are summoned ten days at least before the day on which they are required to attend. (Sect. 25.)

A printed panel of the jurors must, seven days before the commission-day, be made by the sheriff, and kept in the office for inspection; and a printed copy of such panel must be delivered by the sheriff to any party requiring the same, on payment of one shilling, and it must be annexed to the *nisi prius* record. C. L. P. Act, 1852, s. 106.

[2] The sheriffs of London and Middlesex respectively, pursuant to a precept under the hand of a judge of any of the superior courts, and without any other authority, must, in the same manner, summon a sufficient number of common jurors for the sittings in London and Middlesex; and seven days before the first day of each sittings, a printed panel of the jurors so summoned for the trial of causes at such sittings is made by the sheriffs, and kept in their offices for public inspection, and a printed copy of such panel may be obtained on payment of one shilling, and is to be annexed to the *nisi prius* record.

One precept only issues for each term, and for all the superior courts, and it is the duty of the sheriffs respectively to apply for and procure such precept to be issued in sufficient time before each term, to enable them to summon the jurors; and the courts, or any judge, may issue such precepts at any time, and direct the time and place of summoning the jurors as to them or him may seem requisite. C. L. P. Act, 1852, s. 107. The court or a judge may make all other necessary orders they or he think fit. Id. 1854, s. 59.

[3] The precept issued by the judge to the sheriff directs the latter to summon a sufficient number of special jurymen mentioned therein, not exceeding forty-eight in all, to try the special-jury causes at the assizes; and the persons summoned in pursuance of this precept shall be the jury for trying all special-jury causes at the assizes, subject to the right of challenge.

A printed panel of the special jurors is to be made, kept, and delivered by the sheriff, and annexed to the *nisi prius* record, as in the case of a common jury; and upon the trial the special jury is ballotted for, and called in the order in which they are drawn from the box, in the same manner as common jurors. But the court or a judge has power to order that a special jury should be struck in the manner after-mentioned, as is usual in London and Middlesex. C. L. P. Act, 1852.

The special jurors must be summoned by the sheriff three days at least before the day on which they are required to attend. 6 Geo. 4, c. 5, s. 20. Though the sheriff must, seven days before the commission-day, have a printed copy of the special jurymen ready for inspection at his office, still he need not summon them, except notice has been given to him six days before the commission-day by one of the parties that his cause is to be tried by a special jury; and failing such notice the cause may be tried by a common jury, unless otherwise ordered by the court or a judge. Reg. Gen. H. T. 1853, r. 47. C. L. P. Act, 1852, s. 112. And if no such notice has been given to the sheriff, and thereby a special jury has not been summoned, or does not attend, the cause is to be tried by a common jury, as if no proceeding had been had to try the cause by a special jury. (Sect. 113.)

In any county except London and Middlesex, the plaintiff in any action, except replevin, is entitled to have the cause tried by a special jury, upon giving notice in writing to the defendant, at such time as would be necessary for a notice of trial (*i. e.* ten days), of his intention that the cause shall be so tried. C. L. P. Act. 1852, s. 109. And the defendant or plaintiff in replevin shall be so entitled, on giving the like notice within the time limited for obtaining a rule for a special jury (Id.), *i. e.* within not less than six days before the day fixed by the notice of trial, if such notice has been given. But the court or a judge may at any time order a cause to be tried by a special jury, on such terms as they or he thinks fit. (Id.)

The notice to the opposite party of trial by a special jury should be served as in case of notice of trial, and it may be as follows:—

(D) *Of the Special Jurors in London and Middlesex.*[1]

IV. Rule for Special Jury, how Obtained and Served.[2]

In the Q. B. [C. P. *or* Exch. of Pleas.]
A. B. *v.* C. D.

Take notice, That the issue joined in this cause will be tried by a special jury.

Dated this day of A.D.

P. A. Plaintiff's Attorney.

The defendant in like manner must give a similar notice to the plaintiff, six days before the day for which notice of trial has been given. C. L. P. Act, 1852, s. 109. Rule (Pr.) 44, H. T. 1853. If the defendant is under terms to take short notice of trial, he may, if such notice has been given before issue joined, obtain an order from a judge for a special jury. *Sayer v. Dufaur*, 9 Q. B. 800.

At the same time either party must give notice to the sheriff six days before the commission-day, otherwise the case will be tried by a common jury. C. L. P. Act, 1852, ss. 112, 113.

The following may be the

Notice to the Sheriff.

In the Q. B. [C. P. *or* Exch. of Pleas.]
Between A. B. Plaintiff,
and
C. D. Defendant.

Take notice, That this cause, which is to be tried at [*as in notice of trial*], is to be tried by a special jury.

P. A. &c.

To the sheriff or sheriffs of

In extraordinary cases, where local prejudices may be supposed to influence the special jury obtained in the above manner, it may be advisable for the party to apply to the court or a judge for an order that a special jury should be struck, according to the practice in London and Middlesex, in which case the order will be a sufficient warrant for striking the jury, and making a panel thereof. C. L. P. Act, 1852, s. 108.

[1] The C. L. P. Act, 1852, s. 110, enacts, "in London and Middlesex special jurors shall be nominated and reduced by and before the under-sheriff and secondary respectively, in like manner as by the master before this act, upon the application of either party entitled to a special jury, and his obtaining a rule for such purposes; and the names of the jurors so struck shall be placed upon a panel, which shall be delivered and annexed to the *nisi prius* record, in like manner, and upon the same terms, as hereinbefore provided with reference to the panel of common jurors, and upon the trial the special jury shall be balloted for and called in the order in which they shall be drawn from the box, in the same manner as common jurors."

[2] Every plaintiff is entitled as of course to the rule after issue joined; but no rule for a special jury is granted on behalf of any defendant or plaintiff in replevin, except on an affidavit stating that no notice of trial has been given, or if it has, then stating the day for which such notice has been given; and in the latter case no such rule is granted unless application be made for it more than six days before that day; but a judge may, on summons, order a rule for a special jury to be drawn up at any time. Reg. Gen. (Pr.) H. T. 1853, r. 44.

A defendant cannot, without special application to a judge, have a rule before issue joined, although, being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for the special jury a sufficient number of days before trial. *Sayer v. Dufaur, supra. Dresser v. Norman*, 6 C. B. 427.

A motion-paper indorsed to move for a special jury, and signed by counsel (and if applied for by a defendant, with an affidavit as above mentioned), must be taken to the clerk of the rules, at the master's office, who will draw up the rule. Then an appointment must be obtained from the under-sheriff in a Middlesex cause, or the secondary in a London cause, and a copy of the rule and appointment served on the opposite attorney.

The following is the form of an affidavit on the part of defendant for special jury: —

In the Q. B. [C. P. *or* Exch. of Pleas.]
Between A. B. Plaintiff,
and
C. D. Defendant.

I, D. A., of attorney for the above-named defendant [*or* plaintiff in replevin] in this cause, make oath and say, that no notice of trial has been given in this cause [*or if it has*, that on the day of notice was given on the part of the above-named plaintiff of the trial in this cause on [*the day for which notice was given*].

Sworn, &c. D. A.

The following is the form of the rule for special jury: —

In the Q. B. [C. P. *or* Exch. of Pleas.]
The day of in that year.
Term Victoria.

A. B. *v.* C. D. } It is ordered that the sheriffs of London [*or* sheriff of Middlesex] shall, at the expense of the plaintiff [*or* defendant], upon notice of this rule, to be given to their secondaries [*or* if in Middlesex, to be given to the under-sheriff] pursuant to the statutes in such case made and provided, nominate out of the jurors' book and special jurors' list forty-eight persons, being qualified to serve on special juries for the said city [*or* county], of whom twelve shall be struck out on each side, and the remaining twenty-four shall be returned by the said sheriffs [*or* sheriff] to try the issue [*or* issues] joined between the parties. Upon the motion of Mr.

By the Court.

The party applying must also give notice to the opposite party of his intention to try by special jury [*which may be done by serving the rule, if then obtained*], and a notice to the same effect to the sheriff six days before the first day of sittings in London, otherwise the case will be tried by a common jury.

V. Costs of Special Jury.[1]

Where the defendant in any case, or plaintiff in replevin, gives notice of his intention to try the cause by a special jury, and the venue is in London or Middlesex, the court or a judge, if satisfied that such notice is given for the purpose of delay, may order that the cause be tried by a common jury, or make such other order as to the trial of the cause as such court or judge shall think fit. C. L. P. Act, 1852, s. 111. Where the defendant has obtained the rule for delay, the proper application to the court is not to move to set aside the rule, but to move for a rule to show cause why the cause should not be tried by a special jury in its order at the sitting for which the notice was given, if the defendant shall then have one in attendance, and in default thereof, then that the cause be tried by a common jury. *Gray v. Knight*, 16 C. B. 143. *Breach v. O'Brien*, 9 id. 227. *Dawson v. Smith*, 1 L., M. & P. 151.

By Reg. Gen. (Pr.) H. T. 1853, r. 45, "no cause will be tried by special jury in London or Middlesex, unless the rule for such special jury be served, and the cause marked in the associate's book as a special jury cause on or before the day preceding the day appointed, in Middlesex or London respectively, for the trial of special juries." The rule must be served in sufficient time to enable the opposite party, with the use of ordinary diligence, to strike the jury. Service at six o'clock, p.m. of the day preceding the day of trial was held too late. *Gunn v. Honeyman*, 2 B. & A. 400. Where a rule was not served till four days after it was obtained, the court discharged it. *Phelps v. Kelly*, 3 Man. & G. 883. It has, however, been held no objection, unless the opposite party was thereby injured. *Gurney v. Gurney*, 3 Dowl. & L. 735. If the defendant after serving the rule takes no further steps, the plaintiff will be entitled to have the cause tried by a common jury. *Farren v. Richards*, 2 Stark. 369.

Trial at bar is always by a special jury, and the motion for that purpose must be made by counsel in court. *Thorn v. Marquis of Londonderry*, 8 Bing. 26.

For the purpose of striking the special jury, the attorneys on both sides attend at the time appointed at the office of the under-sheriff or secondary, who puts certain cards containing numbers corresponding with the names of special jurors into a box, which is shaken, and thereafter the names are taken out successively and read aloud, when either party may object to any name for cause until forty-eight are obtained, when they are written down on paper, and a copy of the list, with the additions and places of abode given to each party, and an appointment made for striking the special jury. 6 Geo. 4, c. 50, ss. 32, 33. C. L. P. Act, 1852, s. 110. A judge may make an order to compel a party to proceed to the striking of the special jury. *Joseph v. Perry*, 3 Dowl. 699. Where the defendant has served the rule, but not nominated the jury, the court will grant a rule to show cause why the rule should not be set aside on a certain day, unless he previously nominate the jury. *Davenage v. Smith*, 2 L., M. & P. 277.

Where the defendant having obtained the rule has nominated, but not reduced the jury, the proper course is for the plaintiff to proceed to reduce, and not to set aside the rule, and he will get the costs of doing so if he succeed. *White v. Eastern Union Railway Co.* 11 C. B. 873. The appointment being served, the parties again attend, when each strikes out twelve names; and if one party does not attend, the under-sheriff or secondary will do so for him. 1 Salk. 405. The clerk then makes out the list of the twenty-four remaining names, which are placed upon a panel. This panel is kept in the office of the under-sheriff or secondary for public inspection, and any person may obtain a copy for a shilling. The panel must also be annexed to the *nisi prius* record. C. L. P. Act, ss. 106, 110.

[1] By the 6 Geo. 4, c. 50, s. 34, it is enacted, "that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same upon taxation of costs than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge before whom the cause is tried shall *immediately* after the verdict certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." This provision is extended, by virtue of 3 & 4 Wm. 4, c. 42, s. 35, to cases in which the plaintiff is nonsuited, to which it did not originally apply. *Wood v. Grimwood*, 10 B. & C. 689. The certificate should be granted at least on the same day as the trial (*Christy v. Richardson*, 10 Mee. & W. 688. *Waggett v. Shaw*, 3 Camp. 315. *Grace v. Clinch*, 4 Q. B. 606. *Leach v. Lamb*, 11 Ex. 347), unless the parties consent to extend the time. 10 C. B. 910. In Probate Court the same. 8 W. R. 589.

By the 35th section of the 6 Geo. 4, c. 50, it is provided, that "no juror who shall serve upon any special jury shall be allowed or take for serving on any such jury more than such sum of money as the judge who tries the issue shall think just and reasonable, and which shall not exceed the sum of 1*l.* 1s., except in cases where a view is had, and shall have been had by such juror." The parties cannot by any arrangement between themselves, as to the amount to be allowed to the special jury, deprive the judge of his discretion in the matter. *Molloy v. Brown*, 11 Ir. L. R. 503. If there be no certificate the expense must be paid by the party applying for the special jury, though he succeed in the action. If he fail in the action, the opposite party is entitled to the costs to which he has been put by reason

VI. Attendance of Jurors, and Consequences of Neglect.[1]

VII. Of a Tales.[2]

VIII. Of Challenges of.[3]

of the cause being tried by a special jury, as costs in the cause, without any certificate of the judge. Thus, if the rule for a special jury has been obtained by the plaintiff, the defendant, if successful, will be entitled to the costs of the special jury as costs of the cause. *Jones v. Tobin*, 6 Dowl. 251; 5 Scott, 251. And so of a special jury obtained by the defendant, if the plaintiff succeed he is entitled to the costs, and in each case without any certificate. Marsh. Costs, 299. If the record be withdrawn, no certificate can be given. *Clements v. George*, 11 Moore, 510. And if the cause be referred to arbitration there must be a special power for the arbitrator to certify for these costs, and he must so certify, otherwise they cannot be allowed. *Rex v. Moate*, 3 B. & Adol. 237. But it is otherwise if the parties agree that the costs of a special jury should abide the event, the successful party will be entitled without a certificate. *Greaves v. Gorton*, 15 Mee. & W. 186; 15 L. J. Ex. 169. The costs of a special jury are not included in a rule in the ordinary terms for the costs of the day. *Morgan v. Miller*, 1 Man. & G. 325; 9 Dowl. 51. The granting of the certificate is entirely in the discretion of the judge. It will not be granted unless there is some *fact* in dispute. Where the only point in dispute was a point of law, *Abbott, C. J.*, refused on that ground to certify for a special jury. *Wemyss v. Greenwood*, 2 C. & P. 483. See *Roberts v. Brown*, 6 id. 757.

Where a special jury has been obtained on the application of the plaintiff, and, there being several counts in the declaration, the defendant suffers judgment by default as to some of them, and the issues upon the others go down to trial, and are all of them found for the defendant, and at the trial the damages are assessed upon the judgment by default, the plaintiff will not be entitled to the expenses of the special jury, notwithstanding the judge certify for a special jury, for the plaintiff in such a case has lost the cause, and the special jury merely perform the functions of a common jury, by assessing damages in the counts as to which the defendant had suffered judgment by default. *Walters v. Howells*, 8 Ex. 244; 22 L. J. Ex. 96.

[1] If any man summoned to attend a jury shall not attend in pursuance of such summons, or being thrice called shall not answer to his name, or any talesman being present after being called shall be present but not appear, or after appearance shall wilfully withdraw himself from the presence of the court, the court shall set such fine upon him as it shall think meet, and in the case of a viewer not less than 10*l.*, unless some reasonable excuse shall be proved by oath or affidavit, or upon such default as the execution of a writ of inquiry the undersheriff, &c., may set a fine not exceeding 5*l.* 6 Geo. 4, c. 50, ss. 38, 47, 51, 53.

A person not duly summoned and returned need not serve on juries. If a stranger cause himself to be sworn in the name of one who was impannelled and returned, it is in such case a misdemeanor, for which he may be indicted, and for which an action on the case lies at the suit of the party injured. *See* Marsh. 81.

A fine for not attending as a special juror at the C. P. at Westminster, having been imposed upon a gentleman having a house in London and in Brighton, but who had resided the twelve months preceding at Brighton, the court refused to remit it (1 Y. & J. 309); but where the party summoned had let his house and was abroad, which fact was communicated to the summoning officer, the court remitted the fine. So, where it had been left at a wrong house. (Id. 401.)

The court will not hear counsel for a juryman who has been fined for contempt. *Carne v. Nicoll*, 3 Dowl. P. C. 115. Where an issue was directed by a court of equity to be tried at bar by a special jury of a county in which the cause did not arise, the court fined those special jurors who did not attend, it being proved that they were duly summoned. *Layburn v. Crisp*, 8 C. & P. 397. And the court will fine the summoning officer if not in attendance when a fresh jury is called, as in default of their appearing they cannot be fined without his evidence. *Duffill v. Spottiswoode*, 3 C. & P. 437.

By 25 & 26 Vic. c. 107, s. 12, fines upon persons not attending as jurors may be remitted without being estreated, by the judge imposing the same, upon an affidavit of the cause of non-attendance.

[2] Where only a part of the special jury appear, the plaintiff is entitled to pray a tales without the defendant's consent. *Gatliffe v. Bourne*, 2 M. & Rob. 100. In a prior case it was held that in a special jury cause the plaintiff's counsel cannot have a tales without the consent of the counsel for the defendant. *British Museum v. White*, 3 C. & P. 289. *Semble*, that in an information at the suit of the attorney-general, a tales may be prayed for the crown without his warrant, though he be not present, but not for the defendant. *Attorney-General v. Parsons*, 2 Mee. & W. 23. Under 7 & 8 Wm. 3, c. 32, s. 3, talesmen can only be taken from such persons as are summoned as jurors, and not from the bystanders; nor can the judge at *nisi prius* order other jurors to be summoned (*Rex v. Hill*, 1 C. & P. 667); nor can jurors summoned on the crown side serve as talesmen on civil issues. *Rex v. Tipping*, id. 668.

[3] When the jurors are called, either party is at liberty to challenge them, either the whole panel, or any individual of the panel. Challenges are consequently distinguished into two kinds: challenges to the array, and challenges to the poll. Challenges to the array are at once an exception to the whole

panel, in which the jury are arrayed or set in order by the sheriff in his return. Lord Coke (*see* Co. Litt. 156) again divides the former into a principal cause of challenge, or to the favour: a principal cause is grounded on such a manifest presumption of partiality, that if it be found true, it unquestionably sets aside the array or the juror; but a challenge to the favour leaves it to the discretion of the triers. *See* 3 Bac. Abr. Juries. The same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer, of whose partiality there is any tolerable grounds of suspicion. *See* 3 Bl. Com. 359.

Principal challenges are subdivided by Lord Coke into four kinds:— *Propter honoris respectum, propter defectum, propter affectum, propter delictum.* *See* Co. Litt. 156 b. *Propter honoris respectum,* when a lord in parliament is impannelled on a jury he may be challenged by either party, or challenge himself. *See* id. 15. *Propter defectum,* when the person challenged is an alien, or not qualified according to law. *See* 6 Geo. 4, c. 50, s. 27. In juries *de medietate linguæ* neither of these objections holds good. (Id. s. 47.) *Propter affectum,* for suspicion of bias or partiality; and this may be either a principal challenge, or to the favour: it is a principal challenge when there are evident grounds of suspicion, either of express favour or malice; as that a juror is of kin to either party within the ninth degree (*see* 3 Bl. Com. 363); that he has been arbitrator on either side; that he has an interest in the cause.

Peremptory challenges are allowed only in cases of treason or felony *in favorem vitæ.* *See* 4 Bl. Com. 353. A person arraigned for murder or felony is not allowed more than twenty peremptory challenges. *See* 6 Geo. 4, c. 50, s. 29. In cases of high treason the prisoner is still allowed thirty-five peremptory challenges, the number formerly allowed in all cases of felony. Challenges to the favour are where the party has no principal challenge, but objects some probable circumstances of suspicion, as acquaintances and the like. Challenges to the favour are determined by triers, who are two indifferent persons named by the court, or the two first jurors allowed. If the triers appointed by the court find one man indifferent, he is sworn, and he and the two triers try the next; and when another is found indifferent, the two triers are superseded, and the two sworn first on the jury try the rest. *See* 3 Bl. Com. 303.

The proper time to challenge the jury is upon the calling of their names, after a full jury has appeared. *R. v. Edmonds,* 4 B. & A. 471.

A challenge has been allowed after the swearing of the jury, but before they were charged. *R. v. Flint,* 3 Cox, 66.

Where alienage is a disqualification the objection must be made, as to the petty jury, before it is sworn, and as to the special jury before it is struck. *Rex v. Despard,* 2 M. & R. 406. *Rex v. Sutton,* 8 B. & C. 417.

The cause of a principal challenge to the array are, where the sheriff is the actual prosecutor or party aggrieved (*R. v. Edmonds, supra. Rex v. Sheppard,* 1 Leach, 101); or where, at the time of the return, he was of actual affinity to either party; or if he return any jurors at the request of the prosecutor or defendant, or any person whom he believes to be more favourable to the one side than to the other; or if the defendant have an action depending against the sheriff (Co. Litt. 156, a); or if he have any pecuniary interest in the event; or if he be counsel, attorney, servant, or arbitrator in the same cause (Id. *Herbert v. Badcock,* 13 Burr. 185); or a subscriber to a society who are the prosecutors. *Reg. v. Hughes,* 1 C. & Kir. 235. It is no ground of challenge for an indifferency on the part of the sheriff that the officer had omitted to summon one of the twenty-four special jurymen returned on the panel. *R. v. Edmonds, supra.*

If one prisoner challenge a juror, others indicted with him on joint process shall be bound likewise, because there is only one panel. 1 Hawk. c. 43, s. 4. Thus, in the case of principal and accessory, the prisoners cannot insist upon severing their challenges. *R. v. Fisher,* 3 Cox, 68.

The Crown has a right of peremptory challenge until the panel has been exhausted. *Mansell v. Reg.* 26 L. J. M. C. 137; in error, 27 id. 4.

Since the Jury Act, 6 Geo. 4, c. 50, the Crown is not to be put to show grounds of challenge of jurors, in a case of felony, till the panel is exhausted, and that statute makes no alteration of the law in this respect. *Rex v. Parry,* 7 C. & P. 836. Prisoner, in a case of felony, having challenged twenty jurors peremptorily, cannot withdraw one of those challenges to challenge another juror, instead of one that he had previously challenged. (Id.) On an objection to the panel, on an indictment for maliciously setting fire to premises, that the sheriff was an inhabitant of the hundred:— *Held,* that proof of the notice and examination required, in order to entitle the party injured to recover against the hundred, was essential to sustain such challenge. *Rex v. Savage,* 1 R. & M. 51.

A challenge to the array ought to be in writing, so that it may be put upon the *nisi prius* record, and the other party may demur or counter-plead to it. *See* 4 B. & Adol. 471; 10 Mee. & W. 274. The ground of objection must be specifically stated. *Reg. v. Hughes, supra.* The improper disallowance of a challenge is ground, not for a new trial, but for a *venire de novo.* *R. v. Edmonds, supra.*

No cause of challenge to the jury, whether to the array or to the polls, can be taken, either in arrest of judgment or otherwise, after the jury are sworn. *R. v. Sutton, supra. R. v. Sheppard, supra.*

Upon a gaol delivery, the consequence of

IX. Verdict of.[1] *See post*, Verdict.

X. Jury, Discharge of, without Verdict: Effect of.[2]

XI. Juror, Withdrawing: Effect of, and the Costs upon.[3]

XII. Jury de Medietate Linguæ.[4]

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an exhaustion of the panel by reason of challenges is that a new panel must be awarded; whereas, in the court of Queen's Bench, a tales may be prayed upon indictments or informations by the warrant of the attorney-general. Steph. 302. *R. v. Jones*, cited 12 Mod. 246.

[1] After the jury are charged, they can only state a question, and receive the law from the court; the court therefore refused to permit them to have a law treatise on the subject which had been cited. *Burrows v. Unwin*, 3 C. & P. 310.

Where, in a criminal prosecution, it is essential to prove the particular value of an article, the jury may use that general knowlege which any man can bring to the subject; but if any of the jurors has a particular knowledge on the subject, arising from his being in the trade, he ought to be sworn and examined as a witness. *Rex v. Rosser*, 7 C. & P. 648.

[2] The jury may be discharged by the judge without returning a verdict, where one of them is unable to remain in court from sudden illness; or where, after conferring together for a reasonable time, they are unable to agree upon a verdict: but, except in cases of some such urgent necessity, the judge has in general no power to discharge the jury without the consent of the parties. *Tinkler v. Rowland*, 4 Ad. & E. 869. *Empson v. Fairfax*, 8 id. 296. *See* also *Powell v. Sonnett*, 1 Bligh, N. S. 545. *R. v. Johnson*, 5 Ad. & E. 488.

Discharging the jury by consent does not terminate the suit, and in this respect is not like the withdrawal of a juror (*Moscati v. Lawson*, 4 Ad. & E. 331), which has that effect. *Everett v. Youells*, 3 B. & Ad. 349.

If the jury be discharged from returning a verdict either as to one of several issues, or as to all the issues in the cause, and whether by the consent of the parties or by order of the judge, as where the jury are unable to agree, or where the jury having found their verdict on all the material issues joined, the judge discharges them from returning any verdict on issues which remain, but are immaterial; in either event, the costs of issues so withdrawn from the jury are not payable by either party to the other. *Reg. v. Johnson, supra. Powell v. Sonnett, supra. Hill v. the London and South-Western Railway Co.* 11 Ex. 696. *Bostock v. the North Staffordshire Railway Co.* 18 Q. B. 777. See *Sanderson v. Neston*, R. & M. 402. *Vallance v. Evans*, 1 C. & M. 856. *Allenby v. Proudlock*, 4 Ad. & E. 326.

Where a juryman is taken suddenly ill, even in capital cases, the jury may be discharged, and the prisoner tried by a fresh one. *Rex v. Edwards*, 4 Taunt. 309.

The grand jury had come into court, and had been discharged, and had left the court, but had neither left the building nor separated. The judges directed them to be sent for back into court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them. *Reg. v. Holloway*, 9 C. & P. 43.

The court will not compel the prosecutors to give a list of their names to the defendant previous to striking a special jury, but will give such directions, by consent of the prosecutors, as shall prevent prejudice accruing to the defendant in consequence of such list not being furnished. *Reg. v. Nicholson*, 8 Dowl. P. C. 422.

Where, after the jury had been discharged, not agreeing on their verdict, there being an insufficient number remaining after challenges allowed of the original panel, the judge ordered a new panel to be returned:— *Held*, that a conviction from the jury selected therefrom was good. *Reg. v. Cropper*, 2 Moo. C. C. 18.

The court will not quash the indictment after conviction, on the ground that the bill was found by a minority only of the grand jury, but will leave the defendant to his writ of error. *Rex v. Marsh*, 1 Nev. & P. 187.

[3] During the trial, after the jury are sworn, the parties frequently, by themselves or their counsel or attorneys, agree to withdraw a juror. This is usually done at the recommendation of the judge, in cases where it is doubtful whether the action will lie, or where the judge intimates an opinion that, under the peculiar circumstances of the case, the action should proceed no further. 1 Chit. Arch. 397.

The withdrawal of a juror seems to put an end to the action; or rather, it is more correct to say, it is presumed that the parties intend thereby to put an end to the action, unless the contrary is stated. *Gibbs v. Ralph*, 14 Mee. & W. 804. But see *Harries v. Thomas*, 2 id. 32. *Bentley v. Dawes*, 10 Ex. 347. *Burden v. Flower*, 7 Dowl. 786. If further proceedings are attempted, the defendant may obtain an order to stay. *Gibbs v. Ralph, supra. Hammond v. Thorpe*, 1 C., M. & R. 64.

The effect of withdrawing a juror being that neither party is successful in the cause, neither is entitled to costs from the other; but each must bear his own. *Stodhart v. Johnson*, 3 T. R. 657. See *Thomas v. Lewis*, 5 Dowl. 395.

[4] An alien, indicted or impeached of any felony or misdemeanor, has the right of being tried by a jury *de medietate linguæ*; and it is enacted, "that on the prayer of every alien so indicted or impeached, the sheriff or other proper minister shall, by

XIII. Jury of Matrons.[1]

JUS accrescendi inter Mercatores locum non habet pro beneficio Commercii. Co. Litt. 182 a; 2 Brownl. 99; Broom. 343. *The right of survivorship does not obtain among merchants for the benefit of commerce.*[2]

JUSTICES of the Peace. *See* Apprentices, vol. i. p. 394; Arrest, id. p. 519; Certiorari, vol. iii. p. 62; Commitment, id. p. 143; Constable, id. p. 183; Conviction, id. p. 216; False Imprisonment, vol. iv. p. 428; Habeas Corpus, id. 619; Indictments, *ante*, p. 105; Information, *ante*, p. 149; *post*, Libel; Mandamus; Poor; Prohibition; Session; Shipping; Warrant.

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command of the court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, and that no such alien-juror shall be liable to be challenged for want of freehold or of any other qualification required by this act; but every such alien may be challenged for any other cause, in like manner as if he were qualified by this act." *See* 6 Geo. 4, c. 50, s. 47.

[1] Pregnancy may be pleaded in stay of the execution of a sentence of death. Where pleaded, a jury of matrons are sworn to ascertain the fact. Should such jury desire to have the evidence of a surgeon before they deliver their verdict, the surgeon should be examined in open court. *R. v. Wycherley*, 8 C. & P. 262.

[2] In the absence of special stipulation (*Balmain v. Shore*, 9 Ves. jun. 500), all property, whatever be its nature, purchased with partnership capital for the purposes of a partnership trade, continues to be partnership capital, and to have, to every intent, the quality of personal estate. *Phillips v. Phillips*, 1 Mylne & K. 663. *Feredey v. Wightwick*, 1 Russ. & Mylne, 149. *Selkrig v. Davis*, 2 Dow. 242. *Dale v. Hamilton*, 16 L. J. Ch. 397. *Crawshay v. Maule*, 1 Swanst. 521. *See post*, Partnership.

IV. Appeal to Quarter Sessions. *See post*, Quarter Sessions.

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I. The Nature of their Office, its Continuance and Incidents.[1]

II. Jurisdiction, Duties, and Privileges.

(A) *Jurisdiction in General.*[2]

[1] Justices of the peace are appointed by the Crown, and continue in office during the royal pleasure. Some of them are of the *quorum;* that is, certain business cannot be transacted without their presence. The powers and duties of justices depend on their commission, and on the several statutes which have created objects of their jurisdiction. They are commissioned to preserve the peace, to suppress riots and affrays, to commit felons and inferior criminals; and two or more of them may inquire into and determine felonies and other misdemeanors. Their duties have greatly increased by late acts of parliament, especially in sessional business, in regulating gaols and houses of correction, in taking cognisance of various offences against the vagrant, game, and revenue laws, and in the licensing of public-houses. Every justice must have an estate of 100*l.* per annum, clear of incumbrance; and if he act without such qualification he forfeits 100*l.* But this does not extend to corporation justices, peers, privy councillors, judges, under-secretaries of state; nor to the heads of colleges in the two universities, or mayors of Oxford and Cambridge. 18 Geo. 2, c. 20, s. 1.

Where the qualification of a justice of the peace is an ecclesiastical benefice, a sequestration issued at the suit of a creditor, under which possession has been duly taken, and the profits received, is an incumbrance affecting the estate, within stat. 18 Geo. 2, c. 20, s. 1. *Pack v. Tarpley*, 9 Ad. & E. 468; 1 Per. & D. 478. As to an estate in remainder, see *Woodward v. Watts*, 2 E. & B. 452; 22 L. J. M. C. 149. As to incumbrances on estate, see *Durnclose v. Lees*, 1 C. & Kir. 408. *See* exceptions, 5 Geo. 2, c. 18, ss. 13-15; 5 & 6 Wm. 4, c. 76, s. 101; 9 & 10 Vic. c. 95, s. 21.

No practising attorney, solicitor, or proctor, is qualified to act as justice for any county. A justice of the peace acts ministerially or judicially. Ministerially, in preserving the peace, hearing charges against offenders, issuing summonses or warrants thereon, examining the informant and his witnesses, binding over the parties to prosecute and give evidence, bailing the supposed offender, or committing him for trial. Judicially, as when he convicts for an offence. His conviction, drawn up in due form and unappealed against, is conclusive, and cannot be disputed by action; though if he act illegally, maliciously, or corruptly, he is punishable by information or indictment. When a criminal information is applied for against a magistrate, the question for the court is not whether the act done be found on investigation not strictly right, but whether it proceeded from an unjust, oppressive, or corrupt motive (among which fear and favour are generally included), or from mistake or error only.

[2] Where a justice of the peace for any county, division, liberty, borough, or place, shall also be justice for a county, riding, division, liberty, city, borough, or place next adjoining thereto, or surrounded thereby, he may act in the one for the other. 11 & 12 Vic. c. 42, s. 5; id. c. 43 s. 6. And it shall be lawful for any justice of a county at large, or for any riding or division of such county, to act as such at any place within any city, town, or other precinct, being a county of itself, or having exclusive jurisdiction, and situated within, surrounded by, or adjoining to any such county, &c., but this shall not authorise him to act or intermeddle in any matters or things arising within any such city, town or precinct, unless he also be a justice of the peace for the same. 11 & 12 Vic. c. 42, s. 6; id. c. 43, s. 6. See *Reg v. East Looe*, 8 Jur. 1128.

Even before the 1 & 2 Geo. 4, c. 63, the jurisdiction of county magistrates was not excluded by the grant, if within a district of the county, to the city or borough justices, unless by a non-intromittant clause; both, therefore, had concurrent jurisdiction within the district. *Rex v. Sainsbury*, 4 T. R. 451.

Where jurisdiction was granted by charter to borough justices within the borough, to the exclusion of the county justices, and jurisdiction was likewise given to them over a place within the limits of the borough, but not in exclusion of the county justices, it was holden that the county justices might assess such place to the county rates. *Rates v. Winstanley*, 4 M. & S. 429. And if jurisdiction be given to borough magistrates over a district not within the borough, without expressly excluding the jurisdiction of the county magistrates, the former have a concurrent jurisdiction only with the latter, and not an exclusive one. *Blankley v. Winstanley*, 3 T. R. 279. See *Reg. v. East Looe*, *supra*.

When a statute gives a magistrate jurisdiction over an offence, it impliedly gives him power to make out a warrant and bring before him any person charged with such offence. *Bane v. Methuen*, 2 Bing. 63.

Unless facts are stated to make the contrary appear, the court will always presume in favour of the inferior jurisdiction. *Rex v. Morgan*, Cald. 156. *Rex v. Borron*, 3 B. & A. 432.

If a justice entertain a reasonable doubt of his jurisdiction, the court will not compel him to do an act which may subject him

(a) *Of Stipendiary Magistrates.*[1]

(B) *When he may act Separately or Jointly.*[2]

(C) *Informations before.*[3]

to an action. *Rex v. Broderip*, 7 D. & R. 861; 5 B. & C. 239. *Rex v. Buckingham Justices*, 3 D. & R. 689; 1 B. & C. 485. *Rex v. Justices of Farringdon Without*, 4 D. & R. 735. *Ex-parte May*, 2 B. & S. 426; 31 L. J. M. C. 161.

Where justices are required to do an act by rule of court under 11 & 12 Vic. c. 44, s. 5, they are expressly protected against any action in respect of their having so done.

Justices of a borough having no quarter sessions of the peace have no jurisdiction to grant ale-house licenses under 9 Geo. 4, c. 61; but the power is vested in the justices of the peace of the county. *Candlish v. Simpson*, 30 L. J. M. C. 178.

The seashore between high and low-water mark is within the adjoining county, and the justices of such county have jurisdiction to take cognisance of offences committed thereon, whether the land was or was not covered with water at the time the offence was committed. *Embleton v. Brown*, 30 L. J. M. C. 1; 6 Jur. N. S. 1298.

They have jurisdiction to convict summarily in cases of simple larceny, where the value of property stolen does not exceed five shillings, and on charges of attempting to commit larceny from the person, or simple larceny. 18 & 19 Vic. c. 126. *See post*, Larceny, p. 311. And where a person charged with larceny pleads guilty, they may, notwithstanding the value of the property exceeds ten shillings, convict him upon such plea, and pass sentence upon him; but they must caution him that he is not obliged to plead, and that if he does not he will be committed for trial. 18 & 19 Vic. c. 126, s. 3. *Post*, Larceny.

Whenever a power is given to justices, their decision is final, unless an appeal is expressly given. *Parson v. Blondy*, Wightw. 22. But *see* 20 & 21 Vic. c. 43, enabling justices to state case for the opinion of one of the superior courts. Vol. i. p. 381; and *Ex-parte May*, *supra*.

A justice may commit for a breach of peace in his view, or for an apprehended breach, without warrant or information. *Brookshaw v. Hopkins*, Lofft. 240. He may require sureties of the peace for a limited time, according to his discretion, and need not bind the party over to the next sessions only (*Willes v. Bridges*, 2 B. & A. 287); as, to prevent an intended prize-fight. *Rex v. Billingham*, 2 C. & P. 234.

The acts of a justice of the peace who is not duly qualified are not absolutely void. *Margate Pier Co. v. Hannam*, 3 B. & A. 266.

[1] By the 21 & 22 Vic. c. 73, s. 1, every stipendiary magistrate appointed for any city, town, liberty, borough, place, or district, sitting at a police-court, or other place appointed in that behalf, shall have power to do alone any act, and to exercise alone any jurisdiction, which (under any law now in force, or under any law not containing an express enactment to the contrary, hereafter to be made) may be done or exercised by two justices of the peace; and all the provisions of any act of parliament auxiliary to the jurisdiction of such justices, shall be applicable also to the jurisdiction of such stipendiary magistrate.

By sect. 2, the authority and jurisdiction given to a stipendiary magistrate by the enactment hereinbefore contained shall extend and apply as well to the cases where the act or jurisdiction is or hereafter may be expressly required to be done or exercised by justices sitting or acting in petty sessions, as to other cases, and any enactment authorising or requiring persons to be summoned or to appear at such petty sessions shall, in the like cases, authorise or require persons to be summoned or to appear before the stipendiary magistrate having jurisdiction at the police-court, or other place appointed for his sitting. (Id.) But nothing hereinbefore contained shall extend to acts to be done, or jurisdiction to be exercised, at the general or quarter sessions of the peace, or to acts or jurisdiction expressly required (by any existing or future law) to be done or exercised at special sessions, or to any grant or jurisdiction in relation to the grant or transfer of any license (sect. 3), or to affect the jurisdiction of the metropolitan police magistrates. (Sect. 4.)

Stipendiary magistrates have power to appoint as deputy a barrister of not less than seven years' standing. (Sect. 13.)

[2] When a statute empowers two justices to execute a *judicial* act, they must meet and execute it together; but where the act is merely ministerial, it may be executed separately. *Rex v. Forest*, 3 T. R. 38. *Rex v. Great Marlow*, 2 East, 244. *Rex v. Hamstall Ridware*, 3 T. R. 380. *Wootton v. Harvey*, 6 East, 75. But an order of removal, signed by two justices separately and in different counties, is only voidable, not void. *Rex v. Holfield*, 6 T. R. 596.

[3] Informations before magistrates must be taken as nearly as possible in the language used by the party. *Cohen v. Morgan*, 6 D. & R. 8. The information ought to contain a specific charge without ambiguity (*see* 2 Stra. 900; 1 Burr. 399; 1 Salk. 372; 2 Hawk. P. C. c. 25, s. 59), and it must not be in the alternative. *Rex v. North*, 6 D. & R. 143. *Rex v. Jukes*, 8 T. R. 536. On the abandonment of one information a party may be charged on a second. *Galliard v. Laxton*, 2 B. & S. 363.

On deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity than of one who cannot do so. *Selwood v. Mount*, 9 Car. & P. 75.

(D) *Attendance of Attorney.*[1]

(E) *Orders of.*[2]

(F) *Must abstain from adjudicating where he has Interest.*[3]

(G) *May be compelled to perform Duty by Rule of Court.*[4]

It is improper to take the examination of witnesses first, and then swear them to the truth. *Rex v. Kiddy*, 4 D. & R. 734.

Where a magistrate has exercised his discretion by refusing to convict on the evidence adduced before him in support of an information, the court will not compel him to rehear the case, or return the proceedings which had taken place before him. *Ex parte the British and Foreign Invention Co.* 7 Dowl. P. C. 614.

It is the duty of magistrates in all cases to commit an accomplice, and not to admit him to bail, notwithstanding it may be intended to call the accomplice as a witness on the trial. *Rex v. Beardmore*, 7 C. & P. 497.

[1] It seems that an indictment will not lie for words spoken of a justice of the peace in his absence. *Rex v. Weltje*, 2 Camp. 142. *Rex v. Wringston*, 2 Salk. 698. *Rex v. Pocock*, 2 Stra. 1157); but an action will for imputing disaffection or corruption. *How v. Prinn*, Holt, 652.

On inquiries before justices, an attorney has no right to be present, except as a matter of courtesy (*Rex v. Borron*, 3 B. & A. 432. *Cox v. Coleridge*, 1 B. & C. 37; 2 D. & R. 86. *Rex v. Justices of Staffordshire*, 1 Chit. Rep. 217); but it has been doubted whether he may not insist on attending where he is retained for a prisoner on a charge in which the decision of the justices is final. *Cox v. Coleridge*, 1 B. & C. 37.

[2] Everything is to be intended in support of an order of justices. *Rex v. Inhabitants of Farringdon*, 2 T. R. 471. *Rex v. Clayton*, 3 East, 58. *Rex v. Aire and Calder Navigation Co.* 2 T. R. 660. But an order is void if it do not appear by the order itself that the justices had jurisdiction to make it. *Rex v. Hulcott*, 6 T. R. 587.

When magistrates have jurisdiction on certain conditions only, their orders, though confirmed on appeal, may be disputed on a collateral proceeding, on the ground of non-compliance with these conditions. *Welch v. Nash*, 8 East, 394.

An order of justices may be good in part and void for the residue, where distinct (*Rex v. Price*, 6 T. R. 148); and the court may quash it as to the defective part, and enforce it as to that which is good. *Rex v. Sweet*, 9 East, 25.

Justices may supersede their own orders, when improvidently made. *Rex v. Justices of Norfolk*, 5 B. & A. 485; 1 D. & R. 69.

[3] Justices ought to abstain from taking part in any matters in which they individually have a personal interest; for although they may act most fairly, still their conduct is liable to suspicion. *Anon.* 1 Salk. 396; 2 id. 607. *Reg. v. Tyrone*, 12 Ir. C. L. R. 91 Q. B.

If any of the justices be interested, it will invalidate the decision of all, even although there be a majority for the decision, without counting the vote of the interested party, and notwithstanding the interested justice may, after he had taken part in the discussion, but before the justices came to the vote, have left the court. *Reg. v. Justices of Hertfordshire*, 6 Q. B. 753. But if, at the time the justice took part in the decision, he was not aware that he could be interested, but it afterwards turned out that he had an interest, this circumstance was held not to invalidate the decision. *R. v. Justices of Surrey*, 21 L. J. M. C. 195.

Where, upon an appeal against an order of removal, one of the justices, who was a rated inhabitant of the appellant parish, was on the bench during the hearing, and in the course of the proceedings referred the chairman to some documents put in evidence, upon which the counsel for the respondents objected, that as he was an interested party he should take no part in the trial of the appeal, and the justice then stated that he should take no part in the decision, but he remained on the bench until the final decision, which was in favour of the appellants: upon an application for a *certiorari* to remove the order of sessions, in order to quash it, it was sworn, in answer, that the chairman and the other justices decided the appeal without conferring with the justice objected to, or being at all influenced by anything said or done by him; but the court granted the rule. The justice was interested as being a ratepayer in the appellant parish, and if he had done his duty he should at once have voluntarily withdrawn from the court. *Reg. v. Justices of Suffolk*, 18 Q. B. 416; 21 L. J. M. C. 169. See *R. v. Paving Commissioners of Cheltenham*, 1 Q. B. 467; 10 L. J. M. C. 99. And where, upon an appeal against an order for paying a sum out of the highway-rate to repair a turnpike-road, a justice, who was a creditor of the turnpike-trust, was holden incompetent, on the ground of interest. *Reg. v. Justices of Hertfordshire*, *supra*.

The justice whose order or conviction is appealed against cannot take part in the appeal. (Id.)

[4] By 11 & 12 Vic. c. 44, s. 5, "in all cases where a justice of the peace shall refuse to do any act relating to the duties of his office as such justice, it shall be lawful for the party requiring such act to be done to apply to her majesty's court of Queen's Bench, upon an affidavit of the facts for a rule, calling upon such justice, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause

(H) *Of his Privileges.*[1]

III. Action against.

(A) *When it Lies, and Form of.*[2]

shall not be shown against it, the court may make the same absolute with or without, or upon payment of costs, as to them shall seem meet; and the said justice, upon being served with such rule absolute, shall obey the same, and shall do the act required, and no action or proceeding whatsoever shall be commenced or prosecuted against any such justice for having obeyed such rule and done such act so thereby required as aforesaid."

Where the court granted a rule *nisi*, calling upon a justice to show cause why he should not issue his distress warrant to compel payment of an order for church-rate, but upon showing cause it appeared that the proceeding was invalid, as being made without jurisdiction, the court discharged the rule. *Reg. v. Collins*, 21 L. J. M. C. 73.

Where a complaint was made before a magistrate, and he gave his opinion against the complainant, but at the request of the applicant he refused to adjudicate, in order that he might take the opinion of the Court of Queen's Bench upon the question, the defendant objected to this course, and claimed that the magistrate should adjudicate by dismissing the complaint. The court refused a rule to compel him to adjudicate, holding that there had been no such refusal as would warrant their interfering. *Reg. v. Paynter*, 26 L. J. M. C. 102. See *Reg. v. Dayman*, id. 128.

Upon a charge of perjury before two justices, it appeared that the offence was alleged to have been committed in a deposition made in a suit then pending in the Ecclesiastical Court, to which both the informant and the person charged were parties. The justices having thereupon declined further to proceed, the court refused to compel them to do so, as they had a discretion in the matter, which they had properly exercised. *Reg. v. Ingham*, 19 L. J. M. C. 69.

The section has no application to a case in which the justices have acted, notwithstanding they may have acted erroneously. Where justices drew up a separate conviction upon a joint information against two, a rule requiring them to draw up a joint conviction against both was refused on this ground. *Re Clee & Osborne*, 21 id. 112.

Convictions for penalties being regular, and no reason being shown why the defendants had not paid them, the court said they felt bound to grant a rule requiring the justices to issue warrants to levy the amounts, and that they had no discretion to withhold the rule on the ground of some supposed hardship in the number of the convictions or the amount of the costs. *In re Hartley*, 31 id. 232.

[1] Slanderous words spoken by a justice in the discharge of his duty are not actionable. *Rex v. Skinner*, Lofft, 55. *Kindillon v. Maltby*, 1 C. & Marsh. 408; *post*, Libel; Slander.

An individual justice is not liable to pay for expenses incurred in executing things ordered by the session, of which he is a member. *Tuck v. Ruggles*, 5 Esp. 237.

And where justices covenanted by deed that the treasurer of the county should pay the plaintiff a certain sum under an act of parliament, which directed that all actions or proceedings connected with the execution of the statute should be brought by and against in the name of the clerk of the peace, it was holden that the justices were not liable. See *Allen v. Waldegrave*, 2 Moore, 621. As to his privileges when sued, *see post*, p. 290.

[2] If a magistrate commit a party charged before him, in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's power cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation. *Per Tindal, C. J.: Cave v. Mountain*, 1 Man. & G. 257. See *Reg. v. Bolton*, 1 Q. B. 66. *Reg. v. Inhabitants of Hickling*, 7 id. 880. And where the authority is given to justices by statute, and they appear to have acted within the jurisdiction so given, and to have done all that the particular statute requires them to do, in order to originate their jurisdiction, their conviction drawn up in due form, and remaining in force, is a protection and conclusive evidence for them in any action which may be brought against them for the act so done. *Per Abbott, C. J.: Basten v. Carew*, 5 B. & C. 652; 5 D. & R. 558. *Painter v. Liverpool Gas Co.* 3 Ad. & E. 433. *Baylis v. Strickland*, 1 Scott, N. R. 540. *Fernley v. Worthington*, id. 432. *Tavey v. Newman*, 15 Mee. & W. 645. *Stamp v. Sweetland*, 8 Q. B. 13. *Haseldine v. Grove*, 3 id. 997. See *Gelen v. Hall*, 2 H. & N. 379; 27 L. J. M. C. 78; Broom's *Max.* 64. *Pedley v. Davis*, 10 C. B. (N. S.) 492; 30 L. J. C. P. 374; 8 Jur. 263.

An action will not lie against justices of the peace for refusing to license an alehouse (*Bassett v. Godschall*, 3 Wils. 121), or other discretionary applications. *See* s. 4, 11 & 12 Vic. p. 291; and vol. i. p. 278. Nor does trespass lie against a justice acting upon a complaint made to him on oath, though the real facts of the case might not have supported such complaint. *Lowther v. Radnor*, 8 East, 113.

Where an officer, professing to act under a magistrate's warrant, is in point of fact (and not in law, by subsequent abuse), a trespasser *ab initio*, he only is liable, and not the m[illegible]

gistrate, to the party grieved. *Bell v. Oakley*, 2 M. & S. 259.

A justice is liable in trespass if he commit a person for disobedience to an order which turns out to be invalid. *Wilkins v. Hemsworth*, 3 Nev. & P. 55. If a party make a complaint of another to a magistrate, in a matter over which he has a general jurisdiction, who thereupon issues his warrant, by force of which an arrest is made, neither the party complaining nor the magistrate is liable in trespass; and the only remedy for the party aggrieved is in case for malicious prosecution. But if the matter were one in which the magistrate had no jurisdiction at all, then the latter is a trespasser. *West v. Smallwood*, 3 Mee. & W. 418. *Pedley v. Davis*, *ante*, 289.

A magistrate meeting a constable with a party in charge is liable in trespass if he order him back to the lock-up. He is bound either to hear the case at once, or order the prisoner before another justice. *Edwards v. Ferris*, 7 C. & P. 542.

In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent of the offence of which he was convicted; but a want of probable cause must be proved. *Burley v. Bethune*, 1 Marsh. 220; 5 Taunt. 580.

Where an order for the payment of a church-rate had been made by justices more than two months after there had been a demand and refusal, and was therefore bad; a declaration alleging this fact, without stating that the justices had acted maliciously, was held unsustainable. *Somerville v. Morehouse*, 9 W. R. 53; 3 L. T. (N. S.), 294. Q. B.

Actions against justices of the peace, for anything done in the execution of their duty, are regulated by 11 & 12 Vic. c. 44, which repeals all prior acts relating to such actions, and applies to the protection of all persons for anything done in the execution of their office, in all cases in which such repealed statutes were formerly applicable. 11 & 12 Vic. c. 44, s. 18.

Acts done within his Jurisdiction. — By sect. 1, "every action hereafter to be brought against any justice of the peace, for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause: and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

Acts done without Jurisdiction. — By sect. 2, "for any act done by a justice of the peace, in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, or order made, or warrant (see *Bessell v. Wilson*, 1 E. & B. 489; 22 L. J. M. C. 94) issued by such justice, in any such matter, may maintain an action against such justice, in the same form, and in the same case, as he might have done before the passing of this act, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause: Provided nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal, or upon application to her majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by such conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless, if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for anything done under such warrant." See *Pease v. Chryton*, 1 B. & S. 658; 8 Jur. N.S. 482; 31 L. J. M. C. 1. *Bott v. Ackroyd*, 28 L. J. M. C. 207.

The meaning of the words "exceed his jurisdiction," in the 2d sect. is, assuming to do something which the statute under which the justice proceeds could by no possibility justify. *Ratt v. Parkinson*, 20 L. J. M. C. 208: *per Jervis, C. J.* Where a justice convicted a person in a penalty for trading on a Sunday, and adjudged that it should be levied by distress and sale, and in default that the party should be set in the stocks; this, which was an excess of jurisdiction, was not, however, done, but the penalty was levied by distress, it was held that an action of trespass would not lie. *Barton v. Bricknell*, 20 L. J. M. C. 1. Where a conviction contained no adjudication as to costs, but the justices issued a warrant of distress, reciting the conviction as adjudicating costs, and the party's goods were seized as well for the costs as for the penalty, this was held to be an excess of jurisdiction within the section, and that trespass lay for it. *Leary v. Patrick*, 19 L. J. M. C. 211.

If an order be good in part and bad in part, a justice may issue a warrant to enforce so much of it as is good, without subjecting himself to an action. *Reg. v. Green*, 20 id. 168.

The notice of action required (*see post*, p. 291) may be given before the quashing the order, the cause of action being complete before the quashing, which is only a condition precedent to the action, like the de-

(B) *Setting aside Proceedings in Action.*[1]
(C) *Limitation of Action.*[2]
(D) *Notice of Action.*[3]

livery of an attorney's signed bill of costs. *Haylock v. Sparke*, 1 E. & B. 471.

Conviction by one and Warrant by another Justice.—By 11 & 12 Vic. c. 44, s. 3, "where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace, *bonâ fide* and without collusion, no action shall be brought against the justice who so granted such warrant, by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made the same, but the action, if any, shall be brought against the justice or justices who made such conviction or order."

Warrant for Poor-Rate.—By sect. 4, "where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein; and in all cases where a discretionary power shall be given to a justice of the peace by any act or acts of parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power."

After Conviction confirmed no Action.—By sect. 6, "in all cases where a warrant of distress, or warrant of commitment, shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall have been or shall be confirmed upon appeal, no action shall be brought against such justice who so granted such warrant, for anything which may have been done under the same, by reason of any defect in such conviction or order."

Where the Court of Queen's Bench has required a justice to perform a particular act by rule of court under 11 & 12 Vic. c. 44, s. 5, it is by the same section provided that no action or proceeding shall be commenced or prosecuted against such justice for having done such act.

[1] By 11 & 12 Vic. c. 14, s. 7, "in all cases where by this act it is enacted that no action shall be brought under particular circumstances, if any such action shall be brought, it shall be lawful for a judge of the court in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set aside the proceedings in such action with or without costs, as to him shall seem meet."

[2] By 11 & 12 Vic. c. 44, s. 8, "no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within *six calendar months* next after the act complained of shall have been committed." The six months are reckoned exclusive of the day of committing the act. *Hardy v. Ryle*, 9 B. & C. 603. *Young v. Higgon*, 6 Mee. & W. 49. The time in the case of a distress for church-rates is calculated from the day on which the distress was sold. *Collins v. Rose*, 5 Mee. & W. 194; 7 Dowl. 796. It is enough if any part of an imprisonment was within the six months. *Massey v. Johnson*, 12 East, 67.

[3] By 11 & 12 Vic. c. 44, s. 9, "no action shall be commenced against any such justice of the peace until *one calendar month* at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of business of the said attorney or agent."

The magistrate is entitled to this notice when he *bonâ fide* and reasonably believes that he was acting in the character of a justice and in the execution of his duty (*Greenway v. Hurd*, 4 T. R. 553. *Read v. Coker*, 13 C. B. 850. *Cann v. Clipperton*, 10 Ad. & E. 582. *Booth v. Clive*, 10 C. B. 827. *Horn v. Thornborough*, 3 Ex. 846), and it is necessary, in cases where he has acted within his jurisdiction, even though he may have acted maliciously, and without probable cause. *Kirby v. Simpson*, 10 Ex. 358. If, however, the act has no reference to his character as a magistrate, no notice is necessary (*James v. Saunders*, 10 Bing. 429; 4 M. & Scott, 316), as where the action is for his not being duly qualified (*Wright v. Horton*, Holt. 458); or for illegally receiving a fee (*Morgan v. Palmer*, 2 B. & C. 729. *See* 1 C., M. & R. 505; 10 Bing. 429); or where he *bonâ fide* believed he was a magistrate, but was in fact not so. *Copland v. Powell*, 1 Bing. 369. *Hughes v. Buckland*, 15 Mee. & W. 356. *Lister v. Barrow*, 9 Ad. & E. 654. The notice is not the less necessary, because the justice may not have known of his privilege of receiving notice. *Read v. Coker, supra.* It is for the judge to decide whether the notice is necessary; and it seems the question of *bona fides* is not to be left to the jury: at all events, that question does not arise where the action is for acting maliciously and without probable cause. *Kirby v. Simpson*, 10 Ex. 358. See *Cox v. Reid*, 13 Q. B. 558. A tender of amends by the justice does not dispense with the proof of the notice. *Martins v. Upcher*, 3 Q. B. 662.

The notice must be given by the plaintiff himself, or his attorney or agent. 11 & 12 Vic. c. 44, s. 9. It may be given by the *prochein amy* of an infant plaintiff, though he

(a) *Form of Notice of Action.*[1]

(E) *Venue.*[2]

(F) *Plea of General Issue.*[3]

(G) *Action in the County Court may be Removed.*[4]

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is not the *prochein amy* on the *record*. *De Gondouin v. Lewis*, 10 Ad. & E. 117. Where a notice was served on behalf of two, one having died and the other bringing the action, it was held insufficient. *Pilkington v. Riley*, 3 Ex. 739. Where it was signed by the party, but indorsed by his attorney, it was deemed a compliance with the act. *Morgan v. Leach*, 10 Mee. & W. 558.

The notice should be addressed to the defendant in a more formal mode than an ordinary letter (*Lewis v. Smith*, Holt, N. P. C. 27), though it is not construed with the strictness of a pleading. *Jones v. Bird*, 5 B. & A. 837. The cause of action, and the court in which the action is to be brought, must be clearly and explicitly stated. 11 & 12 Vic. c. 44, s. 9. *See Lovelace v. Currie*, 7 T. R. 631. Other matters, such as the addition and residence of the defendant and form of action, the names of all the parties intended to be included, are not essential; and a mistake as to the number of the parties is not fatal. *Breese v. Jerdein*, 12 L. J. Q. B. 234. *Hollingworth v. Palmer*, 4 Ex. 267. If the act was within the justice's jurisdiction, being within sect. 1 of the stat. 11 & 12 Vic. c. 44, the notice must allege that the act was done "maliciously," and it is not enough to say, "without reasonable and probable cause." The time and place of the act should be stated with reasonable certainty. *Leary v. Patrick*, 15 Q. B. 266. *Jacklin v. Fytche*, 14 Mee. & W. 381. *Prickett v. Greatrex*, 8 Q. B. 1020. *Breese v. Jerdein*, 4 Q. B. 585. *Martins v. Upcher*, *supra*.

Indorsement of Notice. — On the back of the notice must be indorsed the name and place of abode of the party intending to sue, and also that of the attorney or agent, if it is he who serves it. 11 & 12 Vic. c. 44, s. 9. It is sufficient to give the initial of the attorney's Christian name (*Mayhew v. Locke*, 7 Taunt. 63), or those of the firm. *James v. Swift*, 4 B. & C. 681; 1 D. & R. 625. "Given under my hand at Durham," is an insufficient address, for it denotes only the place of signature. *Taylor v. Fenwick*, 7 T. R. 635. It is sufficient that a firm of attornies sign it, though the partnership be dissolved before the action is brought. *Hollingworth v. Palmer*, *supra*.

As to the Service of the Notice. — The notice must be served one calendar month before the action is brought (11 & 12 Vic. c. 44, s. 9), and the days of serving the notice and of bringing the action must be excluded from the computation. *Young v. Higgon*, 6 Mee. & W. 49. The notice may be personally served, or may be left for the defendant at his usual place of abode. 11 & 12 Vic. c. 44, s. 9. The notice, in cases where the justice had no jurisdiction, may be given before the quashing of the order, the act itself, being the cause of action, being complete before the quashing, though the action itself cannot be brought until after the quashing. *Haylock v. Sparkes*, 1 E. & B. 471. The month begins with and includes the day on which the notice was served. *Castle v. Burditt*, 3 T. R. 623. It may be proved by a duplicate or original without giving a notice to produce.

[1] *Form of Notice of Action by the Attorney.*

To C. D. of Esq., acting as one of her majesty's justices of the peace for
I do hereby, as the attorney [*or* agent] of and for A. B. of according to the form of the statute in such case made and provided, give you notice, that the said A. B. will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of her majesty's court of against you at the suit of the said A. B, and proceed thereupon according to law; for that you, the said C. D., on the day of at [*here specify with precision the cause of action, giving the time and place thus:* — "You assaulted the said A. B. and caused him to be apprehended by a policeman, and to be detained and be kept in prison at for a space of hours"] to the damage of the said A. B. of £

Dated the

P. A. of Attorney for the said A. B.

[There must be indorsed on the notice the name and the address of the attorney, as, "P. A. of No. street, in the parish of in the county of attorney for the within-named A. B. of in the parish of in the county of].

[2] By the 11 & 12 Vic. c. 44, s. 10, "in every such action the venue shall be laid in the county where the act complained of was committed, or in actions in the county court the action must be brought in the court within the district of which the act complained of was committed."

[3] In such actions against justices "the defendant shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse or justification, in evidence under such plea at the trial of such action. 11 & 12 Vic. c. 44, s. 10. The plea must have the words "by statute," inserted in the margin. *See* rule, pl. 21, T. T. 1853.

[4] In the county court the action must be brought in the court within the district of which the act complained of was committed: "Provided always, that no action shall be

(H) *Tender and Payment into Court.*[1]

(I) *Verdict or Nonsuit.*[2]

(K) *Damages.*[3]

(L) *Costs.*[4]

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brought in any such county court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto; and if within six days after being served with a summons in any such action, such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action that he objects to being sued in such county court for such cause of action, all proceedings afterwards had in such county court in any such action shall be null and void." 11 & 12 Vic. c. 44, s. 10.

Where a justice of the peace, who had been sued in the county court for an act done by him in execution of his office, gave notice that he objected to being sued in the county court, and afterwards applied for and obtained a writ of *certiorari* to remove the cause into one of the superior courts, it was held that the notice had terminated the proceedings in the county court, and that the suit could not be removed into the superior court. *Weston v. Sneyd*, 1 H. & N. 703; 26 L. J. Ex. 161.

[1] By 11 & 12 Vic. c. 44, s. 11, "in every such case after notice of action shall be so given as aforesaid, and before such action shall be commenced, such justice, to whom such notice shall be given, may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and after such action shall have been commenced, and at any time before issue joined therein, such defendant, if he have not made such tender, or in addition to such tender, shall be at liberty to pay into court such sum of money as he may think fit, and which said tender and payment of money into court, or either of them, may afterwards be given in evidence by the defendant at the trial under the general issue aforesaid; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into court, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuit, and the sum of money, if any, so paid into court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of court to him, and the residue, if any, shall be paid to the plaintiff; or if, where money is so paid into court in any such action, the plaintiff shall elect to accept the same in satisfaction of his damages in the said action, he may obtain from any judge of the court in which such action shall be brought an order that such money shall be paid out of court to him, and that the defendant shall pay him his costs to be taxed, and thereupon the said action shall be determined, and such order shall be a bar to any other other action for the same cause."

[2] By 11 & 12 Vic. c. 44, s. 12, "if at the trial of any such action the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the margin of the declaration, or, when such plaintiff shall sue in the county court, within the district for which such court is holden, then and in every such case such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant."

If an action of trespass be brought against magistrates for convicting a person and causing him to be imprisoned, in a case where the magistrates had jurisdiction, the plaintiff must be nonsuited if a valid and subsisting conviction be adduced and proved. *Mould v. Williams*, 5 Q. B. 469. *Stamp v. Sweetland*, 14 L. J. M. C. 184.

[3] By 11 & 12 Vic. c. 44, s. 13, "in all cases where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of two pence, as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and with respect to such imprisonment, that he had undergone no greater imprisonment than that assigned by law for the offence of which he was so convicted, or for nonpayment of the sum he was so ordered to pay."

[4] By 11 & 12 Vic. c. 44, s. 12, "if the plaintiff in any such action shall recover a verdict, or the defendant shall allow judgment to pass against him by default, such plaintiff shall be entitled to costs in such manner as if this act had not been passed; or if in such case it be stated in the declaration, or in the summons and particu-

(M) *Metropolitan Police Magistrates.*[1]

JUSTICES' Clerks.[2]

JUSTIFIABLE Homicide. *See post,* Murder.

JUVENILE Offenders.[3]

K.

KILLING. *See post,* Murder.

Cattle. *See* Cattle, vol. iii. p. 52.

Conies. *See post,* Larceny, p. 311.

Deer. *See* Deer, vol. iv. p. 30.

or Destroying Fish. *See* Fish, vol. iv. p. 473.

KLEPTOMANIA.[4]

lars in the county court (if he sue in that court), that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client."

[1] The magistrates of the metropolitan police courts are protected against actions done in pursuance of the Metropolitan Police Acts, 10 Geo. 4, c. 44; 2 & 3 Vic. c. 71; and 3 & 4 Vic. c. 84. These are not local and personal acts within 5 & 6 Vic. c. 97. *Burnett v. Cox,* 9 Q. B. 617. The notice of action must be according to the terms pointed out in 10 Geo. 4, c. 44, s. 41, and 2 & 3 Vic. c. 71, s. 53. The venue must be laid in the county of Middlesex, and though the act done was within the ordinary province of a county justice of the peace, the action against him must be commenced within three, and not more than six calendar months. *Hazeldine v. Grove,* 3 Q. B. 997; 3 Gale & D. 210. *Miller v. Leathor,* 22 L. J. M. C. 76.

[2] *Justices in counties* may employ clerks to assist them in the execution of their duties, who are entitled to fees (26 Geo. 2, c. 14; 11 & 12 Vic. c. 43, s. 30), and who receive payment of penalties under convictions and orders. 11 & 12 Vic. c. 43, s. 31.

In boroughs the justices also have power to appoint a clerk (5 & 6 Wm. 4, c. 76, s. 102), not being an alderman or councillor of such borough, or clerk of the peace, or partner of such clerk of the peace, or clerk or person in his employ, and who is prohibited from being "by himself or partner, directly or indirectly, interested or employed in the prosecution of any offender committed for trial by the justices of whom he shall be such clerk as aforesaid, or any of them, at any court of gaol delivery or general or quarter sessions." A penalty of 100*l.* is incurred by any alderman, &c. acting as such clerk. (Sect. 102.) *Coe v. Lawrence,* 22 L. J. Q. B. 140. As to their fees, *see* 5 & 6 Wm. 4, c. 76, s. 124; 11 & 12 Vic. c. 43, s. 30. *Reg. v. Mayor of Gloucester,* 5 Q. B. 862. As to the payment of penalties to them, *see* 11 & 12 Vic. c. 43, s. 31.

[3] By 17 & 18 Vic. c. 86, s. 2, "any person under the age of sixteen years convicted of any offence, punishable on summary conviction before two justices, may, in addition to the sentence passed as a punishment for his offence, be directed to be sent at the expiration of his sentence (not being less than imprisonment for fourteen days) to some one of the reformatory schools, certified by the Secretary of State for the Home Department, to be named in such direction, the directors or managers of which shall be willing to receive him, and to be there detained for not less than two years, and not exceeding five years." *See* also 1 & 2 Vic. c. 82; 19 & 20 Vic. c. 109, s. 9; and as to punishment of, *see* 25 & 26 Vic. c. 18.

[4] Propensity for theft. *See* Tayl. Med. Jur. 814. In order to constitute a defence to a charge of larceny, the alleged mental disease must be shown to be of the same quality, and productive of the same consequences, as insanity of any other character. *See post,* Lunacy.

L.

LABOURERS. *See post*, Master and Servant.

LACHES. *See post*, Negligence.

LANCASTER, Palatine Court of. *See post*, Palatine Court.

LAND, Abstract of Title. *See* vol. i. p. 63.

Registering Title to: Transfer of.[1] *See post*, Transfer.

Tax.[2] *See* Covenant, vol. iii. p. 443; *post*, Landlord and Tenant, p. 296; Lease, p. 338.

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[1] *See* 25 & 26 Vic. c. 53, "An Act to facilitate the Proof of Title to, and the Conveyance of Real Estate." 25 & 26 Vic. c. 67, "An Act for obtaining a Declaration of Title."

[2] This is a territorial impost, anciently levied under the name of scutage, hydage, and tilliage. It was introduced in its present form in 11 Wm. & Mary, 1699, when a new assessment or valuation of estates was made throughout the kingdom; which, though by no means a fair one, had the effect of raising a supply of 500,000*l.* by an assessment of 1*s.* in the pound on the value of the estates given in. The method of raising it is by charging a particular sum on each county, according to the valuation of 1692, and this sum is assessed and raised on individuals by commissioners appointed in the act, being the principal landholders in the county, and their officers. Up to the year 1798, the land tax was an annual tax; at that period, with the view of supporting public credit, and augmenting the national resources, it was made perpetual. The last annual act was the 38 Geo. 3; which imposed the tax for the year at the rate of 4*s.* in the pound; and it was made perpetual at that rate, by a statute passed in the same year (the 38 Geo. 3, c. 60), which has been modified and amended by several subsequent statutes. At the same time, the land tax was made subject to redemption by the owner of the land on which it was laid, or, in default of his redeeming it, to purchase by any other person. The sums paid in either case are applied to the reduction of the national debt; and the price is regulated by the price of the funds at the time, being always so much stock in the 3 per cent Consols, or 3 per cent Reduced, as will yield a dividend exceeding the land tax redeemed or purchased by one-tenth. By 46 Geo. 3, c. 133, the commissioners may exonerate small livings and charitable institutions, the income of which is under 150*l.*, from the land tax, without any consideration whatever, provided the annual amount in the whole does not exceed 6000*l.*

See also 4 & 5 Wm. 4, c. 60; 5 & 6 Wm. 4, c. 20, s. 19; 6 & 7 Wm. 4, c. 80; 7 Wm. 4, and 1 Vic. c. 17; 1 & 2 Vic. cc. 57, 58; 5 & 6 Vic. c. 37; 16 & 17 Vic. cc. 74, 90, 117; 17 & 18 Vic. c. 85; 19 & 20 Vic. c. 80, ss. 2, 4; 20 & 21 Vic. c. 46; 24 & 25 Vic. c. 91, ss. 39–46.

A person possessed of a freehold office may act as a commissioner of the land tax under the qualifications of his office. *Sone v. Ashton*, 3 Burr. 1288. An election for the office of clerk to the commissioners, at a meeting held for a different purpose, and without notice of the intended election being given to the friends of the other candidate, is void on the ground of surprise. *Rex v. Commiss. of Land Tax*, 1 T. R. 146.

Lands purchased before the act which made the land tax perpetual, by a college under a private statute, which provided that the college should pay all taxes which the premises then were or should thereafter be subject to, are not exempt from the tax, but additions to the limits of a college made before the act, which made the land tax perpetual, though after the first land-tax act, are exempt from the tax. *All Souls' College v. Costar*, 3 B. & P. 635.

A house within the boundaries of an hospital, yielding no profit, but occupied by an officer attached to the charity as incident to his office, is within the exemption in the land-tax act. *Harrison v. Bullock*, 1 H. Black. 68.

An adjudication of the commissioners of land tax confirmed on appeal, is conclusive in a collateral proceeding. *Patchett v. Bancroft*, 7 T. R. 367.

The duty of the commissioners of land tax in assessing the contributions by the several parishes within a division, is regulated, not by stat. 38 Geo. 3, c. 5, s. 8, but by 38 Geo. 3, c. 60, s. 74. *Reg. v. Land-Tax Comm. for Tover Division*, 2 E. & B. 694.

Crown dockyards are not assessable to the land tax. *Attorney-General v. Hill*, 2 Mee. & W. 160. An assessment in a wrong parish is no ground for setting aside a *levari facias*. *In re Glatten Land Tax*, 4 Mee. & W. 570.

LANDLORD and TENANT.[1] *See* County Courts, Recovery of Small Tenements, vol. iii. p. 413; Covenant, id. p. 443; Distress, id. p. 80; Disclaimer, id. p. 71; Ejectment, vol. iv. p. 169; Fixtures, id. 474; *post*, Lease, p. 338; Notice to Quit; Trespass; Use and Occupation.

I. Relative Situation of; how Created, p. 297.

II. ,, to the particular Kind of Tenancy, p. 299.

(A) *Tenancy from Year to Year*, p. 299.
(B) *Weekly*, p. 300.
(C) *At Will*, p. 301.
(D) ,, *Sufferance*, p. 301.

III. Of the Tenant being Estopped from Denying the Title of his Landlord, p. 302.

With respect to ecclesiastical possessions, if the land tax be not added to the ancient rent reserved according to the 42 Geo. 3, the lease will be voidable. *Bishop of Rochester v. Bridges*, 1 B. & Adol. 847.

Houses built on land embanked from the Thames, in pursuance of the 7 Geo. 3, c. 37, which vests those lands in the owners free from taxes, are not liable to be assessed to the general land tax imposed by the 27 Geo. 3. *Williams v. Pritchard*, 4 T. R. 2. *Perchard v. Heywood*, 8 id. 468.

Where, after redemption of land tax, a bridge was, under the authority of an act of parliament, built upon the land, and tolls levied from passengers under the statute, it was held that the company were liable to land tax in respect of the tolls: for as the tolls were distinct from the land, the redemption of the tax in respect of the land did not affect their liability in respect of the tolls. *Charing-Cross Bridge Co. v. Mitchell*, 4 E. & B. 549.

Where tenant for life, without impeachment of waste, makes an absolute sale, and conveyance of land under stat. 42 Geo. 2, c. 116, s. 51, for the purpose of redeeming the land tax on other property, the growing timber, though not mentioned in the conveyance, passes with the land, and the price of it as well as that of the land must be paid into the Bank of England, under sect. 98, although the price of the land without the timber makes up the sum for which the land tax is to be redeemed. *Doe d. Blewett v. Phillips*, 1 Q. B. 84.

The stat. 1 & 2 Vic. c. 58, s. 2 (enabling the Court of Exchequer to call upon commissioners of land tax to appear and maintain, or to relinquish, their assessments, in cases where any person has been rated cumulatively in two divisions, parishes, or places), applies only to cases in which two separate and distinct bodies of commissioners, acting for different districts, have respectively assessed the applicant, and not to the case of a double rating in separate parishes by the same body of commissioners. The remedy in the latter case is by appeal under 38 Geo. 3, c. 5. *In re Glatten Land Tax*, 6 Mee. & W. 689.

Under the 38 Geo. 3, and 42 Geo. 3, the landlord is entitled to recover from his tenant the proportion of the tax imposed. *Ward v. Const*, 10 B. & C. 635. The land tax is due at any period of the quarter before the quarter day, but cannot be distrained for without a personal demand (*Gibbs v. Stead*, 8 id. 528); and upon the sale of land there can be no distress for the land tax until the ascertainment of the precise quantity of land, and the portion of the rent reserved. *Warner v. Potchett*, 3 B. & Adol. 921. A warrant of distress for the tax due from different parties is bad. *Charleton v. Alway*, 11 Ad. & E. 993; 3 Per & D. 618. Under a distress the landlord cannot break open an outer door without a constable. *Foss v. Racine*, 7 Dowl. P. C. 53; 4 Mee. & W. 419; 8 C. & P. 699.

Land-tax assessments are not evidence of seisin (*Doe d. Stanbury v. Arkwright*, 2 Ad. & E. 183; 1 Nev. & M. 731), but they may be of occupation. *Doe v. Seaton*, id. 171.

The court, upon summary application, made an order upon the commissioners to compel a due assessment of land tax. *Attorney-General v. Land-Tax Commissioners*, 12 Price, 647. *Semble*, that a broker who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as *allowing* the land tax so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted. *Saunderson v. Hanson*, 3 C. & P. 314. The court will not declare the land tax on an estate to have been redeemed merely for the benefit of a trustee for sale, and to supply an alleged defect of title, although such redemption has, in fact, taken place. *Ex-parte Sparkes*, 1 M'Clel. 518. An agreement by tenant "to pay all taxes," includes land tax. *Amfield v. White*, 1 R. & M. 246.

On a grant of a fee-farm rent without any deduction, defalcation, or abatement, for or in any respect whatsoever, the grantee is entitled to receive the full rent without deducting the land tax. *Bradbury v. Wright*, 2 Dougl. 624.

[1] *See*, on this subject, Woodf. L. & T.; Comyn's L. & T.; Arch. L. & T.; Smith's L. & T. by *Maude*.

IV. Rights of the Landlord, p. 302.
(A) *To Re-enter*, p. 302.
(B) „ *Recover Tithe Rent-Charge left unpaid by Tenant*, p. 303.
V. Rights of the Tenant, p. 303.
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X. Dissolution of Tenancy, p. 308.
XI. Actions by and against, p. 309.
(A) *Declaration*, p. 309.
(B) *Plea*, p. 309.
(C) *Evidence*, p. 309.

I. Relative Situation of; how Created.[1]

[1] The relative situation of landlord and tenant may be created in a variety of distinct ways—by lease under seal, by written agreement not under seal, by a mere verbal contract, or by a union of circumstances which give rise to the reciprocal duties of landlord and tenant independently of any contract; as when the lessor or lessee dies, or either party becomes bankrupt, or the term be seized under an execution.

The question, Who is to be considered as landlord? must be determined by reference to the title and acts of the parties. *Knight v. Lady Smythe*, 4 M. & S. 347.

Ascertaining the *quantum* of rent to be paid is not essential to the creation of a tenancy. *Dearn d. Jacklin v. Cartwright*, 4 East, 29. And an occupation under an agreement for the sale of premises may have that effect. *Doe d. Newby v. Jackson*, 2 D. & R. 514; 1 B. & C. 448. But if, in an agreement for the sale of leasehold premises, it is stipulated that, in default of payment of the instalments at specified times, the former instalments shall be forfeited, and the vendor shall not be compellable to convey, the party is a mere tenant at sufferance. *Doe d. Moore v. Lawder*, 1 Stark. 308. But where the defendant by parol agreed to rent a house, as tenant from year to year, for the residue of a term which was for three years and three quarters, and quitted at the end of three years and one quarter, it was held that he was liable to pay the remaining half-year's rent. *Sauvage v. Dupuis*, 3 Taunt. 410.

Occupation of premises pending the execution of a lease constitutes the relation of landlord and tenant. *Hamerton v. Stead*, 5 D. & R. 206; 3 B. & C. 478; 2 Esp. 717. So, an occupation under an unstamped agreement for a lease creates a tenancy from year to year, though no lease has ever been tendered by the lessor, or demanded by the lessee (*Weakly d. Yea v. Bucknell*, Cowp. 473. *Chapman v. Towner*, 6 Mee. & W. 100), if he enter and pay rent (*Doe d. Westmoreland v. Smith*, 1 M. & R. 137), or from quarter to quarter. *Wilkinson v. Hall*, 4 Scott, 301; 3 Bing. N. C. 508.

A letter by a lessor accepting the lessee's terms creates a demise. *Chapman v. Bluck*, 4 Bing. N. S. 187. So, verbally assenting to a printed agreement, and entering the premises, is sufficient to establish a tenancy. *Lord Bolton v. Tomlin*, 1 Nev. & P. 247. And a payment of rent of 6*d.* per annum, on three occasions, is sufficient to produce that effect (*Doe d. Jackson v. Wilkinson*, 3 B. & C. 413; 5 D. & R. 273); and what the tenant himself has said as to the terms of the tenancy or the amount of the rent is admissible, without producing the contract. *Howard v. Smith*, 3 Scott, N. R. 574. *Scatterie v. Pooley*, 6 Mee. & W. 664. *See* 7 B. & C. 611; 5 Bing. 136; Sid. 239.

If two tenants exchange holdings, and the landlords concur, it amounts to a new demise. *Bees v. Williams*, 2 C., M. & R. 581; 1 Tyr. & G. 23.

So where A., whose term was about to expire, together with B., agreed to take a lease of the premises, but no lease was executed, it was held to create a new tenancy. *Hamerton v. Stead*, 3 B. & C. 478; 5 D. & R. 206.

A contract to purchase may create the relation of landlord and tenant. *Saunders v. Musgrave*, 6 B. & C. 524. But a mere payment of rent by assignees of a bankrupt

(*Doidge v. Bowers*, 2 Mee. & W. 365), or a memorandum that a party holds at sufferance, and agrees to give immediate possession, does not prove a tenancy. *Barry v. Goodman*, 2 id. 768.

So, where a contract for a lease is abandoned, payment of a quarter's rent (*Doe d. Rogers v. Pullen*, 2 Bing. N. S. 479), or a deduction from wages by way of rent, does not establish a tenancy. *Hunt v. Colson*, 3 M. & Scott, 790. Nor is the relation of landlord and tenant created by the mere payment of rent under an order of court. *Strachan v. Smith*, 4 Bing. 91.

Where a remainderman, on the death of a particular tenant, sells the premises, held under a lease void against himself, subject to such lease, and the lessee is no party to the conveyance, no demise is thereby created. *Doe d. Potter v. Archer*, 1 B. & P. 531.

If a tenant, where a lease has expired, be permitted to continue in possession pending a treaty for a further lease, he is not tenant from year to year, but strictly a tenant at will, so that he may be turned out of possession without notice. *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717. But where a man enters under a void lease, and pays rent, he is not a disseisor, but a tenant at will. *Warren v. Fearneside*, 1 Wils. 176. So, where one enters under a demise by a tenant for life, and after his death the remainderman receives rent. *Doe d. Martin v. Watts*, 7 T. R. 83; 2 Esp. 501. *Ludford v. Barber*, 1 T. R. 90. And in such cases the tenant holds under the terms of the lease in all other respects, except the duration of time. *Doe d. Riggie v. Bell*, 5 T. R. 471.

A longer tenancy than that for a year will not be inferred. *Wilson v. Abbott*, 3 B. & C. 88; 4 D. & R. 693. A promise that a party, if he pays the mortgage money, shall have an underlease, does not make him a tenant from year to year. *Doe d. Rogers v. Pullen*, 2 Bing. N. S. 479; 3 Scott, 245.

Where a tenancy has expired, a new tenancy is not created merely by the landlord neglecting to take possession (*Cobb v. Stokes*, 8 East, 358); or where the rent received is but trifling, and bears no proportion to the real value of the premises. *Dem d. Brune v. Rawlins*, 10 East, 261.

If, after the expiration of a tenancy, determined by the effluxion of time or the happening of a particular event, the reversioner or remainderman receives rent from the person in possession, or in any way acknowledge him as tenant, a tenancy from year to year will be created. *Roe d. Jordan v. Ward*, 1 H. Black. 97.

Where premises had been let to A. for a term determinable by a notice to quit, and pending such term, B. applies to the landlord for leave to become the tenant instead of A., and upon the landlord consenting, agrees to stand in A.'s place, and offers to pay rent:—*Held*, that the landlord might sue B. for the rent. *Phipps v. Sculthorpe*, 1 B. & A. 50.

The payment of a customary rent for copyhold premises is not a payment between landlord and tenant. *Right d. Dean and Chapter of Wells v. Bowden*, 3 East, 260.

When a lease is not void, but voidable, the receipt of rent under it does not create a tenancy from year to year. *Bryan v. Bancks*, 4 B. & A. 401.

The general rule is, if a tenant for a year hold on without the landlord's consent after the term has expired, the demise is tacitly renewed for one year. *Right d. Flower v. Darby*, 1 T. R. 159.

When the rent is not paid and received as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created, nor will a notice to quit be necessary. See *Right d. Dean and Chapter of Wells v. Bowden, supra. Dem. d. Brune v. Rawlins, supra.*

When one who had built a cottage on the waste land, on three several occasions paid 6*d.* as rent to the person who had bought the adjoining old inclosure, it was held to be a proper question for the jury whether there had been an acknowledgment of tenancy. *Doe d. Jackson v. Wilkinson*, 5 D. & R. 273; 3 B. & C. 413.

A general occupation of lands enures as a tenancy from year to year, determinable only by a regular notice to quit. *Doe d. Warner v. Brown*, 8 East, 165.

No tenancy is created by a mere agreement for an increase of rent in the middle of the year or tenancy. *Doe d. Bedford v. Kendrick*, cited Ad. Eject. 129.

Payment of rent by a tenant to his landlord after the title of the latter had expired, and after the tenant had received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord, unless at the time of such payment the tenant knew the precise nature of the adverse claim, or the manner in which the landlord's title has expired, *Fenner v. Duplock*, 2 Bing. 10; 9 Moore, 38.

A mortgagee is bound by existing tenancies created before the mortgage, and by giving notice of the mortgage to the tenants he may place himself to every intent in the same relation towards them as the mortgagor occupied before the mortgage. *Rawson v. Encke*, 7 Ad. & E. 451. *Burrows v. Gradin*, 1 D. & L. 213. But with regard to tenancies subsequently created by agreement between the mortgagor and third persons, the mortgagee is not bound unless he recognises such tenancies by receiving rent, or by other acts decisively showing his adoption of them. *Rogers v. Humphries*, 4 Ad. & E. 299. *Doe d. Fisher v. Giles*, 5 Bing. 421. *Doe d. Shepherd v. Allen*, 3 Taunt. 78. *Evans v. Elliott*, 9 Ad. & E. 342. *Brown v. Storey*, 1 Scott, N. R. 9. *Doe d. Whittaker v. Hales*, 7 Bing. 322. See *Doe d. Calvert v. Frowd*, 4 Bing. 557; 1 M. & P. 480. *See* note on *Keech v. Hall*, 1 Smith, L. C.

The mere receipt of interest by the mortgagee up to a given day, does not amount to a recognition by him that the mortgagor or his tenant was lawfully in possession until the time when such interest was paid. *Doe v. Cadwallader*, 2 B. & Adol. 473.

II. Relative to the particular Kind of Tenancy.

(A) *Tenancy from Year to Year.*[1]

A pauper put into a house by parish officers can by no length of time acquire any title, and may be turned out by future parish officers. *Fox v. Oakley*, Woodf. L. & T. 541. And where in trespass the issue was whether the plaintiff was tenant of the defendant under a demise for one year, from, &c., and thence afterwards from year to year, evidence that the plaintiff had paid rent to the defendant is not sufficient proof of such demise. See *Phillips v. Moseley*, 1 C. & P. 262. So, where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, and the landlord may distrain. See *Mann v. Lovejoy*, 1 R. & M. 355.

Possession and payment of rent under a written but invalid agreement to let lands at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent, was held to create a tenancy. *Doe d. Warner v. Brown*, 8 East, 165.

A general parol demise at an annual rent, when the bulk of the farm is inclosed, and a small part in the open common fields, is only a lease from year to year, and not for so long as the usual round of husbandry extends. *Roe d. Bree v. Lees*, 2 Black. 1171.

All agreements for leases must be authenticated by some note or memorandum, signed according to the provisions of the Statute of Frauds. And all leases exceeding three years in duration, required by the Statute of Frauds to be in writing, must, if made after 1st October, 1845, be authenticated by deed. 8 & 9 Vic. c. 106, s. 3; 1 Platt on Leases, 580.

Every lease in writing not under seal for a term exceeding three years in duration, amounts only to an agreement to grant a lease for the term specified. *Bond v. Rosling*, 30 L. J. Q. B. 227. *Burton v. Reevel*, 16 Mee. & W. 307; 16 L. J. Ex. 85.

[1] Until the reign of Henry the Eighth, a general letting of land — that is, a demise without limit as to the period of holding — was held to create a tenancy strictly at the will of the parties, and determinable at the pleasure of either. But in modern times this rule has been modified.

Although, however, a more general letting or permission to occupy creates only a tenancy at will, yet if the lessor accepts from the lessee a yearly rent, or rent measured by any aliquot part of a year, the courts will infer from this circumstance an intention to create a tenancy from year to year. *Doe d. Hull v. Wood*, 14 Mee. & W. 682. Yet, where there is an express contract for a strict tenancy at will (although it be at a yearly rent payable quarterly) occupation and payment of rent for more than a year will not create a tenancy from year to year. *Doe d. Basto v. Cox*, 11 Q. B. 122; 17 L. J. Q. B. 3.

One joint tenant or tenant in common cannot bind his companion by holding over without his consent. *Draper v. Crofts*, 15 Mee. & W. 166. *Christy v. Tancred*, 9 id. 438. And both the fact of holding over and the payment of rent may be explained so as to rebut the presumption that the parties intended thereby to create a tenancy from year to year. *Doe d. Lord v. Cragg*, 5 C. B. 90. *Jones v. Shears*, 4 Ad. & E. 832.

If a party take possession of premises under an agreement for a future lease, and he afterwards pay rent for a year, or any aliquot part of a year, under such agreement (*Braythwaite v. Hitchcock*, 10 Mee. & W. 494), or if he admit such rent to be due (*Cox v. Bent*, 3 Bing. N. C. 185), he thereby becomes tenant from year to year, subject to all the terms of the contemplated lease. *Doe d. Thompson v. Amey*, 12 Ad. & E. 476. *Regnart v. Porter*, 7 Bing. 453. And where a party enters under such agreement, and in the expectation of or under an agreement to take a lease, procures attornment from some of the tenants, and receives rent from others, he may be sued for rent on the common count for use and occupation, although he himself has not paid rent, or been in any manner expressly recognised as a tenant. *Waring v. King*, 8 Mee. & W. 571. *Hamerton v. Stead*, 3 B. & C. 478; 5 D. & R. 206. *Cox v. Brent*, *supra*. *Neale v. Swind*, 2 C. & J. 377.

If a proposed purchaser of the premises be let into possession, but the contract of sale is not completed on account of a defect in the title, the vendor cannot maintain an action for the use and occupation of the premises up to the time at which the contract for the purchase went off. *Winterbottom v. Ingham*, 7 Q. B. 611. But if a party who is let into possession under such circumstances continues in possession of the premises after the contract is gone off, he is liable to an action for use and occupation, at the suit of the vendor, for the period during which he so continues in possession. *Howard v. Shaw*, 8 Mee. & W. 118.

Where a mortgage deed, which was executed by the mortgagor only, contained a a clause whereby, "for the more effectual recovery of interest, the mortgagor did attorn and become tenant to the mortgagee of the mortgaged premises, at a yearly rent, to be paid half-yearly, so long as the principal sum remained secured; and the mortgagor continued in possession, and made several half-yearly payments, it was held that this, taken together with the covenant, created the relation of landlord and tenant between him and the mortgagee. *West v. Ritche*, 3 Ex. 216.

It seems that, even where a party holds premises under a void lease, the payment and receipt of rent are evidence from which a demise from year to year will be presumed. *Doe d. Pennington v. Taniere*, 18 L. J. Q. B. 49.

(B) *Weekly.*[1]

If a lessee hold over after the expiration of his term, and the lessor receive rent as rent, or otherwise recognise the party as his tenant, there is tacitly created a tenancy from year to year (*Doe d. Clark v. Smurridge*, 7 Q. B. 957); and in such a case, the tenancy will be held to be upon the terms of the old lease, so far as they are applicable to a yearly holding, if there be no evidence to the contrary. *Mayor of Thetford v. Tyler*, 8 id. 95. And if, before the expiration of a term created by lease, the parties agree that the lessee should continue tenant for a year after the expiration of such lease, and nothing be said about the terms of the holding, the tenant will continue to hold subject to the terms of the original lease. *Finch v. Miller*, 5 C. B. 428.

It was formerly held that an agreement for "one year certain, and so from year to year," created a tenancy for two years. *Doe d. Chadburn v. Green*, 1 Per. & D. 454. *Birch v. Wright*, 1 T. R. 380. Woodf. L. & T. 153, 5th ed. But according to the doctrine now adopted, a tenancy from year to year, so long as both parties please, is determinable at the end of the first or of any subsequent year; unless, in creating such tenancy, the parties use words showing that they contemplated a tenancy for two years at least. *Doe d. Clark v. Smurridge, supra.*

Where premises were demised under a written agreement, dated in August, "the tenancy to be from year to year from Michaelmas next," at a rent payable half-yearly, "except the last half-year, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear," the tenant "to allow the landlord or incoming tenant in the last year to enter on the 1st May to make fallows, and carry out the manure," for which compensation was to be paid, and the tenant to have the use of the barns for stacking and thrashing the crops in the last year, till the 1st of May after the tenancy," it was held that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year. *Doe d. Plumer v. Mainby*, 10 Q.B. 473.

In the case of a tenancy from year to year, as long as both parties please, if the tenant die, his personal representatives have the same interest in the premises as the deceased had. *Doe v. Porter*, 3 T. R. 13. *Gulliver v. Burr*, 1 Bl. Rep. 596.

A demise by deed for the term of three years, "determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual time," is a demise for three years certain, and the tenancy cannot be determined sooner than by a six months' notice, ending with the third year. *Jones v. Nixon*, 31 L. J. Ex. 505.

The plaintiff was in possession of land under a lease, granted to him by one W. B., who had previously mortgaged the premises, the transferees of the mortgage (being cognisant of the lease) gave the plaintiff notice of the mortgage, and required him to pay them all rent due, and to become due, in respect of the mortgaged premises:—*Held*, that this was evidence whence the jury might infer a contract of tenancy for a year, as between the mortgagees and the plaintiff:—*Held*, also, that the omission of the judge to leave it to the jury to say whether or not the plaintiff assented to this new contract of tenancy, the fact not being disputed at the trial, did not amount to a misdirection. *Brown v. Storey*, 1 Man. & G. 117; 1 Scott, N. S. 9. So where the occupier, under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year on the terms of the agreement. *Mann v. Lovejoy*, 1 R. & M. 355.

If a person has held under the terms of a lease, and hold over after the lease is at end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he come in as an under-tenant before any lease was granted to the person of whom he took the premises, and that person afterwards take a lease, if there is no evidence that he knew of the lease, it will be for the jury to say whether he is not an under-tenant, and not an assignee of the lease. *Torriano v. Young*, 6 C. & P. 8.

A tenancy from year to year is to be considered as recommencing every year; and therefore an allegation that a party held under a demise from year to year, commencing from 16th November, 1836, is supported by proof of a tenancy, commencing several years before, and still continuing at that time. *Tomkins v. Lawrance*, 8 C. & P. 729.

Primâ facie payment of rent is evidence of a yearly tenancy, but that presumption may be rebutted. *Doe d. Pritchard v. Dodd*, 5 B. & Adol. 689; 2 Nev. & M. 838.

The payment of rent is not, *per se*, evidence of any particular holding for or from any particular period. *Phillips v. Moseley*, 1 C. & P. 262. *Mayor of Thetford v. Tyler*, 8 Q. B. 95. Where, however, there is proof of payment in respect of the occupation of premises which have been ordinarily let from year to year, the law will imply that the party making such payment holds under a tenancy from year to year. *Doe d. Lord v. Crago*, 6 C. B. 90.

[1] In the absence of any evidence of usage, it is not an implied term in a contract for a weekly tenancy that a week's notice is to be given; but where a new week is entered upon, the tenant is bound to continue until the expiration of that week, or to pay that week's rent. *Huffell v. Armistead*, 7 C. & P. 56. But although it may be that, unless there is some custom governing it, a mere weekly or monthly tenant cannot insist on

(C) *At Will.*[1]

(D) „ *Sufferance.*[2]

having a week's or month's notice, still he is not liable, on the expiration of any week, to be turned out of possession without previous notice. "I am inclined to think," said *Erle, C. J.*, "that there must be a demand of possession, such as in the case of a tenant at will, but that at all events, until some notice has been given, the tenant cannot be considered a trespasser." *Jones v. Mills*, 31 L. J. C. P. 66.

[1] Although courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but, as we have seen, have rather held them to be tenancies from year to year as long as both parties please, especially where an annual rent is reserved, estates at will may, notwithstanding, arise now as well as formerly; but it is no longer usual to create such estates by express words, and the judges incline strongly against implying them. *See* Co. Litt. 56. Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor; by force of which demise the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. But every lease at will must be at the will of both parties. If an agreement be made to let premises so long as both parties like, and reserving a compensation accruing daily, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called. And though the tenant has expended money in improving the premises, that does not give him a term to hold until he is indemnified. *Richardson v. Langridge*, 4 Taunt. 128. A man who enters and enjoys under a void lease, and pays rent, is a tenant at will, and not a disseisor. *Warren v. Fearnside*, 1 Wils. 176. But if a man enter by colour of a grant or conveyance which was void, and cannot stand with the rules of law, he shall be a disseisor, and not a tenant at will. *Powsely v. Blackman*, Cro. Jac. 660. A mortgagor is, in some respects, a tenant at will, and in many cases like such a tenant. *See post*, Mortgage.

If a tenant whose lease has expired is permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but strictly at will. *Doe v. Stennett*, 2 Esp. 717.

Whether a tenancy at will is created may be a question for the jury. *Doe d. Bennett v. Turner*, 7 Mee. & W. 226.

A party who enters under a contract to purchase, but has no conveyance, is only a tenant at will. *Doe v. Chamberlaine*, 5 Mee. & W. 14. *Ball v. Cullimore*, 2 C., M. & R. 120.

A tenancy at will is ended by a notice that, unless certain terms be complied with, measures will be taken for the recovery of the property. *Doe d. Price v. Price*, 9 Bing. 356; 2 M. & Scott, 464.

A tenant at will has no right to remain in possession after a demand, and if he does he may be treated as a trespasser. *Doe d. Jones v. Jones*, 10 B. & C. 718.

A tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord. *Pinhorn v. Lorster*, 8 Ex. 772.

Where a lease is made at will, rent being payable quarterly, after a quarter of a year has commenced the tenant may determine his will, but then he must pay that quarter's rent. *Layton v. Field*, 3 Salk. 222. So if the lessor determine his will after the commencement of a quarter, he shall lose his rent for that quarter. So, a half-yearly tenant at will may be ousted also by express words, or by implication; as, if the lessor come upon the land and say that the lessee shall not continue longer, he may determine his will, though in the absence of the lessee, but not in the absence of notice to the lessee. If tenant at will take upon him to make a lease for years, which is a greater estate than he may make, that act is a disseisin, and a determination of the will. *Blunden v. Baugh*, Cro. Car. 304. But though lessee at will make a lease to commence at a future day, it does not amount to determination till the lease commences in point of interest. A tenancy at will is generally determined by the death of either party, but an interest from year to year is transmissible to representatives beneficially, or as trustees. See *Jones v. Dean*, 1 Ves. 493.

[2] A tenant at sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession, as if tenant *pour autre vie* continues in possession after the death of the *cestui que vie*. *See* Co. Litt. 57, b. There is a great diversity, therefore, between a tenant at will and a tenant at sufferance; for tenant at will always holds by right, whereas tenant by sufferance entereth by a lawful demise, and holdeth over by wrong. *See* id. But against the king there is no tenant at sufferance, for the king not being capable of committing laches, such person will be an intruder. So, if a guardian continue in possession after the full age of the heir, he is not a tenant by sufferance, but an abator.

Where mortgagee covenants that mortgagor shall quietly enjoy till default in payment, and assigns, after assignment the mortgagee is only tenant at sufferance. *Smartle v. Williams*, 1 Salk. 246.

When a tenancy at sufferance has existed for twenty years, the landlord's right of entry is barred by the statute, and the tenant becomes the absolute and complete owner of the property. *Doe v. Gower*, 21 L. J. Q. B. 57. It is a statutory title by lapse of time.

III. Of the Tenant being Estopped from Denying the Title of his Landlord.[1]

IV. Rights of the Landlord.

(A) *To Re-enter.*[2] *See* also Conditions, vol. iii. p. 164; Covenant, id. p. 443; *post*, Lease, p. 338.

[1] The general rule is, that a tenant is estopped from denying his landlord's title. *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307. *Fleming v. Gooding*, 10 Bing. 549. And where the lessee is estopped, so is his assignee. *Doe d. Bullen v. Mills*, 2 Ad. & E. 17. *Taylor v. Needham*, 2 Taunt. 278. The same estoppel applies to a licensee. *Doe d. Johnson v. Baytup*, 3 Ad. & E. 188. See *Doe d. Leeming v. Skirrow*, 7 id. 157. *Cuthbertson v. Irving*, 28 L. J. Ex. 306.

The tenant of glebe land is not allowed, in an action for use and occupation, to show a simoniacal presentation of the plaintiff his landlord. *Cooke v. Loxley*, 5 T. R. 5. *Lewis v. Willis*, 1 Wils. 314. So where a tenant comes into possession under a party who claims to be devisee, he cannot dispute the title of such party on the ground that the devise was void. *Doe d. Marlow v. Wiggins*, 4 Q. B. 367. *See* note to *Duchess of Kingston's case*, 2 Smith, L. C.

The estoppel holds in favour of a reversioner whose interest is the same as that of a tenant for life deceased, to whom the defendant was tenant. *Doe v. Whitroe*, 1 D. & R. 1. See *Duke v. Ashby*, 7 H. & N. 600; 31 L. J. Ex. 168.

The payment of rent impliedly admits a tenancy, and is strong *primâ facie* evidence against the tenant of the landlord's title. *Goldsworth v. Knight*, 11 Mee. & W. 337. *Fenner v. Duplock*, 2 Bing. 10. *Cooper v. Blandy*, 1 Bing. N. C. 45. But the tenant may show that the payment of rent, or acknowledgment of the plaintiff's title, was made under a misrepresentation or mistake of facts, for after the discovery of such misrepresentation he is not estopped from disputing the title. *Doe d. Marlow v. Wiggins, supra. Claridge v. M'Kenzie*, 4 Man. & G. 143. *Doe d. Plevin v. Brown*, 7 Ad. & E. 447. *Doe d. Higginbotham v. Barton, supra. Gregory v. Doidge*, 3 Bing. 474; 11 Moore, 349.

The tenant, although estopped, as we have seen, from objecting that his landlord ever had any title, may show that the title of his landlord has expired, for in that case he does not dispute the title, but confesses and avoids it by matter *ex post facto*. *See* vol. iv. p. 287, n. *Claridge v. M'Kenzie, supra.* And he may, it seems, avail himself of this defence, without proving that he renounced his landlord's title, or commenced a fresh holding under another. *Claridge v. M'Kenzie, supra. Doe d. Lowdon v. Watson*, 2 Stark. 230. But see *Balls v. Westwood*, 2 Camp. 11, *contra*. Thus, the tenant may show that his landlord's title has been forfeited by some breach of condition, and that the superior landlord has entered for such forfeiture. *Franklin v. Carter*, 1 C. B. 750. See *Hopcraft v. Keys*, 9 Bing. 613; 2 M. & Scott, 760. And it is a good defence to an action by a landlord for rent that the ground landlord (*Sapsford v. Fletcher*, 4 T. R. 511), or the grantee of an annuity (*Taylor v. Zemira*, 6 Taunt. 527), or a mortgagee of the landlord (*Johnson v. Jones*, 9 Ad. & E. 808. *Waddilove v. Barnett*, 2 Scott, 763. *Pope v. Biggs*, 9 B. & C. 245), claimed the arrears, and that the tenant paid them to such party under a threat of distress or eviction. *See* further, Estoppel, vol. iv. p. 286, n.

The defendant, in March 1832, took certain premises from F. & B., "agents for the trustees of the joint estates of T. and S. B." Upon the trial of an action for use and occupation, brought by the plaintiffs "as trustees of the joint estate of T. and S. B." against the defendant, it appeared by the plaintiff's own evidence that, in 1831, they were trustees for the estate of S. B. only:— *Held*, that the defendant was estopped from taking advantage of this discrepancy, having in 1832 taken the premises of plaintiffs as trustees of the joint estate. *Fleming v. Gooding*, 4 M. & Scott, 455; 10 Bing. 549. If one party take an interest in land under another, although that interest be wrongly acquired, he cannot afterwards dispute the title of the person under whom he took that interest. *Doe d. Johnson v. Baytrup*, 4 Nev. & M. 837; 3 Ad. & E. 188.

[2] The right to re-enter makes the lease voidable, and not void. *Arnsby v. Woodward*, 6 B. & C. 519. *Hartshorne v. Watson*, 5 Bing. N. C. 477; 7 Scott, 494.

There can be no re-entry on the ground of waste if the substitution be an improvement to the reversion. *Doe d. Darlington v. Bond*, 5 B. & C. 855.

A service of a declaration in ejectment is the same as a demand of rent, with a view to re-entry. *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752; 5 D. & R. 711.

A demand of possession by an agent is sufficient to revest the landlord. *Hey v. Moorhouse*, 6 Bing. N. S. 52; 8 Scott, 156.

Where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession by expelling him. *Newton v. Harland*, 1 Scott, N. S. 473. If the landlord of lodgings enter into or use the lodgings while his tenant is in possession of them, it deprives the landlord of his right to rent; but if the tenant has, during the tenancy, abandoned the possession, and the landlord lights fires in the rooms, and even makes some use of such fires, he will not by this lose his right to rent. *Griffith v. Hodges*, 1 C. & P. 419. If a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and

(B) *To Recover Tithe Rent-Charge left Unpaid by Tenant.*[1]

V. Rights of the Tenant.

(A) *As to Quiet Enjoyment.*[2]

putting the tenant's furniture into the street; but if the tenancy be determined, and the tenant and his family be gone away, and the house locked up, no one being in possession, the landlord would be justified in breaking into the house and obtaining possession. *Hillary v. Gay*, 6 C. & P. 284.

After the expiration of a regular notice to quit, and abandonment of the premises by the tenant, the landlord may break open the door and enter the premises. *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158. *Taunton v. Costar*, 7 T.R. 431. *Newton v. Harland*, 2 Scott, N.R. 474. *See* 7 B. & C. 399; 8 id. 409.

By 1 & 2 Vic. c. 74, s. 1, when tenant or occupier of premises, where there is no rent, or where the rent does not exceed 20*l.* a-year, refuses to give possession, the landlord may give him notice of his intention to proceed to recover possession under the authority of this act. If tenant does not appear, or fails to show cause why he does not give possession, the justices may issue their warrant, directing the constables to give the landlord possession. *See post*, Small Tenements, Recovery of.

An action of trespass will lie against the landlord for obtaining a warrant and turning the tenant out of possession, if it be shown that the landlord had at the time no right to the possession. *Darlington v. Pritchard*, 12 L. J. C. P. 34.

The stat. 11 Geo. 2, c. 19, s. 16, enacts, "that if any tenants holding lands, tenements, or hereditaments at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix or cause to affixed on the most notorious part of the premises, notice in writing what day (at the distance of fourteen days at least) they will return and take a second view thereof; and if upon such second view the tenant, or some person upon his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises, and the lease thereof to such tenants as to any demise therein contained only, shall from thenceforth become void."

By sect. 17, "provided always that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties in which such lands or premises lie; and if they lie in the city of London, or county of Middlesex, by the judges of the courts of Queen's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales, then before the courts of Grand Sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs, not exceeding five pounds, for the frivolous appeal."

By stat. 57 Geo. 3, c. 52, the provisions of this statute are extended to tenants who who shall be in arrear one half-year's rent, and who shall hold the lands under any demise or agreement, whether written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent.

The landlord may proceed under 11 Geo. 2, c. 19, s. 16, although he may know where the tenant is to be found. *Ex-parte Pilton*, 1 B. & A. 369.

As to the recovery of possession by action of ejectment, *see* Ejectment, vol. iv. p. 169; or by proceedings in the county court, *see* County Courts, vol. iii. p. 413.

[1] If any occupying tenant quits, leaving unpaid any tithe rent-charge which he is liable to pay, and the titheowner give notice of proceeding by distress for its recovery, the landlord or succeeding tenant may pay the tithe-rent, and any expenses incident thereto, and recover the amount from the outgoing tenant or his legal representatives, in the same manner as if the same were a debt by simple contract due to the landlord or tenant making such payment. 14 & 15 Vic. c. 25, s. 4.

[2] Under a lease by deed, the word "demise," or "let," or any equivalent words sufficient to constitute a lease, import a covenant for title and for quiet enjoyment, unless there be an express covenant on either point, in which case no implication can be raised from such words. *Sone v. Stephenson*, 4 Bing. N. C. 678; 5 id. 183. *Adams v. Gibney*, 6 Bing. 666. *Hall v. City of London Brewery Co.* 31 L. J. Q. B. 257. *See* vol. iii. p. 483. Under a parol demise the law will imply a promise for quiet enjoyment, but not for good title (*Bandy v. Cartwright*, 8 Ex. 913), but not in an agreement to grant a lease. *Brashier v. Jackson*, 6 Mee. & W. 549.

A covenant by lessor that lessee, paying

the rent and performing the covenants, shall quietly enjoy, is not a conditional covenant; and a plea stating the non-payment of the rent, or the non-performance of a covenant by the lessee (to insure) is no bar to an action by the lessee on the covenant for quiet enjoyment. *Dawson v. Dyer*, 2 Nev. & M. 559; 5 B. & Adol. 584. Defendant, a lessee, covenanted that plaintiff, paying rent, &c., should have quiet enjoyment of a term, upon an underlease to commence in 1836. Defendant having afterwards forfeited his own term, by non-payment of rent to the superior landlord, plaintiff could not come into possession of the term to commence in 1836:—*Held*, that plaintiff could not sue on the covenant for quiet enjoyment; at all events, not before 1836. *Ireland v. Bircham*, 2 Bing. N. S. 90; 2 Scott, 207. *See post*, Lease, p. 338.

[1] If a person take lodgings in a house he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; therefore, if the landlord deprive the lodger of the use of either, an action lies. If the defendant in such a case merely pleads the general issue, he cannot show that the water-closet was useless before he removed it; but, in mitigation of damages, he may go into evidence to show that the plaintiff and his family were bad lodgers, and that he did the acts complained of to cause them to quit the house. *Underwood v. Burrows*, 7 C. & P. 26. *See* Fixtures, vol. iv. p. 480.

On the question whether the tenant is entitled to the use of a yard, the jury must say whether it had been demised. *Hebbert v. Thomas*, 1 C., M. & R. 861; 5 Tyr. 503.

[2] As a general rule it may be stated, both as regards parochial rates and parliamentary taxes, that the occupiers of the premises are liable. *See* vol. iii. p. 475.

The land-tax acts direct the tenant to pay the land tax in the first instance, and to deduct out of the rent so much of the rate as, in respect of the rent, the landlord should and ought to pay and bear; and the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions.

The burthen of paying taxes will be shifted from the landlord to the tenant if the contract contain words showing that the landlord was to have the full rent reserved, without any deduction in respect of any charges upon the premises; *e. g.* if the tenant agree to pay all taxes (*Amfield v. White*, 1 R. & M. 246. See *Payne v. Burridge*, 12 Mee. & W. 727), or to pay rent "free from all manner of taxes, charges, and impositions whatsoever" (*Bradbury v. Wright*, Dougl. 624. *Cranston v. Clark*, Say. R. 78), or, free of all outgoings, the tenant must pay the tithe commutation (29 L. J. Ch. 96), or to pay "a net rent." *Bennett v. Womack*, 7 B. & C. 627. The land tax is a "parliamentary tax" within the meaning of an agreement containing these words. *Manning v. Lunn*, 2 C. & Kir. 13. So a rent-charge imposed in lieu of land tax has been held to be a parliamentary assessment. *Governors of Christ's Hospital v. Harrild*, 3 Scott, N. R. 126. A sewer's rate is not (*Palmer v. Earith*, 14 Mee. & W. 428), nor a rate for the repair of a bridge which the occupier of the land was originally liable to repair *ratione tenuræ*. *Baker v. Greenhill*, 3 Q. B. 148. But an extraordinary sewer's rate comes within "all rates," &c. except land tax, to be paid by the tenant. *Waller v. Andrew*, 3 Mee. & W. 312.

The landlord who receives the rent is generally to pay the land-tax, but the poor-rate is payable by the occupier. *Rex v. St. Luke's Hospital*, 2 Burr. 1063.

Under a verbal agreement to pay all taxes, the tenant is bound to pay the land tax. See *Amfield v. White*, *supra*.

If the tenant agrees to pay all taxes, rates, duties, and assessments, he will be bound to pay a paving-rate imposed by commissioners under the authority of a local act. *Payne v. Burridge*, *supra*.

In the case of taxes payable by the occupier, with a right of deduction from the rent, if the landlord is entitled to be relieved from the assessment it his duty to take the necessary steps for the purpose, and if, before he has done this, the assessment is made on the occupier, and the tax paid, it may be deducted from the rent, although at the time the deduction is made the landlord has obtained his exemption from the tax. *Swatman v. Ambler*, 24 L. J. Ex. 185.

If the land tax, paving-rates, &c. are not deducted as they ought to be from the rent of the current year, they cannot be deducted or the amount of them recovered back from the landlord in any subsequent year. *Andrew v. Hancock*, 1 B. & B. 37.

In an action for use and occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial. *Baker v. Davis*, 3 Camp. 474. *Clennell v. Read*, 2 Marsh. 371. But it will not be deducted at Nisi Prius where it has not been actually paid. *Pocock v. Eustace*, 2 Camp. 181. To enable a tenant to deduct such tax he need not produce the assessment, but it will be sufficient to prove the payment to the collector. *Phillipps v. Beer*, 4 Camp. 266.

In the case of property tax paid by the tenant under 5 & 6 Vic. c. 35, s. 60, if he do not deduct it from the next payment of rent he cannot afterwards recover the amount as money paid to the use of the landlord. *Cumming v. Bedborough*, 15 Mee. & W. 438. The sum paid for property tax may be set off in an action for the next rent. *Franklin v. Carter*, 1 C. B. 750.

VII. Relative to Repairs.[1]

The occupier of land is rateable to the poor, and it is immaterial by what tenure he holds it, or whether he has any title or not. *Bute v. Grindall*, 1 T. R. 338.

The landlord is in general liable to pay taxes in proportion to the rent, and not the improved value. Where, therefore, a tenant built on land demised to him, and raised the annual value from 60*l.* to 300*l.* it was held that he was only entitled to deduct sewer's rate and land tax upon the original rent, and that he was himself properly chargeable in respect of the improved value. *Smith v. Humble*, 15 C. B. 321.

[1] *Of the Tenant's Liability to Repair.*—A tenant from year to year is not, unless there be an express agreement to that effect, bound to make substantial and lasting or general repairs. He is only liable where an injury happens to the premises through voluntary negligence, and not from injuries arising from accidental fire, wear and tear of time, or the like. Woodf. L. & Ten. 505.

A tenant from year to year is bound to do fair and tenantable repairs, so as to keep the house wind and water tight. He is accordingly liable if he omit to adopt reasonable and usual precaution to obviate the occurrence of great and manifest injury to the premises. *Leach v. Thomas*, 7 C. & P. 327. *Auworth v. Johnson*, 5 id. 239.

Where there is an express and unconditional agreement to repair and keep in repair, the tenant is bound so to do though the premises be destroyed by fire or other accident. *Bullock v. Dommitt*, 6 T. R. 650. *Brecknock Co. v. Pritchard*, id. 750. *Digby v. Atkinson*, 4 Camp. 275. See *Spence v. Chadwick*, 10 Q. B. 517.

The 32 Hen. 8, c. 34, applies to leases by deed only; and where a lease is not under seal, the assignee of the reversion cannot sue the lessee for breach of his contract with the lessor to repair (*Standen v. Chrismas*, 10 Q. B. 135), but the lessor may, notwithstanding the assignment. *Bickford v. Parson*, 5 C. B. 920.

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair; a literal performance of the covenant is not required. *Harris v. Jones*, 1 M. & Rob. 173. *See* vol. iii. p. 478. The obligation, however, continues *de die in diem.* 12 Ir. Com. Law Rep. 173.

Under an agreement to keep premises, and at the expiration of the tenancy to deliver up the same in good repair, the tenant is bound to put them into good repair, and he is not justified in keeping them in bad repair because he found them in that condition. *Paine v. Haine*, 16 Mee. & W. 541.

If the lessee has covenanted to repair buildings, "the same being first put into repair by the lessor," the liability of the lessee does not arise until after all the buildings have been put into repair by the lessor, who is bound to repair in the first instance. *Neale v. Ratcliffe*, 15 Q. B. 916. *Connock v. Jones*, 3 Ex. 233.

A lease void under the Statute of Frauds, containing a covenant to repair, under which the lessee enters, renders it obligatory upon him to repair, for neglect of which he is liable in *assumpsit*. *Richardson v. Gifford*, 1 Ad. & E. 52. And the same of a lease void under a power. *Beale v. Sanders*, 5 Scott, 58.

A declaration that, "in consideration that the defendant had become and was tenant to the plaintiff of a certain messuage, &c. he undertook to keep the same in good tenantable repair, to uphold and support and to leave the premises in the state he found them," is bad, such an undertaking not resulting from the mere relation of landlord and tenant. *Brown v. Crump*, 6 Taunt. 300; 1 Marsh. 567. See *Granger v. Collins*, 6 Mee. & W. 458. *Jackson v. Cobbin*, 8 id. 790.

Where the tenant has expressly contracted to repair, there is no implied contract to use the premises in a tenant-like manner. *Standen v. Chrismas*, *supra*. See *Holford v. Dunnett*, 7 Mee. & W. 348.

A landlord may support *assumpsit* generally for not repairing against a tenant who occupies premises under a special agreement. *Colley v. Streeton*, 3 D. & R. 522; 2 B. & C. 273.

A contract to leave a farm as the tenant found it, is an agreement to leave it in tenantable repair if he found it so. *Winn v. White*, 2 Black. 840.

A tenant let into possession under an instrument which did not amount to a present lease, is liable to an action for mismanagement of the farm. *Tempest v. Rawling*, 13 East, 18.

A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises. *Ferguson v.* ——, 2 Esp. 590. *Gibson v. Wells*, 1 N. R. 291. *Horsefall v. Mather*, Holt, N. P. 7. *Colley v. Streeton*, 2 B. & C. 278.

Covenants to repair are covenants which run with the land, and are continuing covenants to the end of the term. *Martin v. Clue*, 22 L. J. Q. B. 147.

An agreement by a lessor to do certain repairs in consideration of an increased rent, is only collateral to the lease. *Donellan v. Read*, 3 B. & Adol. 899. And where repairs are to be approved of and inspected by the lessor, and the lessee is to be at liberty to deduct the amount from his rent, such approval is not a condition precedent to the right to deduct. *Dallman v. King*, 4 Bing. N. S. 105; 3 Scott, 382.

A tenant who covenants to repair is to sustain and uphold the premises, but that is not so with a tenant from year to year (*Auworth v. Johnson*, *supra*) who is not bound to do substantial repairs. *Leach v. Thomas*, *supra*. The term, "habitable re-

pair," means a state of repair fit for the occupation of an inhabitant. Where a tenant takes premises which are out of repair, and agrees "to put the premises into habitable repair," this implies that he is to put them into a better state than that in which he found them; and, regard being had to the state of the premises at the time of the agreement, and of their situation, and to the class of persons likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit (*Belcher v. M'Intosh*, 8 C. & P. 720); but where a very old house is demised, with the usual covenants to repair, it is not meant that the house should be restored in an improved state, and that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care. *Gutteridge v. Munyard*, 7 C. & P. 129; 1 M. & Rob. 334. *Burdett v. Withers*, 7 Ad. & E. 136. See *Payne v. Hayne*, 16 Mee. & W. 541; *ante*, p. 305. A landlord has no right to enter in order to repair, without some stipulation to that effect; and the tenant may maintain trespass against him. *Barker v. Barker*, 3 C. & P. 557. Where the landlord covenanted to rebuild the demised premises, if they should be destroyed by fire, in the same state as they were in before the happening of such fire: — *Held*, that he was only bound to build such premises as he had demised, and not subsequent erections by the tenant. *Loader v. Kemp*, 2 id. 375. On a covenant to repair, the lessee is not liable for the expense of renewing works in an improved and more durable manner. *Soward v. Leggatt*, 7 id. 613.

The incumbents of ecclesiastical livings are bound to repair and keep in a good and sufficient state, the houses, chancel of the church, glebe, woods, fences (2 Ad. & E. 773), or other inheritance of the church, and so transmit them to their successors. *See* Rogers' Ecclesiastical Law; Burn's id.; Grady on Fixtures and Dilapidations.

The executors of a deceased incumbent are not bound to put the rectory-house and premises into a finished state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. *Percival v. Cooke*, 2 C. & P. 460. But *see* 10 B. & C. 299.

A. makes an agreement with B. for the sale of premises, at the time in the possession of C., under an agreement for four years (three of which have expired), and undertakes to B. that he will do such repairs as are left undone by C. at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair: — *Semble*, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy, as created by the agreement between A. and C. *Goodson v. Gouldsmith*, 2 id. 555. A. agreed to take an assignment of a lease of a house, which was out of repair, from B.; and by the agreement it was stipulated that all outgoings should be paid by B. up to April 23d; and by an assignment indorsed on the lease (executed by B. but not by A.), B. assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22d day of April, ought to be observed no the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and after the assignment the reversioner sued B., and recovered for dilapidations which occurred before April 22: — *Held*, that B. could not maintain an action on the case against A. for these dilapidations, even though it could be proved that A. gave a smaller price, because the premises were out of repair. *Hawkins v. Sherman*, 3 id. 459.

From the mere fact of a tenancy of a farm, whether under a written or parol agreement, or under a lease by deed, the law implies a promise on the part of the tenant to cultivate it in a husbandlike manner, and according to the custom of the country where the same is situate, unless the express contract is inconsistent with the custom. *Wilkins v. Woods*, 17 L. J. Q. B. 319. *Legh v. Hewitt*, 4 East, 154. *Wigglesworth v. Dallison*, 1 Dougl. 201. *Bailey v. Walker*, 5 T. R. 373. And no obligation out of the mere relative situation of landlord and tenant arises to spend a certain annual sum to manure the ground. *Brown v. Crump*, 1 Marsh. 567. See *Beer v. Santes*, 10 C. B. (N. S.) 435.

As to the Landlord's Liability to Repair. — Unless he has expressly agreed to repair, he is not liable to an action for not repairing. *Brown v. Quilter*, Amb. 619. *Pindar v. Ainsley*, cited 1 T. R. 312. *Leeds v. Cheetham*, 1 Sim. 151. *Loft v. Dennis*, 28 L.J.Q.B. 168. *Bennett v. Ireland*, id. 48. It was at one time held, that if the premises become uninhabitable, or there is no beneficial occupation by reason of the landlord's neglect, the tenant will be justified in quitting the premises without notice. *Salisbury v. Marshall*, 4 C. & P. 65. *Collins v. Barrow*, 1 M. & Rob. 112. *Edwards v. Etherington*, 7 D. & R. 117. But this doctrine is now overruled; and it is established that, even where the agreement contains a stipulation that the landlord shall do the repairs, there is no implied condition that the tenant may quit if the repairs are not done. *Surplice v. Farnsworth*, 7 Man. & G. 576. See *Arden v. Pullen*, 10 Mee. & W. 321. And the fact that the house became uninhabitable for want of repairs affords no answer to an action for the rent. See *Hart v. Windsor*, 12 id. 68. *Izon v. Gorton*, 7 Scott, 537; Add. Contracts, 348. As to fusnishing house by landlord, *see* 3 C. B. 766; 7 Ad. & E. 49.

Where there was no express contract for the landlord to repair, and the demised house fell and destroyed the furniture of the lessee, no action, it was held, lay against the landlord. *Gott v. Gandy*, 2 Ell. & Bl. 845; 23 L. J. Q. B. 1.

As to the Damages in an action for not re-

VIII. Of the Obligation of the Landlord to Indemnify against Distress for Ground-Rent, &c.[1]

IX. Of Away-going Crops, Tillages, &c.[2]

pairing, if the landlord, being himself under an obligation to keep the premises in repair, enter and repair them without the defendant's assent, the damages shall be the sum necessarily expended in putting the premises in repair. *Colley v. Streeton*, 2 B. & C. 273; 3 D. & R. 522. It was at one time supposed that the damages and costs recovered in an action against the mesne landlord for non-repair, was the measure of damages in an action against the sub-tenant for the same non-repair. *Neale v. Wyllie*, 3 B. & C. 533. But it is now settled, that unless the underlease contain a covenant to indemnify, the underlessee is liable only for such damages as necessarily result from the breach of his own contract to repair. *Logan v. Hall*, 4 C. B. 598. *Walker v. Hatton*, 10 Mee. & W. 249. *Penley v. Watts*, 7 id. 601. See *Clow v. Brogden*, 2 Scott, N. R. 303.

Where a tenant neglects to repair, it seems the lessor may not only recover the sum expended, but damages for the loss of the use of the premises whilst repairing. *Woods v. Pope*, 1 Bing. 467; 1 Scott, 536; 6 C. & P. 782.

[1] There is an implied undertaking by the landlord to the tenant to indemnify him against any distress which may be made by the superior landlord for the rent due to him; so long, at least, as the tenant in possession pays his rent to his immediate landlord. *Hancock v. Caffyn*, 8 Bing. 358. So where a lessee assigns the premises, the effect is, that he becomes surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants running with the estate; and the lessee, after paying the rent and discharging the obligation to which the assignee is liable, has his remedy over against him. *Wolveridge v. Steward*, 1 Car. & M. 644. *Burnett v. Lynch*, 5 B. & C. 589. See *Groom v. Bluck*, 2 Scott, N. R. 655. *Lesenberg v. Evans*, 3 id. 476. *Humble v. Langston*, 7 Mee. & W. 517. *Exall v. Partridge*, 8 T. R. 310. *Dawson v. Linton*, 5 B. & Adol. 521. But where it appeared that the plaintiff took a house of the defendant at a yearly rent under an agreement, by the terms of which the latter undertook that, up to the date of the agreement, he had paid or would pay and discharge "all arrears of rent, rates, taxes, and assessments," and the former agreed that "from and after that day the same should be kept paid by him for the period he might occupy the premises," and at the expiration of the first quarter the superior landlord distrained for rent, it was held that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a yearly rent, the defendant having by the subsequent clause expressly undertaken to keep the reserved rent paid. *Upton v. Fergusson*, 3 M. & Scott, 88.

[2] *As to Emblements.*—When the interest of a tenant is determined by the happening of an uncertain event, over which he has no control, and after crops or roots yielding a present annual profit have been sown or planted by him, and have not at such determination of his holding arrived at maturity, such tenant is entitled to emblements; that is, to the crops so sown, and to the produce of such roots. *Graves v. Weld*, 5 B. & Adol. 105. *Kinsbury v. Collins*, 4 Bing. 202; 12 Moore, 424. *Holding v. Pigott*, 7 Bing. 465; 5 M. & P. 437. By the 14 & 15 Vic. c. 25, s. 1, where a lease is determined by the death of the lessor, tenant for life, the lessee is, by virtue of the 14 & 15 Vic. c. 25, s. 1, entitled to hold till the expiration of the current year. *See* vol. iv. p. 241.

The Rights to Away-going Crops, that is, the crops sown during the last year of a tenancy, but not ripe until after its expiration, must be created either by the custom or usage of the county or neighbourhood, or by virtue of express contract between the parties. In the absence of any contract or custom (and provided the law of emblements does not apply) the landlord is entitled to crops unsevered at the determination of the tenancy, as being a portion of the realty. *Caldecott v. Smythies*, 7 C. & P. 808. *See* vol. i. p. 74. As to the custom, *see* vol. iii. p. 536.

When the tenancy of a farm expires, the tenant must, as we have seen, give up the possession of the whole of it to the landlord, crops, and everything else, unless there be a custom of the country for the tenant to hold over any part, or to take any of the crops; and the proof of the custom lies on the tenant. If the custom of the country be for an outgoing tenant, for what is called his odd mark, to crop one-third of the arable in wheat and to reap that wheat, after the tenancy has expired, and the tenant so crop more than the proper one-third, the landlord will be entitled to have all that which was last sown, and which is above one-third, unless it be shown that the tenant has a lien upon it for the sowing and the seed (*Caldecott v. Smythies, supra*); and a verbal permission by the landlord to sow beyond the one-third would be good as against him and his incoming tenant. *Griffith v. Tombs*, 7 C. & P. 810, n. See *Cary v. Cary*, 10 W. R. 669.

A written demise does not control the custom. *Hutton v. Warren*, 1 Mee. & W. 466.

According to the custom in most places the incoming tenant, in the absence of a special agreement, pays the outgoing tenant a consuming price of two-thirds the market price for the straw; but if the outgoing tenant is bound to consume all the manure on the farm, the allowance in respect of straw as between him and the incoming tenant

would be only the market price, called a fodder price. And where there is no special agreement to the contrary, the tenant is allowed to go out as he came in. *Clark v. Westrope*, 18 C. B. 765; 25 L. J. C. P. 287. An outgoing tenant, therefore, who has paid for straw on coming in, is entitled to be paid for straw on going out. And it has been held that a stipulation in a lease binding the tenant "to consume with stock on the farm all the hay, straw, and clover grown thereon, which manure shall be used on the said farm," is in no way inconsistent with the tenant's customary right to receive payment for his unconsumed straw on his going out. *Muncey v. Dennis*, 1 H. & N. 220. There may also be a custom for the tenant to carry away, or be paid for, straw and hay the produce of the land, and which, at the expiration of the tenancy, is on the land in the usual course of husbandry. See *Gough v. Howard*, Peak, Add. Ca. 197. *Furbre v. Andrews*, Woodf. 419.

The right reserved, whether by custom or express contract, to the offgoing tenant, to take the crop after the expiration of the term, is a prolongation of the term as to the land on which it grows. *Boraston v. Green*, 16 East, 71. The sale of the right of cropping does not change the nature of the tenancy. *Petrie v. Daniel*, 1 Smith, 199. An usage for the offgoing tenant to bestow his work, labour, and expense, in manure, tilling, &c., according to the course of husbandry, and for the landlord to pay him a reasonable compensation, &c., is a valid usage. *Dalby v. Hirst*, 3 Moore, 536; 1 B. & B. 224.

A tenant was turned out of possession by *hab. fac. poss.*, whilst crops were on the ground. The court refused to refer it to the master to ascertain the value, so as to be deducted from the rent. *Doe d. Upton v. Witherwick*, 3 Bing. 11.

A bond not to remove manure applies to cattle put on the land by others, who send food and remove the manure. *Hindle v. Pollitt*, 6 Mee. & W. 529.

The Claim to a Remuneration for Tillage, *i. e.* the cultivation of arable land, the cultivation of which cannot have been derived by the outgoing tenant, and which will be received by his successor, may also be supported by custom. *Dalby v. Hirst*, 1 B. & B. 224; 3 Moore, 536. *Clark v. Roystone*, 13 Mee. & W. 752. *Hutton v. Warren*, 1 id. 466. *Senior v. Armitage*, 1 Holt, 197. See *Whittaker v. Barker*, 1 Car. & M. 113. *Thorpe v. Eyre*, 1 Ad. & E. 926.

There may be a customary allowance between landlord and tenant for expenses incurred in draining lands that required draining according to good husbandry, even though the drainage was done without the landlord's knowledge or consent. *Mousley v. Ludlam*, 21 L. J. Q. B. 64.

[1] A tenancy from year to year, created by parol, will not be determined by a parol license from the landlord to quit in the middle of a quarter, and the tenant quitting the premises accordingly, the 3d section of the Statute of Frauds requiring that the surrender should be in writing. *See* vol. iv. p. 538. *Mollett v. Brayne*, 2 Camp. 103. *Thompson v. Wilson*, 2 Stark. R. 379. But if the landlord take possession, so as to render it impossible for the tenant to use or occupy the premises, the tenancy will be legally determined thereby. *Whitehead v. Clifford*, 5 Taunt. 518. *Grimman v. Legge*, 8 B. & C. 324. *Brown v. Burthenshaw*, 7 D. & R. 603. And where the tenant removed his goods with the landlord's assent, and then delivered the key to the landlord, and he accepted it, it was held that the jury might infer that the tenancy had been determined. *Grimman v. Legge*, *supra*. But where the tenant quitted apartments without giving notice, the mere fact of the landlord putting up a bill for the purpose of letting the apartments was held not to warrant this conclusion (*Redpath v. Roberts*, 3 Esp. 225); neither will the circumstance that the landlord has entered the premises and done repairs. *Bessell v. Landsberg*, 7 Q. B. 368. In all these cases the acts from which it is sought to infer that the tenancy has been put an end to should be unequivocal. *Ackland v. Lutley*, 9 Ad. & E. 879. But where the tenant left the key with the landlord, who refused to receive it, and afterwards, the premises being abandoned, the landlord entered by means of the key, put up a board that the premises were to let, repaired them, and painted out the tenant's name upon the door, it was held that there had been a surrender by operation of law, and that the landlord was not entitled to rent claimed in respect of quarters subsequent to that upon which he entered. *Phené v. Popplewell*, 31 L. J. C. P. 235.

A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. *Rickett v. Tullick*, 6 C. & P. 66. See *Mollett v. Brayne*, 2 Camp. 103.

A., being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of A.'s interest. The plaintiff afterwards took a lease of the same premises, expectant on the determination of A.'s term; and the defendants, after the determination of A.'s term, continued in possession for a quarter of a year, when they paid the rent for that period and claimed to give up the premises:—*Held*, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. *Freeman v. Jury*, 1 M. & M. 19.

Where there is a letting in the alternative, as "for three, six, or nine years," it is in the tenant's option to determine the tenancy by reasonable notice at either of those periods, unless it be otherwise expressed. *Dann v. Spurrier*, 3 B. & P. 399. *Goodright d. Hall v. Richardson*, 3 T. R. 462. *See*, further, *post*, Lease, p. 338.

XI. Actions by and Against.

(A) *Declaration.*[1]

(B) *Plea.*[2] (C) *Evidence.*[3]

[1] If there be an express contract between landlord and tenant, the plaintiff cannot recover on an implied one. *Holford v. Dunnett*, 7 Mee. & W. 348.

If the declaration, in an action by B. against A., aver that C. did not leave the premises in good repair at the expiration of his tenancy, the agreement between A. and C. need not be produced to prove such averment. *Goodson v. Gouldsmith*, 2 C. & P. 555.

An action on a demise will lie, notwithstanding the deed creating it has subsequently been cancelled; and the demise may be proved by the cancelled deed. *Ward v. Lumley*, 5 H. & N. 656; 29 L. J. Ex. 322.

As to the Count for Use and Occupation.—The landlord, under a count for use and occupation, may recover rent, or a compensation by way of rent, for the period of occupation by the defendant, under any species of tenancy created by simple contract, express or implied, but not where the tenancy has been by a lease under seal. The action may be maintained by the assignee of the reversion (*Rennie v. Robinson*, 1 Bing. 147. *Standen v. Chrismas*, 10 Q. B. 135), in respect to the occupation subsequent to the assignment (*Mortimer v. Preedy*, 3 Mee. & W. 602), or by the assignee of a mortgagor who has let a tenant into possession after the mortgage (*Hickman v. Machin*, 4 H. & N. 716; 28 L. J. Ex. 310); and it lies against the assignee of a tenant in respect of his occupation. *How v. Kennett*, 3 Ad. & E. 659.

The common count for use and occupation will not lie against an executor or administrator in his representative capacity, in respect of occupation by him since the decease of the testator or intestate, for he can be charged only in his own right in this form of action. *Wigley v. Ashton*, 3 B. & A. 101. *Atkins v. Humphreys*, 2 C. B. 654.

The following is the common count for use and occupation as prescribed by C. L. P. Act, 1852, sched. B.:—"Money payable by the defendant to the plaintiff, for the defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff."

[2] In case against a tenant for carrying away hay off the farm, without bringing back manure, in an untenantable manner, and contrary to the custom of the country. *Plea*, no such custom. On demurrer, the court held the plea to be sufficient. *Hartley v. Burkitt*, 6 Scott, 497; 4 Bing. N. S. 687.

A plea denying "that defendant was such tenant," only puts that fact in issue, and the lease need not be produced. *Halifax v. Chambers*, 7 Dowl. 342; 4 Mee. & W. 662. An acknowledgment of title, without knowing it was in dispute, is not binding, and the defendant may plead *non tenuit*. *Gregory v. Doidge*, 3 Bing. 474. In an action for rent and dilapidations, the court allowed the defendant to pay money into court. *Smith v. King*, 2 Dowl. P. C. 750; 3 M. & Scott, 790.

[3] Where a tenant agrees with the reversioner to hold on the same terms as he then did, the original lease must be produced (*Walliss v. Broadbent*, 4 Ad. & E. 877) properly stamped. It is for the jury to say whether the tenant occupies by adverse title or license. *Doe d. Thompson v. Clark*, 8 B. & C. 717.

In an action for a breach of covenant to keep a house in repair, though the defendant may show generally in what state the premises were at the commencement of the term, and whether they were new or old, it is not competent to him to show it in matters of detail. *Mantz v. Goring*, 4 Bing. N.S. 451; *see ante*, p.305. If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170*l.* a-year, and afterwards an arrangement is made by parol that 30*l.* a-year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it, and therefore an allegation is correct which states it to be 170*l.* *Hilton v. Goodhind*, 2 C. & P. 591. In an action for rent of land verbally let, on the same terms as the former tenant's lease, such lease must be produced, properly stamped. *Turner v. Power*, 1 M. & M. 131.

If two agreements be executed, the assignee of the landlord cannot call upon the tenant to produce his part to be stamped. *Travers v. Collins*, 2 C. & J. 625; 2 Tyr. 726. Where a company let premises by feoffment, and they afterwards passed into other hands by bankruptcy of the lessees, it was held that evidence impeaching the company's title was admissible. *Doe d. Oliver v. Powell*, 3 Nev. & M. 616.

In an action for double value in holding over a room, in estimating the value the purpose for which the room was used cannot be included. *Robinson v. Learoyd*, 7 Mee. & W. 48.

Unless a tenant be found to take possession on the day of the demise, he may show he was ready to enter afterwards. *Edman v. Allen*, 6 Bing. N. S. 19.

In an action for Use and Occupation.—The mere fact of the plaintiff's ownership of the land, and of the defendant's occupation, is sufficient *primâ facie* proof to support the action. *Churchward v. Ford*, 2 H. & N. 446; 26 L. J. Ex. 354. *Hellier v. Silcox*, 19 L. J. Q. B. 295. But the inference of a contract to pay rent may be rebutted by showing that the occupation was adverse to the consent of the plaintiff, or that it was under a contract with a third person, or other circumstances inconsistent with such a contract being implied. *Cox v. Knight*, 18 C. B. 645. *Churchward v. Ford*, *supra*. *Turner v. Cameron Coal Co.* 5 Ex. 932. *Sloper v. Saunders*, 29 L. J. Ex. 275. *Levy v. Lewis*, 6 C. B. (N. S.) 766; 30 L. J. C. P. 141. *See post*, Use and Occupation.

LANDS Clauses Consolidation Act.

See vol. i. p. 456 ; also, *post*, Railways.

Assessment of Compensation under, and what Damages are Included.[1]

[1] The 8 & 9 Vic. c. 18 (*Lands* Clauses Consolidation Act, 1845), consolidates into one act certain provisions, to be thereafter incorporated into acts of parliament, relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made to the owners or occupiers of, or parties interested in, such lands, for any damage that may be sustained by them, by reason of the execution of the works authorised by statute. If the claim for compensation by such person is under 50*l.*, it is to be settled by two justices. (Sect. 22.) If it exceed 50*l.* the claimant may elect to have it settled by arbitration, or by the verdict of a jury. (Sects. 23, 24, 49.) If any party is entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which satisfaction has not been made, and the compensation claimed exceeds 50*l.*, such party may have the same settled by arbitration or the verdict of a jury, as he shall think fit. And if lands required or taken for the purposes of the undertaking, or injuriously affected thereby, are in the possession of a person having no greater interest therein than that of a tenant from year to year, and such person be required to give up possession of the whole, or of part of such lands, before the expiration of his interest therein, the amount of compensation is, if the parties differ, to be settled by two justices. (Sect. 121.) *Reg. v. Manchester, &c. Railway Co.* 4 E. & B. 103.

By the *Railways* Clauses Consolidation Act (8 & 9 Vic. c. 20, s. 6) it is enacted, that in exercising the powers given to the company to construct a railway, the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of a railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers vested in the company, the amount of compensation to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act.

The remedy provided by the statute must be pursued, and the party cannot resort to an action for damages. *Watkins v. Great Northern Railway Co.* 16 Q. B. 968. The sheriff's jury determine the amount of compensation, and not the right of the claimant to be compensated, which is a question for the court. *Reg. v. London & North-Western Railway Co.* 3 E. & B. 465. And their jurisdiction to award damages is restricted to such as flow from the exercise of the statutory powers. *Re Byles*, 11 Ex. 464; 25 L. J. Ex. 53. They ought to give compensation in respect of all the damage likely to arise out of the works of the company. See *Lee v. Milner*, 2 Mee. & W. 841.

Compensation is given in respect of the calculable damage caused or to be caused in or by the execution of the permanent works of the company authorised by the statute, such as obstructing ways, injuring lights, and not the prospective uncertain damage or injury which may or may not result from the use of the railway after it has been constructed. *Broadbent v. Imperial Gas Co.* 26 L. J. Ch. 281. Accordingly where, by agreement between a railway company and the landowner, it was referred to arbitration to ascertain the sum that was to be paid by the company for the purchase of part of the plaintiff's land required for the construction of the line, and as compensation for all injury and damage to his remaining estate by severance or otherwise, it was held that the compensation awarded related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, that it did not embrace contingent and possible damages which might arise afterwards, and which could not at the time have been foreseen by the arbitrator, and that the plaintiff was entitled, notwithstanding the award, to claim compensation for such damages. *Lawrence v. Great Northern Railway Co.* 16 Q. B. 643.

If the under-sheriff direct the jury to assess, and include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a *certiorari* lies, inasmuch as the jury have thus committed an excess of jurisdiction ; and the excess of jurisdiction may be shown by affidavits, and need not appear upon the face of the proceedings. *Re Penny*, 7 E. & B. 660 ; 26 L. J. Q. B. 225. *Reg. v. South Wales Railway Co.* 13 Q. B. 994. *Caledonian Railway Co. v. Ogilvy*, 2 Macq. 229.

If, after compensation made, an unforeseen damage occur, which is the natural and necessary result of the construction of the works, as, for example, the subsidence of an embankment from an accidental cause, the remedy of the landowner is, it appears, by proceeding under the Lands Clauses Act. *In re Ware*, 9 Ex. 402; 7 Rail. Ca. 780. *Glover v. North Stafford Railway Co.* 16 Q. B. 643. *London and North-Western Railway Co. v. Bradley*, 3 Mac. & G. 336. *Lancashire & Yorkshire Railway Co. v. Evans*,

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15 Beav. 332. But if the subsequent injury arise from want of skill or negligence in executing the works, or from the doing of a wrongful and unauthorised act, the remedy is by action. *Lawrence v. Great Northern Railway Co.* 16 Q. B. 643. *Wilkes v. Hungerford Market Co.* 2 Scott, 462; 2 Bing. N. C. 281. *Broadbent v. Imperial Gas Company*, 26 L. J. Ch. 280. *Blagrove v. Waterworks Co.* 1 H. & N. 385.

Where a statute provided that in case of dispute as to amount the same should be referred to arbitration, the court held that power was given to resort to arbitration only where the mere amount of compensation was disputed, and not in cases where the liability to make any compensation was denied. *Reg. v. Metropolitan Commissioners of Sewers*, 1 E. & B. 694.

Although the verdict of the jury and the judgment are declared to be records, they are not made records of any superior court, neither is there any provision for the issuing of any writ of execution for the purpose of enforcing them; the consequence is, that an action must be resorted to, or a *mandamus*, for recovering the amount. *Reg. v. London and N. W. Rail. Co.* 3 E. & B. 468. For form of declaration in such an action, see *Chapman v. Monmouth, &c. Railway Co.* 11 Ex. 267; 27 L. J. Ex. 97; Hodges on Railways, 404, 2d ed. The defendant may traverse the allegation of the land having been damaged or injuriously affected, &c., or may plead that it was not, and prove that the subject-matters of the claim submitted to the sheriff's jury were not within the statute. *In re Ware*, 9 Ex. 402; 7 Rail. Ca. 780. *Glover v. North Stafford Railway Co.* 16 Q. B. 643. *London and North-Western Railway Co.* 3 Mac. & G. 336. But he cannot set up that there was an excess of jurisdiction as to some part of the claim; as, for example, by proving that part of the damages was given in respect of an injury arising from the cutting off some water, to which the plaintiff had no legal title, although the matter might have been set right by *certiorari*, and the inquisition quashed. *Mortimer v. South-Western Railway Co.* 28 L. J. Q. B. 129. *Corrigan v. London and Blackwall Railway Co.* 5 Man. & G. 245.

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I. In General.

(A) *What may be the subject of Larceny.*[1]

(B) *Interpretation of Terms in Larceny Act.*[2]

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[1] Larceny at common law could only be committed of such things as were personal goods; things real, or which savoured of the realty, could not therefore be the subject of larceny at common law. 1 Hale, 510; 1 Hawk. c. 33, s. 35. Neither could choses in action, such as bonds, bills, &c., for they were esteemed of no intrinsic value (*Caley's case*, 8 Co. 33; 1 Hawk. c. 33, s. 35); or things in which no person had any determinate property, as treasure-trove, waifs, &c., or of animals *feræ naturæ*, such as deer, hares, and conies in a forest, chase, or warren. 1 Hale, 511; 1 Hawk. c. 33, s. 39. By statute these are, however, made the subject of larceny; and as the particular enactment in each case will hereafter be found under its appropriate head, further reference to them in this place is unnecessary. Wild fowls, rooks for instance, at their natural liberty, are not the subject of larceny.

Pigeons, if tame and reclaimed, may be subject of larceny, though not in a state of confinement, but living in an ordinary dovecot, which allows them free access to the open air. *R. v. Cheafor*, 21 L. J. M. C. 43.

[2] By 24 & 25 Vic. c. 96, "for Consolidating and Amending the Statute Law relating to Larceny,"—

"1. In the interpretation of this act the term 'document of title to goods' shall include any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to:

"The term 'document of title to lands' shall include any deed, map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate:

"The term 'trustee' shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, or an official manager, assignee, liquidator, or other like officer acting under any present or future act relating to joint-stock companies, bankruptcy, or insolvency:

"The term 'valuable security' shall include any order, exchequer acquittance, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined:

"The term 'property' shall include every description of real and personal property,

(*b*) *Distinction between Grand and Petty Larceny abolished.*[1]

(B) *Of the* Animus Furandi.[2]

money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise:

"For the purposes of this act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

[1] By 24 & 25 Vic. c. 96, s. 2, the distinction between grand larceny and petty larceny is for all practical purposes abolished. It is thereby enacted, that "every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects, as grand larceny was before the twenty-first day of June one thousand eight hundred and twenty seven; and every court whose power as to the trial of larceny was before that time limited to petty larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny."

[2] To constitute larceny the taking and carrying away must be felonious, that is, done *animo furandi*, or as the civil law expresses it, *lucri causa*. 4 Bl. Com. 232. The offence has been defined thus: "Where a man knowingly takes and carries away the goods of another without any claim, or pretence of claim, with intent wholly to deprive the owner of them, and to appropriate and convert them to his own use. If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home with his own flock and shear them, this is no felony, but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another." 1 Hale, 506.

Where a man, having the *animus furandi*, obtains, in pursuance thereof, possession of the goods, this is considered such a taking (even although there be a delivery in fact) as to constitute larceny. In cases of this description, the adoption of some trick or artifice is usually practised for the purpose of obtaining possession of the goods; and although that may be material in leading to the conclusion respecting the purpose for which the goods were obtained, yet such trick or artifice is not necessary, provided the *animus furandi* exist. *Rex v. Stock*, 1 R. & M. 87. *Rex v. Walsh*, 1 R. & R. 215. *Rex v. Parkin*, 1 R. & M. 45. *Rex v. Crump*, 1 Car. & P. 658. *Reg. v. Thompson*, 8 Jur. N. S. 1184.

Questions of mistake or carelessness must be left to the jury. As if A. should drive one of B.'s sheep with his own flock and shear it. It would be against him if he should have marked the animal with his own mark. 1 Hale, 507.

A poacher took a gun from the gamekeeper lest it should be used against him, and afterwards declared that he would sell it. In fact, the gun was not recovered. The question of intent was left to the jury, who negatived the intent, and the judge directed an acquittal. *R. v. Holloway*, 5 C. & P. 524. Where a person pretended to be a confederate in order to obtain the reward for apprehension: — *Held*, that this evidence negatived the felonious intention. *R. v. Dannelly*, R. & R. 310. Where the prisoner had taken some timber at sea, defaced the marks, and then given notice to the Receiver-general of the Droits of Admiralty, *Cresswell, J.*, left it to the jury to say whether the prisoner took the timber for his own use, or with a view of getting salvage. *R. v. Watts*, 1 Cox, 349.

Where a person stole certain articles, and also took a horse, not with intention to steal it, but merely to get off more conveniently with the property, this was held not to be a felonious stealing of the horse. *R. v. Crump*, *supra*. *Reg. v. Hore*, 3 F. & F. 315.

If cattle be distrained under colour of rent, though none be due, it may be a trespass, but is no felony. 1 Hale, 509. So, if I take an estray upon claim of right to it as lord of the manor, it is no felony, however groundless my claim may be. (Id.) If a servant take his master's horse without his knowledge, and bring him home again; if a man take his neighbour's plough that is left in a field, and use it upon his land, and then return it (Id. 509); or his horse from his stable to ride a journey, and then return it (*Reg. v. Holloway*, 1 Den. C. C. 370. See *R. v. Webb*, 1 Moo. C. C. 43); these may be trespasses, but are not felonies. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; for if it appear that he took the goods originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. *See* 1 Hawk. c. 34, s. 2; 1 Hale, 533.

A taking, though induced by the pressure of hunger or want, is felonious. 1 Hale, P. C. 565.

In the case of pawning goods, if the intention was obviously to restore, and there were reasonable grounds for supposing that the intent could be easily realised, the in-

(C) *Of the Taking.*[1]

tent to steal may be negatived. *R. v. Phetheon*, 9 C. & P. 552. *R. v. Wright*, Burn's J., by Chitt. 640. But although there might exist a desire, and even an intent, to redeem, when it can be done, *i.e.* generally, the larcenous conversion then attaches to the taking, because the intent must be positive, not conditional. And where the prisoner had redeemed some of the articles from pawn, the partial redemption was held to be no defence, and the case was left to the jury. *R. v. Medland*, 5 Cox, 292.

The prisoner, the captain of a Prussian vessel, which was captured by the English, broke open a place where some of the goods were and took them away:—*Held*, there was no evidence of a felonious intention, since he may have taken the property for the benefit of the owners. *R. v. Van Mayen*, R. & R. 118.

Where a letter containing a draft was delivered by the postman to a person other than him for whom it was intended, but of the same name, and he opened the letter thinking it was meant for him, and he appropriated the draft; a conviction for larceny of the draft was held bad, because there did not appear to be any *animus furandi* when he received the letter. *R. v. Mucklow*, 1 Moo. C. C. 160. *R. v. Davis*, 25 L. J. M. C. 91.

It is not, however, necessary that the taking should be *lucri causa*, if it is fraudulent and with intent wholly to deprive the owner of the property. Thus, where the prisoner, to screen his accomplice who was indicted for horse-stealing, broke into the prosecutor's stable and took away the horse, which he backed into a coal-pit and killed; these facts were held to support an indictment for larceny. *R. v. Cabbage*, R. & R. 292. See *R. v. Morfit*, R. & R. 397. *Reg. v. Gruncell*, 9 C. & P. 365. *Reg. v. Handley*, Car. & M. 547. *Reg. v. Privett*, 1 Den. C. C. 193; 2 C. & Kir. 114. *Reg. v. Jones*, 1 Den. C. C. 189; 2 C. & Kir. 286. And where the defendant was supplied by his master with pig-iron to be put into a furnace and melted, being paid according to the weight of the metal which ran out of the furnace into bars, and he put in also other iron belonging to his master, whereby the weight of the melted iron being thus increased he gained a larger remuneration, it was held, that if he did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. *Reg. v. Richards*, 1 C. & Kir. 532.

Where the prisoners, glove-finishers, took a quantity of gloves out of their master's store and placed them on a table with others they had finished for him, fraudulently claiming payment as having finished them all; it was held that they were not guilty of larceny, the prisoners having claimed no property in or lien on the goods. *Reg. v. Pool*, 27 L. J. M. C. 53. See *R. v Steer*, 2 C. & Kir. 988. *R. v. Stanbury*, 2 Cox, 272. *R. v. Barnes*, 5 id. 112. The prisoner borrowed a horse under the pretence of carrying a child to a surgeon; whether he did or did not carry the child did not appear, but on the day following, when the purpose of the borrowing must have been over, he sold the horse upon a request made to him. The jury found, that when he borrowed the horse he had no felonious intent, and the judges decided that the conviction could not be supported. *R. v. Banks*, R. & R. 441.

Where several conspired to cheat another by a fraudulent bet, and after inducing him to deposit his stake in the hands of a confederate duped him out of his money, the judges held it a felonious taking, because the prosecutor never intended to pay unless the wager had been really won, and by merely depositing his notes he only parted with the possession of them. *R. v. Robson*, R. & R. 413. *R. v. Pratt*, 1 Moo. C. C. 250.

Where the jury found that the prisoner, who had broken open a chest of plate deposited with him for safe custody, and had taken out some of the plate and pawned it, was guilty of larceny, but recommended him to mercy on the ground that they believed he intended ultimately to return the plate, the conviction was held good. *Reg. v. Trebilcock*, 27 L. J. M. C. 103. But where two persons went to receive money, and they bought a stamp, and one of them signed the receipt, but neither had possession of the receipt after it was signed; upon the pretence of fetching the cheque-book, C., who was deputed by his father to pay the money, took away the receipt:—*Held*, not larceny. *R. v. Frampton*, 2 C. & Kir. 47.

[1] There must be a taking, either actual or constructive, to constitute larceny. Actual, where the goods have been taken out of the owner's possession against his will, or without his consent. Constructive, where the owner delivers the goods, but either does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding such delivery, and if the person to whom he has so delivered them make away with them, and convert them to his own use, he will be guilty of larceny. 2 East, P. C. 683; 1 Hawk. c. 33, s. 2. For instance, if the owner give the goods to a man to carry, and accompany him at the same time, if the man run away with the goods he is clearly guilty of larceny. So, if a man have a bare use of the goods of another, this does not divest the owner of the possession in law; and if

the person who thus hath the use of them fraudulently convert them, it is larceny; as, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny, for he hath not the possession delivered to him, but merely the use. *See* 1 Hale, 506; 1 Hawk. c. 30, s. 6. For although there is a delivery of the goods by the owner, the possession in law in certain cases remains in him. Thus, if a servant who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law; because the goods at the time they are taken are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. 1 Hale, 506. *R. v. M'Mane*, 1 Moo. C. C. 36. *Reg. v. Harvey*, 9 C. & P. 353. *Reg. v. Jackson*, 2 Moo. C. C. 32. *Reg. v. Goode*, Car. & M. 582. *Reg. v. Jones*, id. 611. *Reg. v. Smith*, 1 C. & Kir. 423. *R. v. Robinson*, 2 East, P. C. 565. *R. v. Bass*, 2 id. 566. *R. v. Paradice*, id. 565. *Reg. v. Heath*, 2 Moo. C. C. 33. *R. v. Lavender*, 2 Russ. 160. *Reg. v. Beaman*, Car. & M. 595. *R. v. Abrahat*, 2 Leach, 824. *R. v. Spear*, id. 825; 2 East, P. C. 568. *R. v. Harding*, R. & R. 125. *R. v. Atkinson*, 1 Leach, 302. *R. v. Chipchase*, 2 id. 699. *R. v. Murray*, 1 id. 344. *R. v. Hammon*, R. & R. 221; 2 Leach, 1083; 4 Taunt. 304. And an unauthorised gift by the servant of his master's goods, is as much a felony as if he sold or pawned them. *Reg. v. White*, 9 C. & P. 344. If a sheriff's officer clandestinely sell for his own use part of the goods which he has seized under a *fi. fa.*, he is guilty of larceny, because he has the custody of the goods merely like a servant, and has not the legal possession. *R. v. Eastall*, 2 Russ. 197. *See* Embezzlement, vol. iv. p. 232. *Reg. v. Johnson*, 21 L. J. M. C. 32.

Where, by a delivery of the goods, not only the possession but the right of property also passes, no subsequent conversion by the person in whom the right of property has thus vested can be construed into larceny. *R. v. Parkes*, 2 Leach, 614; 2 East, P. C. 671. *R. v. Harvey*, 1 Leach, 467; 2 East, P. C. 669. So, where the servant of a pawnbroker delivered up a pledge to the pawnor upon receiving a parcel which he supposed contained diamonds, but which contained stones of no value:—*Held*, no larceny. *R. v. Jackson*, 1 Moo. C. C. 119. So, where the defendant sent to a hatter in the name of one of his customers for a hat, which was delivered to his messenger:—*Held*, no larceny. *R. v. Adams*, R. & R. 225. A. allowed B. to take a sovereign away to get change, B. never returned:—*Held*, no larceny. *Reg. v. Thomas*, 9 C. & P. 741. See *R. v. Coleman*, 8 East, P. C. 672. *R. v. Atkinson*, 2 id. 673. So, where money was obtained by sharpers inveigling the prosecutor to bet with them, one of them winning the money by a preconcerted trick, it was held not to be larceny. *R. v. Nicholson*, 2 Leach, 610. See *Reg. v. Rodway*, 9 C. & P. 784. *R. v. Aickles*, 2 East, P. C. 675. But where the defendant prevailed upon a tradesman to take goods to a particular place, under the pretence that the price would there be paid for them, and afterwards induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price; the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, *ab initio*, intended to get the goods without paying for them: this was held to be larceny. *R. v. Campbell*, 1 Moo. C. C. 179. See *R. v. Gilbert*, id. 185. But where the defendant, in the presence of the prosecutor, picked up a purse containing a watch-chain and two seals, which the defendant and his confederate represented to be gold, and worth 18*l.*, and the defendant purchased the defendant's share for 7*l.*, intending to part with the property in the money as well as the possession of it, *Coleridge, J.*, held this not to be larceny. *Reg. v. Wilson*, 8 C. & P. 111. *R. v. Horner*, 1 Leach, 270; Cald. 295. See *R. v. Robson*, R. & R. 413. And if a person, having ordered a tradesman to bring goods to his house, take out a certain quantity, ask the price of them, separate them from the rest, and then, by sending the tradesman home on the pretence of wanting other articles, take the opportunity of running away with the goods so looked out with intent to steal them, it is larceny; for as the sale was not completed, the possession of the property still remained in the tradesman. *Rex v. Sharples*, 1 Leach, 92; 2 East, P. C. 675. So, obtaining a horse under the pretence of hiring it for a day, and immediately selling it, is felony, if the jury find the hiring was *animo furandi*. *Rex v. Pear*, 1 Leach, 212. See *R. v. Banks*, R. & R. 441. *R. v. Semple*, 1 Leach, 409. And the same holds where the horse is hired in the name of another person. *R. v. Charlewood*, 1 Leach, 209; 2 East, 689. So, where the prisoner went to an inn on a fair-day and desired the hostler to bring out his horse, and upon the latter saying he did not know which was his horse, went into the stable, and pointing out a mare, said it was his; and he ordered the horse to be taken from the stable, which was done: this was held to be larceny. *R. v. Pitman*, 2 C. & P. 423. See *Reg. v. Sheppard*, 9 id. 121. *R. v. Longstreth*, 1 Moo. C. C. 137. And if a man *animo furandi* sue out a replevin, and by that means obtain the possession of another man's horse and ride away with it, or by a fraudulent ejectment get possession of another's house and carry away the goods out of it, he is guilty of larceny. 1 Hale, 507; 1 Hawk. c. 33, s. 12; 3 Inst. 108. See *R. v. Fair*, Kel. 43; 2 Leach, 1064, n. Obtaining goods by false pretences from the servant of the owner, to whom they were delivered for the purpose of being delivered to a customer, who had purchased them, is a taking from the possession of the master, and if so taken with a preconceived design to steal them,

amounts to felony. *Rex v. Wilkins*, 1 Leach, 520; 2 East, P. C. 673.

A watchmaker, induced by a fraudulent letter from the prisoner, sent down a customer's watch which he had had to regulate, by post, to a place named in the letter, addressed to the customer. The prisoner, representing himself to be the customer, went to the place and obtained the watch from the postmaster: it was held that he was guilty of larceny, as the special property of the watchmaker, if he had any, ceased when he delivered the watch to the postmaster, and the postmaster had no special property in it, but was only a servant of the true owner, from whose possession, therefore, it was taken. *Reg. v. Kay*, 26 L. J. M. C. 119.

The prisoner, by making use of a false name, obtained some teas which belonged to another person, from a carrier's servant, who had no authority to deliver them to any one except the right owner: it was held to be larceny. *R. v. Longstreeth*, 1 Moo. C. C. See *R. v. Robins*, Dears. 318. And where a gipsy woman, by tricks and menaces, got possession of property, and it was found she had no intention of returning any part of the property, this was held larceny, for the possession only, and not the property, was severed. *R. v. Bance*, 1 F. & F. 523. See *R. v. Morgan*, Dears. 395.

Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on circumstantial evidence, and to be left to the jury's decision. Thus, if two men take horses from a common, and ride with them a considerable distance, then leave them at inns with directions to feed and take care of them, and afterwards are taken walking still further in the country, it will be left to the jury whether they intended to return and remove the horses, or to leave them there for their own purposes, having used them: for if they find the former, it will be felony; if the latter, trespass.

If the original taking be wrongful, though not felonious, a subsequent felonious appropriation may be larceny. *Reg. v. Riley*, 22 L. J. M. C. 48.

If a man take his own goods it is no larceny, unless they be in the hands of a bailee, and the taking of them have the effect of charging the bailee. Thus, if there be joint tenants, or tenants in common, of a personal chattel, and one of them carry away and dispose of it, this is no larceny. 1 Hale, 513. Yet, where a member of a benefit society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, this was held to be a larceny, the bailee being answerable to the society for the funds. *R. v. Bramley*, R. & R. 478. *R. v. Wilkinson*, id. 470.

If a man lose his goods, and another find them, and, not knowing the owner, convert them to his own use, this is said to be no larceny (3 Inst. 108; 1 Hawk. c. 33, s. 2), even although he deny the finding of them, or secrete them. 1 Hale, 506. This doctrine, however, can only apply where the finder *bonâ fide* believes the goods to have been lost or abandoned by the owner, and not to a case in which he colours a felonious taking under that pretence. 1 Hale, 506; 2 East, P. C. 664. *Reg. v. Kerr*, 8 C. & P. 176. *Reg. v. Reed*, C. & M. 306. *Reg. v. Peters*, 1 C. & Kir. 245. *Reg. v. Mole*, id. 417. And to raise this question, the property must have been lost. Thus, where a purchaser, by mistake, left his purse on the prisoner's market-stall, without himself or the prisoner knowing it, and the prisoner afterwards seeing it there, but not at the time knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner, it was held that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and that no question, such as arises in the case of the finding of lost property, could be raised. *Reg. v. West*, 24 L. J. M. C. 4.

If a person picks up a thing where he knows he can immediately find the owner, and, instead of restoring it to the owner, converts it to his own use, this is a larceny. *Rex v. Pope*, 6 C. & P. 346. So, if a person finds a lost article which is so marked as to enable him to find the true owner, and appropriates it to his own use, the question for the jury is not whether at the time he appropriated he knew, or had the means of knowing the owner, but whether, at the time he took it into his possession with such knowledge or means of knowing the owner, he had the intention of appropriating it. *Reg. v. Preston*, 21 L. J. M. C. 41.

Where the prisoner found a note accidentally dropped on the highway; there was no name or mark upon it whereby the owner could at the time be ascertained, nor did the prisoner then know who the owner was, or that there were any means whereby he could be ascertained; the jury found that he meant to take it for his own use when he picked it up. The next day he was made acquainted with the name of the owner, and after such knowledge he changed the note and appropriated the money. It was held that he could not be convicted of larceny: for when a man finds lost property, and appropriates it under the idea that the owner cannot be found, it is not larceny to take it; but if the taker entertains the idea at the time that the owner may be found, then the *animus furandi* attaches. *R. v. Thurborn*, Den. 387; 2 C. & Kir. 831; 18 L. J. M. C. 140.

When a person finds a purse on the highway, and appropriates it to his own use, the question for the jury is whether he does it at the time with a felonious intent, and that depends on whether at that time he knows who the owner is, or has the means of knowing him by reason of the marks on the article indicating the owner. But the finder is not guilty of felony merely because, when afterwards learning who the owner is, he

fails to make restitution, and fraudulently retains the property. *Reg. v. Christopher*, 28 L. J. M. C. 35. *Reg. v. Dixon*, 25 id. 39. See *Reg. v. Davis*, id. 91. *Reg. v. Gardiner*, 7 L. T. (N. S.) 471.

Where a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was held to be larceny. *Cartwright v. Green*, 8 Ves. 405; 2 Leach, 952.

In an indictment for stealing a 10*l.* note, the jury found that the prisoner had dropped the note in the prosecutor's shop; that the prisoner had found it there; that the prisoner, at the time he picked it up, did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use; that the prisoner intended, when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever the owner might be; and at the time he picked up the note he believed that the owner could be found. It was held that he was guilty of larceny. *R. v. Moore*, 30 L. J. M. C. 77.

It is not an excuse that the property was deposited in an unusual place, as where the master hid his purse in a corn-mow, and the servant found it, if there be circumstances to denote a felonious taking. 1 Hale, 507; East, P. C. 644.

The question of knowledge is an important ingredient in these cases (*R. v. Pope*, 6 C. & P. 346), as where a servant picked up notes in the passage of her master's house. *R. v. Kerr*, id. But if a man picks up a purse in the turnpike-road he cannot know whose it is, and he is not guilty of larceny in appropriating it (*R. v. Mole*, 1 C. & Kir. 417), unless there were some obvious marks upon it, or it was claimed on the instant. Id. See *R. v. Scully*, 1 Cox, 189. *R. v. Coffin*, 2 id. 44.

Where an ignorant person found a 5*l.* note, and used it, the judge put it to the jury whether she did not believe that the note was hers by the right of finding, and directed that, if they thought such to be her belief, they should acquit her. *R. v. Reed*, Car. & M. 306. And where a person had purchased a bureau at a sale, and found in a drawer a purse of money, which he applied to his own use; it was held that the purchaser would have been guilty of larceny if he had express notice that the bureau was sold alone without the contents. *Merry v. Green*, 7 Mee. & W. 623.

The stealing must be traced to the finding. Where the jury found a verdict, "Not guilty of stealing, but guilty of keeping possession in hope of reward from the time he found the watch," the judges held that this was no original stealing, and that the verdict ought not to have been recorded. *R. v. York*, Den. 335; 2 C. & Kir. 841; 18 L. J. M. C. 38. But if there be evidence to show that the prisoner, knowing or having reason to know the owner at the time of finding, determined not to return the property without a reward, he must be taken to have had the *animus furandi*, and to be guilty of larceny. *R. v. Spurgeon*, 2 Cox, 102. *R. v. Peters*, 1 C. & Kir. 245. See *R. v. Preston*, 21 L. J. M. C. 41; Den. & P. 353. *R. v. Moore*, 30 L. J. M. C. 77.

It has been said that there must be a felonious intent at the time of finding, and the means of discovering who the owner is immediately. 5 Cox, 25: *per Hill, J.*

If a trunk be left in a cab, and the driver know the house at which he set down the person by whom it was left, if he convert it, that will be larceny. *R. v. Lamb*, East, P.C. 664. See *R. v. Wynne*, Leach, 413. *R. v. Austin*, East, P. C. 664. So, the servant of a railway company appropriating luggage left by mistake. *R. v. Pierce*, 6 Cox, 117.

A boy found a cheque; the prisoner, by a pretence, got it from him, and retained it in hopes of getting a reward; but the owner not offering a sufficiently large reward, he refused to deliver it either to the owner or the boy:—*Held*, not larceny. *Reg. v. Gardner*, 32 L. J. M. C. 35.

The prisoner drove a lamb by mistake, in company with his own lambs, out of a field; this act the judges held to be a trespass. He discovered his error, sold the lamb, and appropriated the proceeds. The trespass became felonious as soon as the mistake was discovered, for the *animus furandi* then took place, and the original taking was not lawful. *R. v. Riley*, Dears. C. 149. So, if a man finds an animal straying, and takes it with intent to convert it, he is guilty of larceny. *R. v. Cook*, 2 Russ. C. & M. 12; Dears, 154.

As a wife cannot be guilty of larceny in taking her husband's goods, a stranger who does no more than assist the wife, though her intent may have been wrongfully to deprive her husband of the property, cannot be guilty of larceny. *Reg. v. Avery*, 29 L. J. M. C. 185. But if a stranger steal the goods of the husband, and the wife is privy and consenting to the taking, such privity and consent will not exonerate him from a charge of larceny if he had an *animus furandi*; as, where a married woman eloped with the defendant, and took a quantity of goods of her husband, such as carpets, &c., which he had previously packed up to be ready for transportation, it was held that he was guilty of larceny. *Reg. v. Berry*, 28 id. 70.

If a wife commit adultery, and then steal the goods of her husband with the adulterer, she has determined her quality of wife, and is no longer looked upon as having any property in the goods, and the person who assists her is guilty of larceny. *Per Lord Campbell, C.J.: Rex v. Featherstone*, 23 L. J. M. C. 127; 1 Russ. on Crimes, 23.

If a woman steal the goods of her husband and give them to her adulterer, who knowing it, carries them away, the adulterer, it is said, is guilty. *R. v. Tolfree*, 1 Moo.C.C. 243. *Reg. v. Tollett*, C. & M. 112. But see *R. v. Clark*, R. & R. 376, n. But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his

(D) *Of the Carrying Away.*[1]

(E) „ *Larceny by Bailees.*[2]

home, merely upon evidence of their being there, unless they be traced to his personal possession. *Reg. v. Rosenberg*, 1 C. & Kir. 233.

And where the only articles taken were articles of wearing apparel of the wife, which were taken away by the wife herself, it was held that there was no evidence to support an indictment of larceny against a man with whom she eloped. *Reg. v. Fitch*, 26 L. J. M. C. 169.

[1] There must be a taking, either by the hand of the party or by procuration (1 Hawk. 33; East, 555); and it may be openly or clandestinely, or by fraud. East, 554. But it will not be sufficient to lay hands on the property, unless it be likewise entirely removed from its original position. This is the asportation, as where the thief took plate out of a trunk, and laid it on the floor, but, being surprised, left it there. Kel. 31. So, where a guest took articles out of his room, and placed them in the hall, this was a carrying away. 27 Ass. 39. So, moving a parcel from one end of a waggon to the other. *R. v. Coslet*, Leach, 236. *Reg. v. Wallis*, 3 Cox, 67.

The prisoner, being on the box of a coach, took hold of the upper part of a leathern bag placed in the front boot, and attempted, with the assistance of a confederate, to pull it out of the boot, but was stopped by the guard:—*Held*, an asportation. *Reg. v. Walsh*, 1 Moo. C. C. 14.

Drawing a sword partly out of the scabbard, will constitute a complete asportation. 2 Russ. C. & M. 6. *Reg. v. Wilkinson*, 1 Hale, 508; East, P. C. 556. *Reg. v. Newman*, 2 Russ. C. & M. 6. But where the defendant merely set a package on end in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose, this was held not sufficient. *R. v. Cherry*, 2 East, P. C. 506.

If a thief cuts a belt to which a purse is hung, and it drops to the ground, where he leaves it; or if he compels a man to lay down goods which he is carrying, and is apprehended as he raises them from the ground, the crime is incomplete. *See* 1 Leach, 322, n.; 1 Hale, 533.

The opening of the stop-cock of a connecting gas-pipe, and letting the gas pass out of the entrance-pipe into it, sufficiently severs a portion of the gas to constitute an asportation. *Reg. v. White*, 22 L.J.M.C. 123.

Where a post-office letter-carrier, instead of delivering a letter containing money, put it in his pocket, where it was found unopened, it was held that there had been a sufficient taking to support a conviction for larceny. *Reg. v. Poynton*, 32 L. J. M. C. 29.

[2] 24 & 25 Vic. c. 96, s. 3. "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction."

Where the prisoner, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and instead of doing so sold them, the judges held this to be felony. *Rex v. Bass*, 2 East, P. C. 566.

The prisoner, who was foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the day-time, received from his master a bill of exchange, with directions to send it enclosed in a letter to J. S., in London; the defendant absconded with the bill: — *Held* to be a felony. *Rex v. Paradice*, id. 565.

A. sent his servant to a railway station to purchase a quantity of coals for him. The wharfinger at the station, on the servant's application on behalf of his master, weighed the coals out, and entered them against N.'s name in his book. The coals were then put into N.'s cart, and the servant drove it off, it being his duty to take the coals to his master's house. On his way home, the servant improperly appropriated some of the coals to his own use, and deposited them at another person's house; it was held that the servant's original exclusive possession of the coals was determined, and his master's constructive possession of them commenced when they were deposited in the master's cart, consequently that the servant, by afterwards taking them, committed a trespass, and was guilty of larceny. *Reg. v. Reed*, 23 L. J. M. C. 25.

A person who holds money for another under an obligation to give back the amount deposited at a specified time, but who is not bound to return the specific coins which he has received, is not indictable as a bailee. *Reg. v. Hassell*, 31 id. 175.

Where a person in the employment of a savings' bank received a cheque, which he afterwards cashed as the agent of the depositor, and not as the agent of his employers, it was held that he could not be indicted for stealing it. *Reg. v. Essex*, 27 id. 20. *Reg. v. Loose*, 29 id. 132.

Although a married woman cannot enter into a contract of bailment, she may, it seems, become a bailee by license, so as to be chargeable with larceny in case of a felonious conversion. *Reg. v. Robson*, 31 id. 22; 9 Cox, 29; 8 Jur. N. S. 64.

Where goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of the bailor or bailee. 2 Hale, 881. *R. v. Remnant*, R. & R. 136. *R. v. Wymer*, 4 C. & P. 391. *R. v. Todd*, 2 East, P. C. 658. *R. v. Taylor*, 1

(F) *Of a Second Offence after a previous Conviction.*[1]

Leach, 356. *R. v. Statham*, id. *Reg. v. Ashley*, 1 C. & Kir. 198. *R. v. Deakin*, 2 East, P. C. 653. *R. v. Packer*, 1 Leach, 357. *R. v. Woodward*, 2 East, P. C. 653. *Reg. v. Bird*, 9 C. & P. 44. *Reg. v. Vincent*, 2 Den. C. C. 464; 2 Hale, 181; 1 id. 513; 2 East, P. C. 652; 1 Hawk. c. 33, s. 47.

Where a bailor steals his own goods from his bailee, they must be described as the goods of the bailee. *R. v. Wilkinson*, R. & R. 470. *R. v. Bramley*, id. 478. *Leekey v. Webster*, 9 Cox, C. C. 13.

If it should appear that the person named as owner is merely servant to the real owner, the defendant must be acquitted unless the indictment be amended. *R. v. Hutchinson*, R. & R. 412; 2 East, P. C. 652. See *Reg. v. Green*, 1 Dears. & B. 113. *R. v. Adams*, R. & R. 225. But it has been said, that if the money has never been in the possession of the master, it should be laid as the property of the servant. *Reg. v. Rudick*, 8 C. & P. 237.

[1] 24 & 25 Vic. c. 96, s. 116. "In any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places, convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence, or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence."

By sect. 7, "whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment, or under the provisions of the act passed in the session held in the 18th and 19th years of Queen Victoria, c. 126, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

By sect. 8, "whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this act, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

By sect. 9, "whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the act of the session held in the 7th and 8th years of King Geo. 4, c. 29, or the act of the same session, c. 30, or the act of the 9th year of King Geo. 4, c. 55, or the act of the same year, c. 56, or the act of the session held in the 10th and 11th years of Queen Victoria, c. 82, or the act of the ses-

sion held in the 11th and 12th years of Queen Victoria, c. 59, or in sections 3, 4, 5, and 6 of the act of the session held in the 14th and 15th years of Queen Victoria, c. 92, or in this act, or the act of this session, intituled, 'An Act to Consolidate and Amend the Statute Law of England and Ireland relating to Malicious Injuries to Property' (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions, or either of them, shall have been or shall be before or after the passing of this act), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

[1] The presumption of guilt arising in the case of recent possession varies in strength according as it is nearer or more remote to the time of the theft and other circumstances. East, P. C. 657. Thus, where two ends of woollen cloth of twenty yards each, in an unfinished state, were found upon the prisoner in the same state two months after the theft, the possession was deemed sufficiently recent to call upon him for his defence, by reason of the nature of the property. *R. v. Partridge*, 7 C. & P. 551.

If, however, notwithstanding many months have elapsed since the theft, yet if the prisoner claim an article found on him, and say he has bought it, and further disputes the identity of the thing found upon him with that lost, he must, it has been said, account for the possession. *R. v. Evans*, 2 Cox, 270. And if he give an account when before the magistrate, and refer to some known person, the magistrate ought, if possible, to call that person before him, for his evidence would either exonerate the prisoner or show that the prisoner has given a false account. *R. v. Smith*, 2 C. & Kir. 207: *per Lord Denman, C. J.* See *R. v. Crowhurst*, 1 id. 370. But this is not necessary if the account is improbable or unreasonable. *R. v. Harmer*, 2 Cox, 487. *R. v. Wilson*, Dears. & B. 157; 26 L.J.M.C. 45. *Reg. v. Smith*, 3 F. & F. 123.

On a charge for stealing sheets found on the prisoner's bed after three calendar months, *Wightman, J.*, left the matter to the jury. *R. v. Hewlett*, 2 Russ. & M. 278. And where six months had elapsed between the theft and the finding of a shovel in the prisoner's house, the prisoner not being at home when the shovel was found, the court would not call upon him for his defence. *R. v. Cruttenden*, 6 Jur. 267. See *R. v. Harris*, 8 Cox, 333. *R. v. Cooper*, 3 C. & Kir. 318; 16 Jur. 78. *R. v. Collier*, 4 Jur. 703.

[2] By 24 & 25 Vic. c. 96, s. 91, "whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping: Provided that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

By sect. 92, "in any indictment containing a charge of feloniously stealing any property it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof, knowing the same to have been stolen, and in any indictment for feloniously receiving any property knowing it to have been stolen it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same or any part or parts thereof, knowing the same to have been stolen."

By sect. 93, "whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of, in such a manner as to amount to a felony, either at common law or by virtue of this act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged

with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

By sect 94, "if upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property."

By sect. 95, "whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

By sect. 96, "whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property."

By sect. 97, "where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable."

By sect. 98, "in case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be indicted and punished as a principal offender."

By sect. 99, "whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this act made liable."

If the indictment allege the goods to have been stolen by A. B., it must be so proved (*R. v. Woolford*, 1 M. & Rob. 384); but a variance would be amendable. The indictment may charge the larceny to have been committed by persons to the jurors unknown. See *R. v. Bush*, R. & R. 372. *R. v. Caspar*, 2 Moo. C. C. 101; 9 C. & P. 289. The defendant may be convicted both on a count charging him as an accessory before the fact, and on a count for receiving. *Reg. v. Hughes*, Bell, C. C. 242. Where three persons were charged with larceny, and two others as accessories in separately receiving portions of the stolen goods, and the indictment contained also two other counts, each of them charging one of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods, it was ruled that, though the principals were acquitted, the receivers might be convicted on the last two counts of the indictment. *Reg. v. Pulham*, 9 C. & P. 280. See *Reg. v. Hayes*, 2 M. & Rob. 156. *Reg. v. Huntley*, 1 Bell, C. C. 238.

The larceny of the goods must be proved. The principal felon is a competent witness to prove both the larceny and the receiving (*R. v. Haplam*, 1 Leach, 418), but his confession is not receivable (*R. v. Turner*, 1 Moo. C. C. 347), unless assented to by the receiver when made. *R. v. Cox*, 1 F. & F. 90. If the exclusive possession of the goods remain in the thief, a conviction for receiving cannot be supported. *Reg. v. Wiley*, 2 Den. C. C. 37. A person having a joint possession with the thief may be convicted as a receiver (*Reg. v. Smith*, Dears. C. C. 494), but not a principal in the first degree. *Reg. v. Perkins*, 2 Den. C. C. 459; 21 L. J. M. C. 152. The goods being found in defendant's possession is presumptive

II. Of the Indictment.

(A) *Form of.*[1]

(B) *Of the Venue.*[2]

(C) *Joint Indictment of Receivers, &c.*[3]

evidence of the fact, and he need not have the actual manual possession or touch of the goods if they are in the possession of a person over whom he has control. *Reg. v. Smith, supra.* See *R. v. Dyer*, 2 East, P. C. 767. *R. v. Attwell*, id. 768.

If a husband, knowing that his wife has stolen certain goods, receive them from her, he may be convicted of receiving goods knowing them to have been stolen. *Reg. v. M'Athey*, 32 L. J. M. C. 35. *Reg. v. Deer*, id. 33. But where husband and wife were indicted jointly for receiving, and the jury found both guilty, and found also that the wife received the goods without the knowledge or control of the husband, and apart from him, and that he afterwards adopted his wife's receipt, it was held that this finding did not warrant the conviction of the husband. *Reg. v. Dring*, 1 Dears. & B. 329. *Reg. v. Woodward*, 9 Cox, C. C. 95; 31 L. J. M. C. 91.

It may be shown that the defendant knew that the goods were stolen, directly by the evidence of the principal felon, and circumstantially by proving that the defendant bought them very much under their value (1 Hale, 619), or denied their being in his possession, or the like. Other instances of the defendant's receiving goods of the prosecutor from the same person may, it seems, be shown for this purpose. *R. v. Dunn*, 1 Moo. C. C. 146. *R. v. Davis*, 6 C. & P. 177. *Reg. v. Dolan*, Dears. C. C. 463, overruling *R. v. Lyons*, Car. & M. 217.

If the goods stolen have been altered, *e.g.* if a sheep, the subject of the larceny, has been killed, and part of the mutton received, it should be described by the altered denomination in the indictment. *R. v. Cowell*, 2 East, P. C. 617. *R. v. Walkley*, 4 C. & P. 132.

[1] *Form of Indictment.*

—— } The jurors for our Lady the Queen
to wit. } on their oath present that J. S. on the day of in the year of our Lord three pairs of shoes, one shirt, and one waistcoat, of the goods and chattels of J. N. feloniously did steal, take, and carry away; against the peace of our Lady the Queen, her crown and dignity.

[*If the defendant has been guilty of other distinct acts of stealing (not exceeding three) committed by him against the same person within the space of six calendar months, one or two other counts (as the case may be) may be added.*]

[2] By 24 & 25 Vic. c. 96, s. 114, "if any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part."

By sect. 115, "all indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined, in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence or for being an accessory to any such offence the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas:' Provided, that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

Where a larceny is committed in one county, and the thief at any distance of time carries the goods into another county, in contemplation of law he is guilty of not only a carrying away, but also a taking in every county through or into which the goods have been carried by him. *R. v. Parkin*, 1 Moo. C. C. 405; 1 Hale, 507; 1 Hawk. c. 33, s. 52; 3 Inst. 113.

[3] If upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property. By 14 & 15 Vic. c. 100, s. 14,—"And whereas it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony or receivers at different times of stolen property,

(D) *Statement of Offence.*[1]

(E) *Description of Property.*[2]

(F) *Allegation as to Ownership of Property.*[3]

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the subject of such felony, may be in custody and amenable to justice: for the prevention of several trials be it enacted, that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

[1] "If upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as in law to amount to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, and no person so tried for larceny is liable to be afterwards prosecuted for embezzlement on the same facts." 14 & 15 Vict. c. 100, s. 13.

Although under the statute a person indicted of stealing may be convicted of embezzlement, yet he cannot be convicted of stealing, if there is only evidence of embezzlement. *Reg. v. Gorbutt*, 26 L. J. M. C. 47.

[2] By 14 & 15 Vic. c. 100, s. 18, "in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved; and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin, or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly."

Bank-notes are such within the meaning of the statute, although they have never been put in circulation, and may be described as money. *Reg. v. West*, 26 L.J.M.C. 6.

It seems that if, upon an indictment for stealing sovereigns and half-sovereigns, the jury find that the prisoner stole either sovereigns or half-sovereigns, but they cannot say which, they ought to acquit him. *Reg. v. Bond*, 19 id. 138.

The species of goods must be proved as laid, and a variance in this respect will be fatal, unless amended under 14 & 15 Vic. c. 100, s. 1. *See* Amendment, vol. i. p. 323; Indictments, *ante*, p. 105. But it is sufficient if it be proved that the defendant stole some only of the goods alleged. A description of goods by the name in which they are known in trade is sufficient. R. & R. 25. See *Reg. v. Smith*, 21 L. J. M. C. 111.

An indictment for stealing "a ham of the value of 10s." &c., was held good. *Reg. v. Gallears*, 19 id. 13.

[3] It must be proved upon the trial that the goods stolen are the absolute or special property of the person named in the indictment. If he be misnamed, if the name there stated be not either his real name or the name by which he is usually known, or if it appear that the owner of the goods is another and different person from him thus named as such in the indictment, the variance, unless amended, will be fatal, and the defendant must be acquitted. Arch. Cr. Law, 278, 15th ed. *See post*, Name.

It is sufficient if the prosecutor be described by the name by which he is generally known. *R. v. Norton*, R. & R. 510. *R. v.* ——, 5 C. & P. 408. *R. v. Berriman*, 5 id. 601. And a misspelling, if the name be *idem sonans*, will be immaterial (*Williams v. Ogle*, 2 Stra. 889. *Ahitbol v. Beniditto*, 2 Taunt. 401. *R. v. Foster*, R. & R. 412. *Reg. v. Wilson*, 1 Den. C. C. 284. *R. v. Tannet*, R. & R. 351. *R. v. Shakespeare*, 10 East, 83. *Bingham v. Dickie*, 5 Taunt. 814), and whether it be, is a question for the jury. *Reg. v. Davis*, 2 Den. C. C. 231.

The goods of a married woman should be laid in her husband (*R. v. Roberts*, 7 C. & P. 485. *R. v. Swallow*, 2 Cox, 63), even though she be living apart from him upon an income arising from property vested in trustees for her separate use. *R. v. French*, R. & R. 491. See *R. v. Wilford*, id. 517.

Goods let with a ready-furnished lodging must be described as the goods of the lodger. *R. v. Belstead*, R. & R. 411. *R. v. Brunswick*, 1 Moo. C. C. 26. But if stolen by the lodger, they may be described as the property of the owner or person letting to hire. *R. v. Healey*, 1 Moo. C. C. 1.

Clothes furnished by a father to his child may be described either as the property of the father or of the child. *R. v. Hayne*, 12 Co. 113; 2 East, P. C. 654. *R. v. Forsgate*, 1 Leach, 463. *R. v. Hughes*, Car. & M. 593. *Reg. v. Webster*, 31 L.J.M.C. 17; 9 Cox, 13.

Where goods are vested in a body not incorporated, they must not be described as the property of the body, but of the indi-

(G) *Several Counts for distinct Acts of Taking.*[1]

III. Of Particular Larcenies.

(A) *Stealing Horses or Cattle, &c.*[2]

(B) *Killing Animal with intent to Steal the Carcase.*[3]

(C) *Stealing Deer.* *See* Deer, vol. iv. p. 31.

(D) „ *Hares or Rabbits.*[4]

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viduals who constitute it, or some of them, as in the case of partners, trustees, and joint-stock companies not incorporated *R. v. Sherrington*, 1 Leach, 513. *R. v. Beacall*, 1 Moo. C. C. 15. *R. v. Boulton*, 5 C. & P. 537. But when the goods of a corporation are stolen, they must be laid to be the property of the corporation in their corporate name, and not in the names of the individuals who compose it. *R. v. Patrick*, 2 East, P. C. 1059; 1 Leach, 253. *See* further, Indictments, *ante*, p. 105.

If articles are stolen after the death of the owner, and he has made a will, the property may be laid in the ordinary until the will is proved. *Reg. v. Johnson*, 27 L. J. M. C. 52.

It is sufficient in an indictment for stealing the effects of a joint-stock banking company to allege the property stolen to belong to one of the partners named, and others, under the 7 Geo. 4, c. 64, s. 14. *R. v. Pritchard*, 30 L. J. M. C. 169.

Iron stolen from a canal while the water was out, and which had probably fallen from some barge, was held properly to be laid as the property of the proprietors of the canal. *Reg. v. Rowe*, 28 id. 130.

[1] By 24 & 25 Vic. c. 96, s. 5, "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them."

By sect. 6, "if, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such taking."

Before the above enactment (*see* 14 & 15 Vic. c. 100, ss. 16, 17), where several articles were mentioned in the indictment, the prosecutor must have proved that they were all taken at the same time, or at several times so near to each other as to form parts of one continuing transaction; otherwise the court would have put the prosecutor to elect for which act of larceny he would prosecute. *R. v. Smith*, R. & M. 296. See *R. v. Ellis*, 6 B. & C. 145. But he would not be put to such election if, from anything appearing in the case, it were not impossible that all might have been taken at the same time. *R. v. Dunn*, 1 Moo. C. C. 146. *Reg. v. Henley*, 2 M. & Rob. 524.

[2] 24 & 25 Vic. c. 96, s. 10. "Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

If the animal stolen be specifically mentioned in the statute, it must be described and proved to be of that particular description, for the enumeration of the several kinds contradistinguishes the one from the other. Thus, where both cows and heifers were mentioned in the statute, an indictment for stealing a cow was held not supported by evidence of stealing a heifer. *R. v. Cooke*, 2 Leach, 405; 2 East, P. C. 616. So, where it was sheep in the indictment, and lambs in proof. *R. v. Loom*, 1 Moo. C. C. 160. So, where it was sheep in the indictment, and ewes in proof. *R. v. Puddifoot*, id. 247. See *R. v. Birket*, 4 C. & P. 216. But it is now held that an indictment which describes a thing by its general term is supported by proof of a species clearly comprehended within its description. *Reg. v. Spicer*, 1 Den. C. C. 83, n. *Reg. v. M'Culley*, 2 Moo. C. C. 34.

[3] 24 & 25 Vic. c. 96, s. 11. "Whosoever shall wilfully kill any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony."

[4] By sect. 17, "whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be in-

(E) *Stealing Dogs.* *See* vol. iv. p. 121.

(F) „ *Beasts or Birds ordinarily kept in Confinement, and not the subject of Larceny at Common Law.*[1]

(G) *Stealing Fish in private Fishery.* *See* vol. iv. p. 473.

(H) „ *or Destroying Bonds, Bills, Notes, &c.*[2]

closed or not, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, take or kill any hare or rabbit in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet: Provided that nothing in this section contained shall affect any person taking or killing in the daytime any rabbits on any sea-bank or river-bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank."

Catching a rabbit in wires, is a "taking" within the statute, although it has not been carried away. *R. v. Glover*, R. & R. 269.

[1] 24 & 25 Vic. c. 96, s. 21. "Whosoever shall steal any bird, beast, or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast, or animal, with intent to steal the same or any part thereof, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the bird, beast, or other animal, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit."

By sect. 22, "if any such bird, or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal, or any part thereof, shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner thereof; and any person in whose possession or on whose premises such bird, or the plumage thereof, or such beast, or the skin thereof, or such animal, or any part thereof, shall be so found (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is a part of a stolen animal), shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section."

By sect. 23, "whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds." *See* vol. i. p. 358.

[2] By sect. 27. "whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security."

The bill or other security must be of the description specified in the statute. See *R. v. Craven*, R. & R. 14. *R. v. Chard*, id. 488. *R. v. Astlett*, 2 Leach, 954. *R. v. Hart*, 6 C. & P. 106. *R. v. Clark*, R. & R. 181; 2 Leach, 1036. *Reg. v. Perry*, 1 Den. C. C. 69; 1 C. & Kir. 725. *R. v. Vyse*, 1 Moo. C.C. 218.

Where the prosecutor was compelled by duress to sign a promissory note, which had been previously prepared by the defendant, who produced it, and withdrew it again as soon as it was signed, the majority of the judges held that it was not a case within the statute. *R. v. Phipoe*, 2 Leach, 673. See *R. v. Edwards*, 6 C. & P. 515. *Reg. v. Smith*, 2 Den. C. C. 449.

The halves of bank-notes, if stolen, should be described as goods and chattels. *R. v. Mead*, 4 C. & P. 535.

A cheque on a banker, written on unstamped paper, payable to A. B., and not made payable to bearer, has been held not to be a valuable security within the statute. *R. v. Yates*, 1 Moo. C. C. 170. But it is not necessary that a bill should be indorsed by the payee so as to be in a negotiable state. *Anon.* 2 East, P. C. 598. See *R. v. Pooley*, R. & R. 12.

A post-office money order is a warrant or order for the payment of money within the statute. *Reg. v. Gilchrist*, 2 Moo. C. C. 233;

(I) *Stealing or Destroying Deeds, &c. relating to Real Property, or Wills or Codicils.* *See* vol. iv. p. 28.

(K) *Stealing Records or other Legal Documents.*[1]

(L) *Larceny of Things attached to or growing on Land.*

(*a*) *Metal, Glass, Wood, &c. fixed to House or Land.*[2]

(*b*) *Trees, Shrubs, &c.*[3]

Car. & M. 224. And a pawnbroker's duplicate is a warrant for the delivery of goods. *Reg. v. Morrison*, 1 Bell, C. C. 158. *R. v. Craven*, R. & R. 14. *R. v. Austin*, 2 East, P. C. 602. *See* Indictments, *ante*, p. 105.

Scrip certificates of a foreign company are valuable securities within the meaning of the statute. *Reg. v. Smith*, 25 L. J. M. C. 31. Such documents cannot properly be described in the indictment as goods and chattels. *Reg. v. Powell*, 2 Den. C. C. 403.

If the instrument be for any reason void in law, the defendant may be convicted on a count charging him with stealing a piece of paper. *Reg. v. Perry*, 1 id. 69; 1 C. & Kir. 725.

[1] 24 & 25 Vic. c. 96, s. 30. "Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under her majesty, and being or remaining in any office appertaining to any court of justice, or in any of her majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and it shall not, in any indictment for such offence, be necessary to allege that the article in respect of which the offence is committed is the property of any person."

[2] By sect. 31, "whosoever shall steal, or shall rip, cut, sever, or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person."

Where the defendant got into possession of a house by false representations, under treaty for a lease, and then stripped it of lead:—*Held*, the jury finding he obtained possession with intent to steal, that he was guilty of larceny. *R. v. Munday*, 2 Leach, 850; 2 East, P. C. 594. As to what is a "building," see *R. v. Worrall*, 7 C. & P. 516.

A copper sun-dial, attached by screws to the top of a wooden post, fixed in a churchyard, was held to be the subject of larceny within the statute 7 & 8 Geo. 4, c. 29, s. 44. *Reg. v. Jones*, 27 L. J. M. C. 171.

The offender cannot, upon an indictment for this statutable felony, be convicted of simple larceny. *Reg. v. Gooch*, 8 C. & P. 293. *R. v. Millar*, 7 id. 665.

[3] By 24 & 25 Vic. c. 96, s. 32, "whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground garden, orchard, or avenue, or in any ground, adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny."

By sect. 33, "whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the

whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting judge shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this act), shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny."

The injury mentioned in the 32d sect. means the actual and immediate, not the consequential, injury resulting from the defendant's act. *Reg. v. Whiteman*, Dears. C. C. 353. The words, "adjoining any dwelling," import actual contact, and therefore ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. *R. v. Hodges*, M. & M. 341.

[1] By 24 & 25 Vic. c. 96, s. 34, "whosoever shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term not exceeding twelve months, as the convicting justice shall think fit."

By sect. 35, "if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile, or gate, or any part thereof, being of the value of one shilling at the least, shall be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds."

[2] By sect. 36, "whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, pleasure-ground, nursery-ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny."

By sect. 37, "whosoever shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure-ground, or nursery-ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty shillings as to the justice shall seem meet, and in default of payment thereof, together with the costs (if ordered), shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner,

(M) *Stealing or Embezzling Post Letter-Bags, Letters, &c.*[1]

(N) *Larceny from Mines.*[2]

(O) „ *the Person, and other like Offences.*

(*a*) *Robbery or Stealing from the Person.*[3]

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shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six months, as the convicting justice shall think fit."

The words "plant" or "vegetable production," do not include young trees. *R. v. Hodges*, M. & M. 341.

[1] By the 7 Wm. 4 and 1 Vic. c. 36, s. 26, it is enacted, that "every person employed under the Post-Office who shall steal, or shall, for any purpose whatever, embezzle, secrete, or destroy a post-letter, shall be guilty of felony."

By sect. 27, "every person who shall steal from or out of a post-office letter any chattel, money, or valuable security, shall be guilty of felony." And "every person who shall steal a post-letter bag, or a post-letter from a post-letter bag, or shall steal a post letter from a post-office, or from any officer of the Post Office, or from a mail, or shall stop a mail with intent to rob or search the same, shall be guilty of felony." (Sect. 28.) And "every person who shall steal or unlawfully take away a post-letter bag, or a post-office packet, or shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall be guilty of felony." (Sect. 29.)

By sect. 25 it is a misdemeanor for any person employed by or under the Post-Office, contrary to his duty, to open or procure, or suffer to be opened, a post-letter, or wilfully to detain or delay, or procure or suffer to be detained or delayed, a post-letter. And by sect. 31 the fraudulent retention of a post-letter, delivered by mistake to the wrong person, is created a misdemeanor.

Where the indictment is against a servant of the Post-Office, it is sufficient to show that he acted as such, without proving his appointment. *R. v. Rees*, 6 C. & P. 606. *Reg. v. Townsend*, Car. & M. 178. *Reg. v. Reason*, Dears. C. C. 226. *Reg. v. Giles*, 2 C. & Kir. 395. It is no objection to the indictment that the letter was of no value. *Reg. v. Young*, 1 Den. C. C. 194; 2 C. & Kir. 466. A letter written by an inspector of the Post-Office, to test the honesty of the defendant, is not a post-letter within the statute; but if he take a sovereign inclosed, he will be guilty of larceny of the sovereign. *Reg. v. Rathbone*, 2 Moo. C. C. 242; Car. & M. 220. *Reg. v. Shepherd*, Dears. C. C. 606. And a fictitious letter sent with money in it to try the defendant's honesty is within the statute. *Reg. v. Young, supra*, overruling *Reg. v. Gardner*, 1 C. & Kir. 628. A destruction of letters by a sorter, to avoid detection of a mistake, is a larceny of them. *Reg. v. Wynn*, 1 Den. C. C. 365; 2 C. & Kir. 859. *See* further, *Reg. v. Mence*, Car. & M. 234. *Reg. v. Harley*, 1 C. & Kir. 89. *Reg. v. Bickerstaff*, 2 id. 261. *Reg. v. Poynton*, 32 L. J. M. C. 29.

As to what is a post-office letter within the statute, see *Reg. v. Shepherd*, 25 L. J. M. C. 52.

[2] By 24 & 25 Vic. c. 96, s. 38, "whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

By sect. 39, "whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of, or any adventurer in, such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Where miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, removed from the heaps of other miners ore produced by them, and added it to their own, in order to increase their wages, it was held not to be larceny, for the ore still remained in the possession of the owner. *R. v. Webb*, 1 Moo. C. C. 431. See *Reg. v. Holloway*, 1 Den. C. C. 370. *Reg. v. Poole*, 1 Dears. & B. 345.

[3] By 24 & 25 Vic. c. 96, s. 40, "whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

By sect. 41, "if upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is

(*b*) *Assault, with intent to Rob.*[1]

(*c*) *Robbery or Assault by a Person Armed, or by Two or more; or Robbery and Wounding.*[2]

(*d*) *Letter demanding Money, &c. with Menaces.*[3]

guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

Robbery consists in the felonious and forcible taking from the person of another or in his presence (*R. v. Francis*, 2 Stra. 1015. *R. v. Grey*, 2 East, P. C. 708. *R. v. Hamilton*, 8 C. & P. 49). against his will, of any property to any value, by violence or putting him in fear. 4 Bl. Com. 243; 1 Hawk. P. C. 95; Fost. 121. Where the defendant tore a lady's ear through in snatching an ear-ring from it, the judges held it to be robbery. *R. v. Lapier*, 1 Leach, 320. See *R. v. Moore*, id. 335.

If there be a struggle for the property, and it be wrested from the prosecutor by superior force, it will be robbery. *R. v. Davis*, 2 East, P. C. 709. But merely snatching property from a person unawares, and running away with it, will not be. *R. v. Steward*, id. 702. *R. v. Homer*, id. 703. *R. v. Baker*, 1 Leach, 290. *R. v. Robins*, id. n. *R. v. Macaulay*, id. 287. *Reg. v. Walls*, 2 C. & Kir. 214. But where the defendant pulled the prosecutor's watch out of his fob, and, it being secured by a steel chain round his neck, jerked the chain several times and broke it, and then ran off with the watch, this was held to be robbery. *R. v. Mason*, R. & R. 419. But see *R. v. Gnosil*, 1 C. & P. 304. Money obtained by rioters under a threat of destroying the prosecutor's house unless he gave them the money, has been held to be robbery. *R. v. Astley*, 2 East, P. C. 729. See *R. v. Simons*, id. 731. *R. v. Winkworth*, 4 C. & P. 444. So has the obtaining money under a threat of charging the prosecutor with an unnatural crime. *R. v. Jones*, 1 Leach, 139; 2 East, P. C. 714. *R. v. Donally*, 1 Leach, 193; 2 East, P. C. 715. *R. v. Cannon*, R. & R. 146. *R. v. Hickman*, 1 Leach, 278. *R. v. Egerton*, R. & R. 375. See *R. v. Elmstead*, 1 Russ. 894. *R. v. Stringer*, 2 Moo. C. C. 261. *Reg. v. Norton*, 8 C. & P. 671. It is of no importance under what pretence the robber obtains the money, if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court may presume it. If a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, it is as much a robbery as if he had demanded the money. 4 Bl. Com. 242. See *R. v. Simons*, 2 East, P. C. 712; Hale, 53. *Merriman v. Hundred of Chippenham*, 2 East, P. C. 709. *R. v. Wood*, 2 Leach, 721; 2 East, P. C. 732. *R. v. Gascoigne*, id. 709.

If a thief put a man in fear, and then drive away his cattle, it is robbery. 1 Hale, 533. *R. v. Fallowes*, 5 C. & P. 508.

If a person, under a *bonâ fide* impression that the property is his own, obtain it by menaces, this is a trespass, but not a criminal offence. *R. v. Hall*, 3 C. & P. 409.

[1] By 24 & 25 Vic. c. 96, s. 42, "whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this act) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

No actual demand of money is necessary to support an indictment for an assault with intent to rob. *R. v. Trusty*, 1 East, P. C. 448. *R. v. Sherwin*, id. 421. *R. v. Stringer*, 2 Moo. C. C. 261; 1 C. & Kir. 188. *R. v. Edwards*, 6 C. & P. 521. See *R. v. Phipoe*, 2 Leach, 673.

[2] By 24 & 25 Vic. c. 96, s. 43, "whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of, or immediately before or immediately after, such robbery, shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Where a robbery with aggravated circumstances is charged in the indictment, the jury may convict of an assault with intent to rob, attended with the like aggravation, and the defendant may, upon such conviction, be sentenced to penal servitude for life under 24 & 25 Vic. c. 96, ss. 41, 43, the assault following the nature of the robbery. *Reg. v. Mitchell*, 2 Den. C. C. 468; *see* Dears. C. C. 19, n.

If the offence were committed by several persons, and one of them were armed, and the others present aiding and abetting, it seems that would be sufficient to convict them all of the whole charge in the indictment. See *R. v. Smith*, R. & R. 368.

[3] By 24 & 25 Vic. c. 96, s. 44, "whosoever shall send, deliver, or utter, or directly or

(*e*) *Demanding Money, &c. with Menaces.*[1]

(*f*) *Letter Threatening to Accuse of Crime, with intent to Extort.*[2]

(*g*) *Accusing, or Threatening to Accuse, with intent to Extort.*[3]

indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

By sect. 49, which applies to the above and four succeeding sections, "it shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person."

As to the Evidence of Sending.—It will be sufficient to show that the defendant dropped the letter in a place where he knew the prosecutor would come, and that it was picked up by a third person, and given to the prosecutor (*R. v. Lloyd*, 2 East, P. C. 1123. *R. v. Wagstaff*, R. & R. 398); or that it came to the prosecutor by the post, and was in defendant's handwriting (*R. v. Heming*, 2 East, 2 P. C. 1116. See *R. v. Jefson*, id. 1115. *R. v. Grimwade*, id. 1120; 1 Leach, 142); or that it was sent to a third party to deliver to the prosecutor, and by him delivered. *R. v. Paddle*, R. & R. 484. See *Reg. v. Grimwood*, 1 Den. C. C. 30; 1 C. & Kir. 592. *R. v. Howe*, 7 C. & P. 268.

As to the Demand.—A mere request, such as asking charity or the like, without imposing any conditions, would not come within the word "demand" in the statute; but if the request be coupled with an intimation that if it is not complied with the writer would publish a libel on the prosecutor, this will amount to a demand. *R. v. Robinson*, 2 Leach, 749; 2 East, P. C. 1110. The words, "without any reasonable or probable cause," apply to the demand of money, and not to the accusation threatened by the defendant to be made against the prosecutor: and it is therefore immaterial, in point of law, whether the accusation be true or not. *Reg. v. Hamilton*, 1 C. & Kir. 212. See *R. v. Gardner*, 1 C. & P. 479. *See*, further, *Reg. v. Smith*, 1 Den. C. C. 510; 2 C. & Kir. 882. *R. v. Pickford*, 4 C. & P. 227.

[1] By 24 & 25 Vic. c. 96, s. 45, "whosoever shall, with menaces or by force, demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[2] By sect. 46, "whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing, accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act."

It is not necessary to describe the accusation in strict technical language in the indictment. *R. v. Tucker*, 1 Moo. C. C. 134. The threat need not be to accuse before a judicial tribunal; if before any third person it is sufficient. *R. v. Robinson*, 2 M. & Rob. 479. It is immaterial whether the prosecutor was or was not guilty of the offence imputed. *R. v. Gardner*, 1 C. & P. 479.

Whether the letter amounts to a threat to accuse the prosecutor of the offence mentioned is a fact to be determined by the jury. See *R. v. Girdwood*, 1 Leach, 142; 2 East, P. C. 1121.

[3] By 24 & 25 Vic. c. 96, s. 47, "whosoever shall accuse, or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valu-

(*h*) *Inducing a Person, by Violence or Threats, to execute Deeds, &c. with intent to Defraud.*[1]

(P) *Larceny or Embezzlement by Clerks, Servants, or Persons in the Public Service.* *See* vol. iv. pp. 231–240.

(Q) *Frauds by Agents, Bankers, or Factors.* *See* vol. iv. p. 237.

(R) *Sacrilege, Burglary, and Housebreaking.* *See* vol. iii. p. 2.

(S) *Larceny in the House.*[2]

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able thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and if a male under the age of sixteen years, with or without whipping."

If the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount to a demand, it seems sufficient. *R. v. Jackson*, 1 Leach, 269.

[1] By 24 & 25 Vic. c. 96, s. 48, "whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime, as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as a valuable security, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[2] By 24 & 25 Vic. c. 96, s. 60, "whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

By sect. 61, "whosoever shall steal any chattel, money, or valuable security, in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

The breaking and entering must be proved in the same manner as in burglary. 1 Hale, 526; Fost. 108.

In the case of a shop, it must, it seems, be a shop for the sale of goods; and a mere workshop would not be sufficient. *Reg. v. Sanders*, 9 C. & P. 79. But see *Reg. v. Carter*, 1 C. & Kir. 173. As to a warehouse, see *Reg. v. Hill*, 2 M. & Rob. 458. *R. v. Stone*, 1 Leach, 334. *Anon.* 2 East, P. C. 642. *R. v. Howard*, Fost. 77. As to a counting-house, *Reg. v. Potter*, 2 Den. C. C. 235; 3 C. & Kir. 179.

An indictment was held sustainable for a misdemeanor, which charged that the defendant unlawfully broke and entered the dwelling-house of J. N., with intent, the goods and chattels then being in the said dwelling-house, to steal, without stating whose goods he intended to steal. *Reg. v. Lawes*, 1 C. & Kir. 62. The taking some money from a bureau, and throwing it under the grate upon being alarmed, was held a sufficient asportation. *R. v. Amier*, 6 C. & P. 344. Where the prosecutor, in consequence of the threats of an armed mob, brought out provisions and gave them to the mob outside, this was held not to be stealing in the dwelling-house. *Reg. v. Leonard*, Arch. Cr. L. 340, 15th ed. *Reg. v. Bain*, 9 Cox, 98; 31 L. J. M. C. 88.

The vestry is part of the church for the purpose of the statute. *Reg. v. Evans*, Car. & M. 298. In the case of a parish church, the property should be alleged to be in the parishioners, rector, or churchwardens. See *R. v. Hutchinson*, R. & R. 412. *R. v. Boulton*, 5 C. & P. 537. *Reg. v. Wortley*, 1 Den. C. C. 162; 2 C. & Kir. 283.

A wharf fixed to the soil is a building within the statute. *Reg. v. Rice*, 28 L. J. M. C. 64.

If it is not proved that the larceny was committed in a dwelling-house or some building communicating therewith, or that it was the dwelling-house of the person alleged (*R. v. White*, 1 Leach, 352. *R. v. Woodward*, id. 253, n); or that the goods were of the value of 5*l.*, the defendant must be acquitted of the compound offence, and may be found guilty of the simple larceny

(T) *Larceny in Manufactories.*[1]

(U) „ *Ships, Wharfs, &c.*[2]

only. Arch. Cr. L. 342. If the goods be under the protection of the person of the prosecutor at the time they are stolen, the case will not be within the statute. *R. v. Campbell*, 2 Leach, 264. *R. v. Owen*, id. 572; 2 East, P. C. 645. It is necessary to be within the statute that the goods should be under the protection of the house, and deposited in it for safe custody. See *R. v. Carrole*, 1 Moo. C. C. 89. *R. v. Hamilton*, 8 C. & P. 49. *R. v. Thomas*, Car. Sup. 295.

As to what buildings are within the curtilage, *see* vol. iii. p. 532. *R. v. Clayburn*, R. & R. 360. *R. v. Chalking*, id. 334. *R. v. Lithgo*, id. 357. *R. v. Walters*, 1 Moo. C. C. 13. *R. v. Hancock*, R. & R. 170. *R. v. Eggington*, 2 Leach, 913. *R. v. Bennett*, R. & R. 289. *R. v. Davis*, id. 322. *Reg. v. Gilbert*, 1 C. & Kir. 84. As to what is a counting-house, see *Reg. v. Potter*, 20 L. J. M. C. 170; or Workshop, *ante*, p. 332, n. [2].

[1] By 24 & 25 Vic. c. 96, s. 62, "whosoever shall steal, to the value of ten shillings, any woollen, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." See *R. v. Highill*, 2 Russ. 225. *R. v. Dixon*, R. & R. 53. *R. v. Woodhead*, 1 M. & R. 549.

[2] By 24 & 25 Vic. c. 96, s. 63, "whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever, in any haven, or in any port of discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

The luggage of a passenger going by a steamboat is within the statute. *R. v. Wright*, 7 C. & P. 159. See *R. v. Grimes*, Fost. 79, n. *R. v. Leigh*, 1 Leach, 52. A man cannot be guilty of this offence in his own ship. *R. v. Madox*, R. & R. 92. The place where the ship was must be correctly described in the indictment. *R. v. Pike*, 1 Leach, 417.

By 24 & 25 Vic. c. 96, s. 64, "whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and the offender may be indicted and tried either in the county or place in which the offence shall have been committed, or in any county or place next adjoining."

By sect. 65, "if any goods, merchandise, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person being taken or summoned before a justice of the peace shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender shall, on conviction of such offence before the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet."

By sect. 66, "if any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or shall be reasonably suspected so to have been taken, from any ship or vessel in distress, or wrecked, stranded, or cast on shore, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace-officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the

(V) *Larceny by Tenants or Lodgers.*[1]

(W) *Obtaining Money by False Pretences.* *See* vol. iv. pp. 434–439.

IV. Restitution of Stolen Property.[2]

V. Receiving Reward, or Advertising Reward, for Restitution of Stolen Property.[3]

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justice) to the person who seized the same; and the offender shall, on conviction of such offence by the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds, as to the justice shall seem meet."

[1] By sect. 74, "whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

[2] By sect. 100, "if any person guilty of any such felony or misdemeanor as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court, before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanor against this act."

[3] By sect. 101, "whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, as in this act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of eighteen years, with or without whipping."

By sect. 102, "whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or

VI. Apprehension of Offenders, and other Proceedings.

(A) *Apprehension and Search Warrant.*[1]

(B) *Compelling Appearance of Person Punishable on Summary Conviction, and Mode of Proceeding.*[2]

(C) *Application of Forfeitures and Penalties on Summary Convictions, and Mode of Enforcing.*[3]

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advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit."

It ought to be alleged in the indictment that the offender had not been apprehended. *R. v. Hicks*, Cox, 145. *See* East, P. C. 771. *R. v. Drinkwater*, 1 Leach, 15.

[1] By 24 & 25 Vic. c. 96, s. 103, "any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this act, shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised, and if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law."

By sect. 104, "any constable or peace-officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law."

[2] By sect. 105, "where any person shall be charged on the oath of a credible witness before any justice of the peace with any offence punishable on summary conviction under this act, the justice may summon the person charged to appear at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode,) the justice may either proceed to hear and determine the case *ex-parte*, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant, and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case."

By sect. 120, "every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the act of the session holden in the 11th and 12th years of Queen Victoria, c. 43, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace or one metropolitan or stipendiary magistrate, in the manner directed by the act of the session holden in the 14th and 15th years of Queen Victoria, c. 93, or in such other manner as may be directed by any act that may be passed for like purposes; and all provisions contained in the said acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this act: Provided, that nothing in this act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the city of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence."

[3] By sect. 106, "every sum of money which shall be forfeited on any summary conviction for the value of any property stolen or taken, or for the amount of any injury done (such value or amount to be assessed in each case by the convicting justice), shall be paid to the party aggrieved, except where he is unknown, and in that case such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such value or amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid and applied in cases where the statute imposing the same contains no direction for the payment thereof to any person: Provided, that where several

(D) *Discharge of Offender.*[1]

(E) *Operation of Summary Proceedings as a Bar.*[2]

(F) *Appeal.*[3]

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persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property or to the amount of the injury, in every such case no further sum shall be paid to the party aggrieved than such value or amount; and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied."

By 24 & 25 Vic. c. 96, s. 107, "in every case of a summary conviction under this act, where the sum which shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction or within such period as the justice shall at the time of the conviction appoint, the convicting justice (unless where otherwise specially directed) may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two months, where the amount of the sum forfeited or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed five pounds, and for any term not exceeding four months where the amount, with costs, shall not exceed ten pounds, and for any term not exceeding six months in any other case, the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs."

[1] By sect. 108, "where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice."

[2] By sect. 109, "in case any person convicted of any offence punishable upon summary conviction by virtue of this act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the Crown, or from the lord lieutenant or other chief governor in Ireland, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause."

[3] By sect. 110, "in all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden, not less than twelve days after the day of such conviction, for the county or place wherein the cause of complaint shall have arisen: Provided, that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or shall enter into a recognisance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; or if such appeal shall be against any conviction, whereby only a penalty or other sum of money shall be adjudged to be paid, shall deposit with the clerk of the convicting justice such a sum of money as such justice shall deem to be sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal; and upon such notice being given, and such recognisance being entered into, or such deposit being made, the justice before whom such recognisance shall be entered into, or such deposit shall be made, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or the affirmance of the conviction shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and in any case where after any such deposit shall have been made as aforesaid the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted; and in any case where after any such deposit the conviction shall be quashed, the court shall order the money deposited to be repaid to the party convicted; and in every case where any conviction shall be quashed on appeal as aforesaid the clerk of the peace, or other

(G) *No* Certiorari, &c.[1]

(H) *Conviction to be returned to the Quarter Sessions.*[2]

VII. Punishment as for Simple Larceny, and Sureties to be of Good Behaviour.[3]

VIII. Costs of Prosecution.[4]

IX. Protection of Persons acting under the Larceny Act.[5]

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proper officer, shall forthwith indorse on the conviction a memorandum that the same has been so quashed; and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction."

[1] By sect. 111, "no such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* into any of her majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

[2] By sect. 112, "every justice of the peace before whom any person shall be convicted of any offence against this act shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown."

[3] By 24 & 25 Vic. c. 96, s. 4, "whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

By sect. 117, "whenever any person shall be convicted of any indictable misdemeanor punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorised, fine the offender, and require him to enter into his own recognisances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this act the court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorised: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

By sect. 118, "whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction."

By sect. 119, "whenever solitary confinement may be awarded for any indictable offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence."

[4] By sect. 121, "the court before which any indictable misdemeanor against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."

[5] By sect. 113, "all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined,

LEASE.[1] *See* Covenant, vol. iii. p. 443; Fixtures, vol. iv. p. 474; *ante*, Landlord and Tenant, p. 296; *post*, Trespass; Use and Occupation.

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or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be shall certify his approbation of the action."

A party is entitled to notice of action if he honestly intended to put the law in force, and really believed the plaintiff had committed the offence, although there was no reasonable cause for such belief. *Hermann v. Seneschal*, 32 L. J. C. P. 43.

[1] *See* the accurate and elaborate treatise on Leases by Platt, and the works on landlord and tenant referred to *ante*, p. 297.

I. Who may Grant, and to what Extent.[1]

[1] All persons seised in fee simple, fee tail, for life or for years, of lands, may grant leases for any term commensurate with their respective interests. A tenant in fee simple, having an absolute and unlimited interest in his estate, may grant leases for life or years, without restriction, qualification, or control; and the stat. 32 Hen. 8, empowers tenants in tail to grant leases for three lives, or twenty-one years, to commence from the making of such demise, provided the accustomed yearly rent be reserved. These leases bind the issue, but not the reversioner. Tenants in tail after possibility of issue extinct, tenants for life by curtesy and in dower, may grant leases of their estate for their own life, or the life of the person on whose death their estate is to determine. The usual mode in which tenants for life, in the absence of a special power, make leases, is, to grant them for a certain term of years, determinable upon the death of the tenant for life. The power of husbands seised of lands in right of their wives to make leases has already been stated under tit. Husband and Wife, vol. v. p. 66. Joint-tenants, tenants in common, and in coparcenary, may grant leases for life or years, or at will, of their own respective interests, or they may join and convey the entirety. *See* Wood's Inst. 207; Co. Litt. 163. Executors and administrators having a term of years vested in them, in their representative character may grant leases, and the rent reserved will be assets in their hands, and be distributable in a course of administration. *See* Co. 63 b; and *see* Bac. Leases (E.) The lease of one executor is binding upon all the others. *See* 1 Mod. 616. Ecclesiastical persons and eleemosynary corporations are also empowered (*see* 32 Hen. 8) to make leases under certain restrictions; viz. they must not exceed twenty-one years, or three lives, from the time of making; the accustomed rent must be reserved; and the old lease, if there be one in existence, must be within three years of expiring. But by 5 & 6 Vic. c. 108, with consent of the ecclesiastical commissioners, longer leases may in certain cases be granted. Leases made by a corporation aggregate, though not conformable to these directions, will be valid as long as the person lives who was at the head of the corporation when the lease was executed. *See* Co. Litt. 45 a. Guardians of infants (whether appointed by a court of equity or by will, or chosen by the infant himself) may demise the infant's lands for any number of years not exceeding the term of his minority; such conveyances may be made in the guardian's own name. Leases by tenants by *elegit*, statute merchant, and statute staple, &c., are conditional, and may be assimilated to tenancy at will, as they may be determined by payment of the sum for which they are created; till such contingency occurs, they remain as valid as any other demises. Having seen who may demise, it will be proper for us to consider briefly who are incapable of granting leases. Mortgagors can only lease subject to the mortgage, unless the consent of the mortgagee be obtained. *See* Dougl. 24. Nor can infants make leases of their estates, so as to bind them after they attain their full age. *See* Co. Litt. 45. Married women are also incapable of making leases, unless the power is expressly reserved to them. Aliens are restricted to leases not exceeding twenty-one years. 7 & 8 Vic. c. 66, s. 5. *See* vol. i. p. 288. In the absence of a special custom, a copyholder cannot make a lease for a longer term than one year, unless he obtain the lord's license. *See* Moore, 182; Salk. 186, pl. 5.

Lay corporations, either sole or aggregate, are not restricted in any respect as to granting or accepting leases, provided the conveyance be under their common seal. *See* Grant on Corp.

A vicar may make a valid and binding lease on his successor, though the prior lease had not expired. *Vivian v. Blomberg*, 3 Bing. N. S. 311; 3 Scott, 681. But a quasi vicar cannot grant a lease for lives under 32 Hen. 8. *Doe d. Richardson v. Thomas*, 9 Ad. & E. 556; 1 Per. & D. 579.

A lease for lives cannot enure to the benefit of a person not then in existence. *Doe d. Edwards*, 1 Mee. & W. 553.

If executors refuse to administer, they cannot dispose of the term after administration has been granted by the ordinary to another. *See* Cro. 92; S. C. Owen, 44; Moore, 272; 1 Leon. 131. Where there are several executors, their interest differs essentially from that of joint tenants, and tenants in common; for if one of several joint tenants, or tenants in common, execute a deed, it passes the share only of the person executing; but several executors are considered only as one, and a grant consequently by one is as effectual as if all had joined; and even where the deed purports to be the grant of all, yet, if one only seals the deed, it has been held that it will be binding upon all, since each has the entire interest. The husband of a feme executrix has a joint interest with her in all the effects of the deceased, and is enabled, by law, to assume the whole administration, and to act in it to all purposes without her consent; nor can the wife do any valid act as executrix or administratrix without the husband's concurrence. The wife, therefore, with respect to terms for years *in autre droit*, is in no better situation during the coverture than in the case of terms for years, in her own right. *See* Roberts on Wills, vol. ii. 153; Com. Dig. D.; 1 T. R. 617.

As it is settled that a tenant at will cannot grant or surrender, *à fortiori*, a tenant at sufferance cannot.

A tenant at will cannot lease, for there can be no such thing as an under-tenant to a tenant at will; the demise itself would amount to a determination of the will.

(A) *In Execution of a Power.*[1] *See* also Powers.

Neither can he surrender any more than he can grant; for to surrender would be to determine his will, and relinquish his estate. See Inst. 574; Dougl. 283; Cro. Jac. 156.

Any one possessed of a certain quantity of interest, may alienate the whole or any part of it, unless restricted from so doing by agreement with the party from whom he derives that interest or estate, or by the terms upon which he takes it. In fact, the tenant has it as a right, incident to his tenancy, to make a sub-tenancy; in order to do which it is by no means necessary to have the first landlord's assent; the law gives him authority to assign his interest. *See* 1 East, R. 598. A tenant from year to year, therefore, may assign his term, or may underlet part of it, as for three quarters of the year, or so many months. So, upon the same principle, one possessed of lands or tenements for a less term, as for half a year, a quarter, or a month, or the like, may grant his interest, however small the quantity, or any portion of it, to another; for, while such interest endures, he has the absolute disposition of it, unless some agreement subsist between him and his lessor, that by circumscribing his power qualifies his right of disposition.

By the 19 & 20 Vic. c. 120, power is given to the Court of Chancery (even in the case of infants, lunatics, bankrupts, insolvents, and married women, ss. 36–38) to authorise leases and preliminary contracts, to grant leases of settled estates; that is, of estates limited by any instrument or instruments (whether before or after the passing of the act, sect. 44) to or in trust for any persons by way of succession, or of any rights or privileges over or affecting any settled estates subject to certain conditions (sects. 1, 2, 3, 6), unless an application for that purpose has been rejected by parliament (sect. 21), or unless it would be contrary to the intention of the settlor (sect. 26), or beyond his power (sect. 27), or, unless in the case of leases of copyholds, without the consent of the lord (sect. 43). But no lease shall be granted for more than twenty years of any settled estate whereof the tenants in tail are debarred from defeating their estate tail, or where the reversion is in the Crown. (Sec. 42.)

By the same statute (even in the case of infants, lunatics, bankrupts, insolvents, and married women) tenants for life or for years determinable on lives or of any greater estate, of property settled since the passing of the act, and tenants by the curtesy, or in dower, or in right of their wives, of unsettled property, may, without application to the court, make binding leases (except of the principal mansion and the land usually occupied therewith) for twenty-one years in possession, subject to certain conditions, except in the case of copyholds, without the consent of the lord. (Sects. 32, 33, 36, 37, 38.) The Court of Chancery may vest powers of leasing settled estates in the trustees of the settlement, or in any other person. (Sects. 7, 10.) *See* 21 & 22 Vic. c. 77, amending and extending the 19 & 20 Vic. c. 120.

In general the lessor is supposed to have the full right and title to dispose of the possession at the time agreed upon by the contract; but since the title of the lessee to the possession is merely a matter of contract, the right to the possession is not so necessary a qualification as the actual possession itself. If the lessor has not the actual possession, the lease is void *ab initio* between the parties; if he has the actual possession, but under a tortious title, the lease will only be void upon eviction by a title paramount. All those, therefore, who have the possession for a single day, or for an hour only, may enter into a contract for years. *See* Plowd. 78. On the same principles a disseisor, though his entry is unlawful, may make leases, which shall be good against all persons except him who has the right of possession. Vin. Abr. Estate, Pl. 5; 32 Hen. 8, c. 9. So, even where a person intrudes upon the possession of the king, who cannot be disseised; yet the intruder gains such a possession that he may make a valid lease against all, except the king. *See* Cro. Eliz. 331. It will follow, likewise, that the rightful owner cannot make a lease for years when he is out of possession. If, therefore, a disseisee intends to make a lease for years in writing, he cannot deliver it as his deed till after entry, and actual possession taken in his name; because, if the deed could operate as a lease before entry, the only interest transferred would be a right of entry, which can be no more transferred than a right of action: neither is mere entry sufficient, but the lease must be executed on the land; for, if there is no actual expulsion of the disseisor, and he regains possession before the execution of the lease, it will operate as a new disseisin, and consequently the possession would be wanting to the lessor at the time of making the lease. *Jennings v. Bragg*, Cro. Eliz. 447; 3 Rep. 35, b; Co. Litt. 48, b; *Doe v. Watts*, 9 East, 19, note. *Stephens v. Eliot*, Cro. Eliz. 484.

So, at the common law, strictly speaking, no lease could be made to convey an interest till the purchaser of the freehold had obtained livery of seisin, for till then no interest passed from the vendor (*see* Plowd. 137, b, 142, b; Bac. Abr. Lease, 1, 4); and it seems to follow on the same principle, that no derivative contract or under-lease can be made by the lessee till actual entry and possession taken by virtue of his own contract, but if the conveyance operates by force of the Statute of Uses, either by transmutation of possession or otherwise, and the uses are well raised and executed, the *cestui que use* may, in case of no adverse possession, make a lease for years, without actual entry, because the statute has already transferred the possession to the use.

[1] By 12 & 13 Vic. c. 26, s. 2, when in the

II. Of what a Lease may be.[1]

III. When it must be by Deed.[2]

intended exercise of a power of leasing, whether derived under an act of parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease; such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract."

Acceptance of rent under such invalid lease is deemed a confirmation of the lease by the person accepting. (Id. s. 3.) And by sect. 4, where the estate of the grantor of such lease continues after the time when the lease might have been granted by him in the lawful exercise of the power, the lease shall take effect and be as valid as if the same had been granted at such last-mentioned time.

Where a lease made under a leasing power was void from non-compliance with the requirements of the power, but the lessee entered and took possession, and paid rent, and continued in possession till the end of the term intended to have been granted, it was held that he must be taken to have promised to hold upon the terms of the lease, and that he was liable in *assumpsit* for not repairing according to the covenants therein contained. *Beale v. Saunders*, 5 Scott, 58; 3 Bing. N. C. 859. *Lee v. Smith*, 23 L. J. Ex. 199.

Where articles of agreement under seal were entered into between an intended lessor and lessee for the grant of a lease for twenty-one years of copyhold land, as soon as a license from the lord of the manor could be obtained, and the lessee covenanted to keep the premises in repair during the term so to be granted, and subsequently entered and took possession of the land, and occupied the same under the agreement for the full term of twenty-one years, it was held that he was responsible upon his covenant to repair, although the intended lease had never been made, nor any license obtained from the lord. *Pistor v. Cater*, 9 Mee. & W. 315.

Where a lessor demised lands of which he was seised in fee, and other lands of which he was seised for life, with a power at leasing at one entire rent, and the lease was not well executed according to the power, it was held that the lease was valid as to the lands in fee, but not for the other lands. *Doe v. Meyler*, 2 M. & S. 276.

The words "new," and "concurrent," in the stat. 12 Car. 2, c. 36, s. 1, as to leases by the Master of the Rolls, mean the same thing. *Wilson v. Sewell*, 4 Burr. 1975.

[1] Incorporeal hereditaments are in general demisable by deed. *Rex v. Inhabitants of Old Alresford*, 1 T. R. 360. *Musgrave v. Cave*, Willes, 320. So are tithes (*Bally v. Wells*, id. 26. *Dean and Chapter of Windsor v. Gover*, 2 Saund. 303), and offices which do not concern the administration of justice. *Howard v. Wood*, 2 Lev. 245; T. Jones, 126. *Sutton's case*, 6 Mod. 57. *The King v. Lady Broughton*, T. Raym. 216; 2 Lev. 71; 3 Keb. 32; Hard. 352. *Veale v. Prior*, Hard. 351. But an office cannot be demised by parol. *West v. Sutton*, 2 Ld. Raym. 853.

Ways may be the subject of demise. *Staple v. Heydon*, 6 Mod. 1.

Where one as trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity, as incidental to the grant. *See* 6 Mod. 3, 149; Cro. Jac. 170, 190. If a man, upon a lease for years, reserve a way to himself through the house of the lessee to a back house, he cannot use it but at reasonable times, and upon request. *See* 1 Vent. 48.

[2] By the Statute of Frauds, 29 Car. 2, c. 3, ss. 1, 2, leases exceeding the term of three years, if by parol only, and not put in writing, and signed by the parties or their agents, shall have the force of leases or estates at will only. *See* Frauds, Statute of, vol. iv. p. 537. *Fitzmaurice v. Bayley*, 9 H. L. C. 78. And by the 8 & 9 Vic. c. 106, s. 3, it is enacted that every lease required by law to be in writing, of any tenements or hereditaments made after the 1st day of October, 1845, shall be void at law, unless made by deed. A tenancy, therefore, which is to endure for more than three years from the making of the agreement, cannot now be by parol. It would seem that a lease for three years, to commence *in futuro*, will be inoperative unless made by deed. See *Rawlin v. Turner*, 1 Ld. Raym. 736. But a lease by parol for a year and a half, to commence after the expiration of a lease which wanted a year of expiring, would be good; for it would not exceed three years from the making thereof. *Riley v. Hicks*, 1 Stra. 651; Bull. N. S. 177. See *Edge v.*

IV. Of the Expense of the Lease.[1]

V. „ Stamp.[2]

Strafford, 1 C. & J. 396. But occupation and payment of rent under a lease, void by the Statute of Frauds, will create a tenancy from year to year (*Clayton v. Blakey*, 8 T. R. 3), and the contract will regulate the terms of the holding in other respects. *Richardson v. Gifford*, 1 Ad. & E. 52. *Beale v. Sanders*, 5 Scott, 58. *De Medina v. Polson*, 1 Holt, N. P. R. 47. *Doe d. Rigge v. Bell*, 5 T. R. 471. *Fitzmaurice v. Bayley*, 9 H. L. C. 78.

No action lies for not taking, occupying, or becoming tenant under a parol agreement for a lease exceeding three years. *Inman v. Stamp*, 1 Stark. R. 12. *Edge v. Strafford*, 1 C. & J. 391.

The 8 & 9 Vic. c. 106, s. 3, does not apply to agreements for letting tolls under 3 Geo. 4, c. 126. *Shepherd v. Hodsman*, 21 L. J. Q. B. 263.

[1] In a written agreement for a lease it was stipulated, that if the tenant shall be desirous to take a lease of the premises, he the said landlord will, at the request and cost of the said tenant, grant and execute to him a lease thereof:—*Held*, that upon this agreement the tenant was not bound to pay for the counterpart of the lease, although the lease was to contain covenants to be performed by the tenant; and that, if the landlord required a counterpart, he must be at the expense of it himself. *Jennings v. Turner*, N. P.; 8 C. & P. 61.

[2] A lease at a yearly rent, without any sum of money by way of fine, premium, or gross sum, paid for the same, is subject to a stamp-duty.

				s.	d.
Where the yearly rent exceeds 5*l.*				0	6
Where the same exceeds 5*l.*, and					
does not exceed 100*l.*			. .	1	0
Where the same exceeds 10*l.*	and does not exceed	150*l.*	. .	1	6
Where the same exceeds 15*l.*	and does not exceed	200*l.*	. .	2	0
Where the same exceeds 20*l.*	and does not exceed	250*l.*	. .	2	6
Where the same exceeds 25*l.*	and does not exceed	500*l.*	. .	5	0
Where the same exceeds 50*l.*	and does not exceed	750*l.*	. .	7	6
Where the same exceeds 75*l.*	and does not exceed	1000*l.*	. .	10	0

Where the same exceeds 100*l.*, then for every 50*l.*, and for every fractional part of 50*l.*, an additional duty of 5*s.* is imposed. (13 & 14 Vic. c. 97, sched.)

Where the lease is granted in consideration of a sum of money by way of fine, premium, or gross sum, and also of a yearly rent amounting to 20*l.* or upwards, it is subject to the *ad valorem* duties payable for a lease, in consideration of a fine only, and for a lease in consideration of a rent only of the same amount. (Id.)

Any surrender of a lease upon any other occasion than a sale or mortgage, is subject to a duty equal to the *ad valorem* duty, with which a similar lease would be chargeable, not exceeding, however, 1*l.* 15*s.* (Id.) And no stamp-duty, except the *ad valorem* duty, is chargeable in respect of any lease, whether in possession, reversion, or remainder, expressed to be granted in consideration of the surrender of an existing lease, and also of a sum of money. (Id.) If an agreement operates as a surrender it must be stamped as a surrender. *Williams v. Sawyer*, 6 Moore, 226.

Agreements for leases for any term not exceeding seven years must be stamped with the same *ad valorem* duty as leases; but the lease itself, when made pursuant to the agreement, is only chargeable with the 2*s.* 6*d.* duty. (23 Vic. c. 15.)

Leases granted in consideration of a fine or premium, without any yearly rent, or with any yearly rent under 20*l.*, must be stamped with the same duty as is imposed on conveyances made on the sale of lands for a sum of money of the same amount, except leases for lives not exceeding three, or for a term of lives determinable with lives not exceeding three, and leases for a term absolute, not exceeding twenty-one years, granted by an ecclesiastical corporation, where the duties on such lease would amount to 1*l.* 15*s.* or upwards. Leases of uncultivated lands to poor persons not exceeding three lives on ninety-nine years, where the fine does not exceed 5*s.*, nor the rent reserved one guinea per annum, and the counterparts and duplicates of such leases, are exempted from all duty. (13 & 14 Vic. c. 97, sched.)

It has been held, on the construction of the above words, that where the expenditure of money in improvements constitutes the consideration for the lease, it is not a lease by way of fine or premium. *Nicholls v. Cross*, 14 Mee. & W. 42. Contracts for the sale of vesture and herbage, and growing grass, for a certain sum, may properly be stamped as a lease, granted in consideration of a sum of money by way of fine or premium. *Cattell v. Gamble*, 5 Bing. N. C. 46.

The provision of the Stamp Act requiring the consideration to be set out, and imposing an *ad valorem* duty thereon, applies only to the case of a consideration passing between the lessor and lessee. 13 & 14 Vic. c. 97, s. 10. The granting of a lease in consideration of a premium, is the sale of an interest in the land for a term of years, and the premium must be truly expressed and set forth "in words at length" in the deed. *Doe v. Lewis*, 10 B. & C. 676.

A present demise must be stamped as a lease by deed, though it be not by deed. *Goodtitle v. Way*, 1 T. R. 737. *Harker v. Birbeck*, 3 Burr. 1560.

An agreement for a lease should be stamped as an agreement. *Rawson v. Eicke*, 2 Nev. & P. 423. That which amounts to a parol agreement only need not be stamped as a lease (*Bicknell v. Hood*, 5 Mee. & W. 104); but an agreement to let for a term of years, and to build, &c., a certain sum to be paid, and reciting part payment as an earnest, is a lease, and must be stamped as such. *Staniforth v. Hood*, 5 Mee. & W. 104.

VI. Of the Execution of the Lease, and Effect of its Delivery.[1]

Where there was a separate reservation of 50*l.* for the furniture and fixtures, it was held that ought to be included in the stamp-duty. *Coster v. Cowling*, 7 Bing. 456; 5 M. & P. 399. An instrument stamped as an agreement may be afterwards stamped as a lease under 55 Geo. 3, c. 184. *Buckworth v. Robinson*, 3 B. & Adol. 395.

If a stamped agreement incorporates an unstamped one, the latter being stamped as a lease is sufficient. *Strutt v. Robinson*, id.

Where an instrument contains a written contract of demise in its general terms, with a several operation in respect to the different tenants who sign it for different estates, at the different rents set opposite to their signatures, and one stamp only appears upon the paper, it is matter of evidence to which contract such stamp applies; and the circumstances of juxtaposition of the stamp to the defendant's signature, which stood untouched while the other names appeared to be cancelled, together with the date of the stamp-office receipt for the stamp and penalty, which showed that it had been affixed recently before the trial, and there being no evidence of a dispute with any other tenant which could make the stamp necessary for another purpose, are evidences that it was intended to be applied to the contract with the defendant. *See* 13 East, 241.

A lease contained a demise of two separate farms, with *habendums* differing from each other, a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time:—*Held*, that one *ad valorem* stamp for the amount of both rents was sufficient. *Blount v. Pearman*, 1 Scott, 55; S. C. 1 Bing. N. S. 408.

[1] By the execution of the deed on the part of the lessor, and the delivering of the lease to the lessee, all the engagements consequent upon the contract seem to be binding upon the parties by force or the privity which the law instantly creates. The lessee is accordingly bound thereby to pay the rent reserved, although he never enter or occupy, because, where there is no impediment to his enjoying the possession, the rent is due by virtue of the contract (*see* Holt, 199); and, on the other hand, the lessor having done everything in his power to divest himself of the possession, and to transfer it to the lessee, such an interest is transferred before entry of the lessee, who may at any time enter into possession, as well after the death of the lessor as before: it is, moreover, such an interest as he may before entry grant over to another, or if he dies before entry, it will go to his executors or administrators. So, if the lease be made to two jointly, this interest, before the entry of either, will survive, or, upon the death of one of them, to the other and his executors or administrators, any of whom may enter at pleasure and reduce the contract into actual execution. *See* Litt. 46 b; 51 b; 270 b; Eliz. 127. And further, where A. made a lease for years, to begin after a prior lease, and at the end of the time a stranger entered before the lessee, it was held that the lessee might grant over his term before his entry. *See* Cro. Eliz. 275; id. 15. So, in a similar case, where a lease was limited to commence after an estate for life, and the lessee for years was considered at liberty to assign his interest notwithstanding his disseisin (*see* 2 Brownl. 233; 1 Keb. 154); and this offends no rule of law; for the lease being only in force by virtue of the contract, there is no such title to the possession transferred as may give a right of entry or a right of action to the assignee in cases of disputed possession. But in the case of entry by a stranger before the lessee enters, it is said that no action of covenant lies against the lessor, because the lessee never was a lessee in privity to have that action. Before entry, likewise, the lessee can maintain no possessory action, such as trespass or ejectment; and it was determined that the confession of lease, entry, and ouster, at the trial in an action of ejectment, did not extend to this kind of entry, which is necessary on a farming lease. *See* 1 Sid. 223; Camp. 209. After the entry of the lessee the title to the possession is complete, and a relation of a more general nature takes place between the parties, called the privity of estate. By virtue of this relation the lessee may maintain actions of trespass or ejectment, or any other action of a possessory nature.

The execution of the lease by the lessor is a condition precedent to the liability of the lessee upon his covenant to pay rent, unless the lessee has waived the condition, and dispensed with the execution of the lease. If the lessee himself executes the lease, and enters and takes possession upon the terms and conditions contained in the indenture, and receives to his own use the rents and profits of the land until the rent is due, without requiring the execution of the deed by the lessor, he would, it has been said, be liable upon his covenant to pay rent, and be deemed to be estopped by his own conduct and actions from setting up the non-execution of the indenture as a ground of exoneration from liability. *Gooch v. Goodman*, 2 Q. B. 599. *Sir B. Barty v. Eccles*, 4 H. & N. 139; 28 L. J. Ex. 122. But it has been held by the Court of Exchequer that, under such circumstances, the lessee is not liable to be sued on the covenants of the lease, notwithstanding he has entered and received the profits of the land to his own use. *Swatman v. Ambler*, 8 Ex. 79. See *Pitman v. Woodbury*, 3 id. 12.

If a concurrent lease does not operate as a lease of the reversion, and is for a longer period than the term limited by the first

VII. Effect of Fraudulent Representation by Lessee.[1]

VIII. Of the Construction and General Requisites of the Instrument.

(A) *With respect to its Effect as a Lease, or an Agreement for a Lease.*[2]

lease, it will operate partly by estoppel, and partly by conveying an interest, and the lessor is entitled to the rent reserved during the first lease, just as much as if the possession had been actually transferred. *Gilman v. Hoare*, 1 Salk. 275; Carth. 247.

An alteration made in a lease by an agent without the consent of the lessor, if before it is executed, does not avoid the lease. *Hall v. Chandless*, 4 Bing. 123; 12 Moore, 316.

[1] Where the lessor had been induced to execute a lease by a fraudulent representation on the part of the lessee, with respect to the use to which he intended to apply the premises, it was held that the lease was not thereby avoided, and that the term was subsisting: for an estate once vested cannot be divested on the ground that the deed by which it was created was obtained by a fraudulent misrepresentation respecting some collateral matter. *Feret v. Hill*, 15 C. B. 226.

[2] Whether an instrument shall operate as a present lease, or only as an agreement for a future demise, must depend on the intentions of the parties, to be collected from the instrument itself. *Goodtitle d. Estwick v. Way*, 1 T. R. 735. *Morgan v. Bissell*, 3 Taunt. 65. *Doe d. Jackson v. Ashburner*, 5 T. R. 162. *Alderman v. Neate*, 6 Mee. & W. 704. And strong circumstances of inconvenience, which are apparent upon the instrument itself, if it should be construed as a lease, indicate the intentions of the parties that it should be an agreement. *Morgan v. Bissell, supra. Doe v. Smith*, 6 East, 530.

The most general rule is, that if the words are that the one party *does* thereby demise, &c., or that the other party *shall* have, &c., and no other words appear to qualify the expressions, they are to be construed as a lease; but if the words do not import immediate possession, the inference will be that it was not intended that the instrument should of itself be a perfect lease, but a contract for a future demise. If there are words of an apparent interest of present demise, and yet allusion is made to a lease to be executed at some future time, such instrument is construed to be an actual lease, with an agreement for further assurance. But where there appears no intent, although there are words of present demise, and the instrument seems only preparatory or relative to one to be afterwards made, it is only considered as an agreement for a lease. 4 Cruise, T. 34, c. 5, s. 2. *Fitzmaurice v. Bayley*, 9 H. L. C. 78.

An agreement to let and take may amount to a lease (*Doe v. Benjamin*, 1 Per. & D. 440; 9 Ad. & E. 644); and an agreement to take the whole of the remaining term amounts to a lease. *Doe d. Pearson v. Ries*, 8 Bing. 178; 1 M. & Scott, 259. So, an instrument containing the terms of letting, viz. for seven, fourteen, or twenty-one years, the time of commencement, the amount of rent, when to be paid, and stipulations for repairs, was held to amount to a lease. *Warman v. Faithful*, 3 Nev. & M. 137; 5 B. & Adol. 1042.

An agreement by which A. agrees to "let" premises to B. "on lease" for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease under which he holds," and "to keep the said stipulations in every respect until the said lease shall be granted, which lease, when required by B., is to be prepared by A.'s solicitor, but B.'s expense," is a lease, and not merely an agreement for one. *Wilson v. Chisholm*, 4 C. & P. 474. So, the following instrument amounts to a lease:— "P. T. agrees to pay F. N. the sum of 140*l.* per annum, in quarterly payments, for the house, &c., at &c., for the term of seven, fourteen, or twenty one years, at his option, at the end of every seven years. The rent to commence on the 1st of Jan. 1827." *Wright v. Trezevant*, 1 M. & M. 231; 3 C. & P. 441. So, a memorandum having a lease stamp, by which A. agrees to let to B. certain lands mentioned in an annexed abandoned lease from A. to C., upon conditions, agreements, &c., contained in the same lease, and by which A. and B. bind themselves to execute a similar lease to such abandoned lease, is itself a valid lease. *Pearce v. Cheslyn*, 5 Nev. & M. 652. But an agreement for a demise of a messuage, and an incorporeal hereditament, license to hunt, &c., not under seal:—*Held* void; and on a declaration upon a parol demise, merely stating that the defendant entered and became possessed of the messuage, right, liberty, &c., without alleging actual enjoyment, the plaintiff could not recover as for use and occupation. *Bird v. Higginson*, 4 id. 505.

Where a farm is to let according to a valuation, but no contract signed, it is an agreement, not a lease. *John v. Jenkins*, 1 Car. & M. 227; 3 Tyrw. 170.

Words in an agreement "that A. shall hold and enjoy," do not operate as words of present demise, unless followed by others which evidently show that the parties had in contemplation a future demise. *Doe d. Jackson v. Ashburner*, 5 T. R. 163. *Colley v. Streeton*, 3 D. & R. 522; 2 B. & C. 273. But the words, "Be it remembered that A. hath let, and by these presents doth demise," have an immediate operation, and create a present interest. *Barry v. Nugent*, cited 5 T. R. 165.

A clause for a future lease does not necessarily intend that the instrument must be only an agreement for a lease, if the intention of the parties appear to be otherwise. *Poole v. Bentley*, 12 East, 168.

(B) *General Requisites and Construction.*[1]

Where articles of agreement set forth with sufficient accuracy the lives upon which a lease is intended to be granted, the mere mentioning of a future lease does not form a condition precedent to the enjoyment of the land. *Baxter d. Abrahall v. Brown*, 2 Bl. Rep. 973. *Doe d. Walker v. Groves*, 15 East, 244.

An agreement by which A. agreed to let her house to B. during her life, supposing it to be occupied by B., or a tenant agreeable to A., and containing stipulations that a clause was to be added in the lease for the particular purpose, was held to be only an agreement for a lease, and not a perfect lease, the stipulations clearly showing it to be executory. *Doe d. Broomfield v. Smith*, 2 Smith, Rep. 570; 6 East, 530.

An instrument on an agreement stamp reciting that A., in case it should be made to appear that he is entitled to certain premises on the death of B., would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a license to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe d. Coore v. Clare*, 2 T. R. 739.

Where a lease was granted to one who afterwards took another into partnership, and both applied jointly to the landlord to enlarge the premises, agreeing to pay 10*l.* per cent annually on the money laid out, which was accordingly done, and the tenants dissolve partnership:—*Held*, that the agreement was collateral to the lease, and not a new demise. *Hoby v. Roebuck*, 2 Marsh. 433; 7 Taunt. 157.

Where an agreement contains no words of demise, and nothing to show when the interest was to commence or determine, it is only an agreement for a lease. *Clayton v. Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41. *Goodtitle v. Morgan*, 1 T. R. 755. *Hegan v. Johnson*, 2 Taunt. 148.

[1] *As to the Construction of a Lease: see* also vol. iii. p. 444.—A lease by deed indented consists of the following parts:—1. The premises. 2. The *habendum et tenendum*. 3. The *reddendum*, or reservation. 4. Covenants. 5. Provisos or conditions. The premises of a lease are all the parts that precede the *habendum*. *See* Shep. Touch. 75. The office of this part of the lease is rightly to name the lessor and lessee, and to comprehend the certainty of the thing demised, either by express words, or by that which by reference may be reduced to a certainty, and the exception or thing excepted, if there be any. The recital also, if there be any, is for the most part contained in the premises. A lease to one for life, *habendum* to his sons successively, but omitting to mention the sons in the premises of the deed, was held to be for the life of the father only, and that the sons should not take in possession or by way of remainder. See *Windsmore v. Hubbard*, Cro. Eliz. 58.

The premises ought to comprehend the certainty of the lands and tenements demised. Land is *nomen generalissimum*, and comprehends all the species of lands; and a nominal manor will pass under the general words messuages, lands, tenements, and hereditaments. If the thing described be sufficiently ascertained, it is sufficient, though all the particulars are not true; as, if a man demise his meadows in B. and D., containing ten acres, whereas they contain twenty acres, all the meadows pass. And if a lease describe the demised land as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term. *See* 3 Taunt. 469.

The *habendum et tenendum* is that part of the lease (*see* Com. Dig. Fait. E. 9) which begins with, "to have and to hold," and properly succeeds the premises. The office of the *habendum* is to name the lessee, and to limit the certainty of the estate. It may also abridge or alter the generality of the premises. The *tenendum* was formerly used to denote the lord and the tenure, and is retained merely by custom.

An exception is a clause in a deed whereby the lessor excepts something out of that which he has granted before by the deed; and being the act and words of the lessor, shall be taken strictly against him. *See* Shep. Touch. 77. In every good exception, these things must always concur:—1. The exception must be by apt words, as "saving and excepting," &c. 2. It must be of part of the thing demised, and not of some other things. 3. It must be part of the thing only, and not of all, the greater part or the effect of the thing granted; an exception, therefore, in a lease which extends to the whole thing demised, is void. 4. It must be of such a thing as is severable from the premises demised, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have, and which properly belongs, and not of a particular thing out of a particular thing. 6. It must be certainly described and set down; therefore, if one demise a manor, excepting one acre, without setting forth which or what acre it shall be, the exception is void. By an exception in a lease "of all trees, woods, coppice, wood ground, of what kind or growth soever," apple-trees are not excepted (*see* 4 Taunt. 316); but if the lessor specifically mention apple-trees, and except all other trees, all other fruit-trees will be excepted. *See* 2 Roll. Rep. 280.

The *reddendum*, or reservation, is a clause in the lease whereby the lessor reserves some new thing to himself out of that which he granted before (*see* Shep. Touch. 80); and to this commonly and properly succeeds the *tenendum*, and is usually made by the words "yielding and paying," and such-like. In every good reservation these things must

always concur:—1. It must be by apt words. 2. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. 3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed. *See* 4 Taunt. 23.

A lease at entire rent, where part of the lands cannot be legally demised, is void for the whole. 3 Esp. Rep. 78.

A covenant is a clause of agreement contained in the lease, whereby either party is bound to do, perform, or give something to the other. A condition or proviso is a clause of restraint in the lease, which is commonly expressed by the words "provided," or "provided always," or words similar. *See* Co. Litt. 25.

All leases for years, whether they begin *in præsenti* or *in futuro*, must be certain; that is, they must have a certain beginning and certain ending; and so the continuance of the term must be certain, otherwise they are not good. *See* Shep. Touch. 272. Yet if the year be certain when the lease is to take effect in interest or possession, it is sufficient; for until that time it may depend upon an uncertainty, viz. upon a possible contingent precedent before it begin, in possession or interest, or upon a limitation or condition subsequent; but in case it is to be reduced to a certainty upon a condition precedent, the contingency must happen in the lives of the parties; and though there appear no certainty of year in the lease, yet, if by reference to a certainty it may be made certain, it is sufficient. *See* Woodf. 117, n. In all cases of uncertain leases made until such a thing be done, or so long as such a thing continue, &c., if livery of seisin be made upon them, they may be good leases for life, determinable upon these contingencies, although they be no good leases for years. *See* Shep. Touch. 273, o. In leases for years, or other chattel interests, livery of seisin is not necessary; but instead thereof an actual entry is requisite, to vest the estate in the lessee; for to many purposes he is not tenant for years until he enter. *See* Co. Litt. 46, b. Before entry the lessee hath but an *inter esse termini*, an interest of a term, and no possession; and, therefore, that which enures by way of enlarging an estate cannot work without a possession; for before possession there is no reversion. Such is the case of leases at common law; for, if it be so framed as to be a bargain and sale under the statute, the possession is immediately executed in the lessee, so that no entry is necessary, *See* id. 270, n. c.

If a man make a lease for a thousand years, this lease is perfect by the delivery of the deed, without any livery of seisin. *See* Shep. Touch. 211. If a man make a lease for years, without saying how many, this shall be a good lease for two years certain; because for more there is no certainty, and for less there can be no sense in the words. If a man lease lands for such a term as both parties shall please, this is but a lease at will; because, what that term will be is utterly uncertain, and the pleasure of the parties seems to be limited to attend the continuance as well as the commencement and first fixation thereof. If a person, having an interest for three years only, make a lease for five years, it would be good for the three years. *See* Bull. N. P. 106. If a lease be made for life or years to A., and afterwards the lessor make a lease for years to B. regularly, this concurrent lease to B. is a good lease, at least for so many years of the second lease as shall be to come after the first lease is determined according to the agreement. *See* Shep. Touch. 275. Although, as hath been said, a lease for years must have a certain beginning and a certain end, yet the continuance thereof may be uncertain; for the same may cease and revive again in divers cases. *See* Co. Litt. 46.

Although a lease must be certain as to the term, yet if it be granted for twenty-one years after three lives in being, though it be uncertain at first when that term will commence, because three lives are in being, yet inasmuch as when they die it is reduced to a certainty, such a lease is valid. *Goodright d. Hall v. Richardson*, 5 T. R. 463.

In construing a lease, the intention of the parties will be taken into consideration, even as to the duration of the tenancy. *Strickland v. Maxwell*, 2 C. & M. 539; 4 Tyrw. 346.

An instrument by which A. agrees to let and B. to take certain premises on the terms that A. shall pay certain rents, varying in amount at the end of every three years, up to a specified date, and which provides that from and after that date "he shall pay the clear annual rent of 9*l.* till the end of the lease, but does not mention any time at which the lease is to terminate," is good only for the time previous to the date at which the 9*l.* is to commence. *Gwynne v. Mainestone*, 3 C. & P. 302.

The day of delivery, and not the date, is the time from which a lease takes effect. *Steele v. Mart*, 4 B. & C. 272; 6 D. & R. 392.

From the terms of the instrument (a blank printed form of lease, filled up, and an erasure in the *habendum*) it was clear that nothing more than a tenancy for one year was created. The court held that subsequent stipulations as to the off-going crop, applicable to a tenancy for a longer term, could not affect or control the *habendum*, so as to give the tenant a right of possession after the expiration of the year; and that the court might look at the original and the altered forms, to collect from the whole instrument the intention of the parties, being apparent from the face of it, and not matter dehors the document. *Strickland v. Maxwell*, *supra*.

A repugnant or inconsistent condition will be excluded. *Holding v. Piggott*, 7 Bing. 467; 4 M. & P. 427.

The word "term" may be construed to mean either the time or the estate granted. *Evans v. Vaughan*, 4 B. & C. 261; 6 D. & R. 349.

IX. Of the Term Granted. *See* also Landlord and Tenant, *ante*, p. 296.

(A) *For Years.*[1]

(B) *From Year to Year.*[2]

(C) *At Will.*[3]

The right of using a passage for shooting coals, &c., passes, though not named in a lease. *Hinchliffe v. Earl of Kinnoul*, 6 Scott, 650; 5 Bing. N. S. 2.

A covenant on the determination of the lease by the death of A. B. to yield up possession, &c., is a lease for life. *Doe d. Pritchard v. Dodd*, 2 Nev. & M. 838.

Under the words, "except all timber and other trees, wood and underwoods," the soil on which trees not timber grow is not excepted. *Legh v. Heald*, 1 B. & Adol. 622. And under the words, "excepting all timber and other trees, but not the annual fruit thereof," apple-trees are not within the exception. *Bullen v. Denning*, 5 B. & C. 842; 8 D. & R. 657.

A covenant to expend a certain sum "in effectually repairing," does not amount to a covenant effectually to repair. *Doe d. Dymoke v. Withers*, 2 B. & Adol. 896.

In an action on a lease, it appeared that the lessee stipulated for an increased rent for every acre suffered to be occupied, without the landlord's consent, by any other person, and the tenant covenanted to occupy and cultivate according to the custom of the country. The court held that underletting in small portions, for the purpose of a potato crop, was within the stipulations entitling the landlord to the increased rent, although proved to be usual amongst the farmers. *Greenslade v. Tapscott*, 1 C., M. & R. 55; 4 Tyr. 566.

The word "from," may mean either inclusive or exclusive, according to the context and subject-matter. *Pugh v. Leeds*, Cowp. 714. But see *Hutter v. Ash*, 1 Ld. Raym. 84.

A lease may commence at one day in point of computation, and at another in point of interest. *Enys v. Donnithorne*, 2 Burr. 1190.

As to the Construction of an Agreement for a Lease.—If a man describe himself in the beginning of an agreement to grant a lease, as making it on behalf of another, but in a subsequent part of it say that he will execute the lease, he is personally liable. *Norton v. Herron*, 1 C. & P. 648; 1 R. & M. 229.

An agreement to grant a lease creates no implied engagement for a general warranty of the land. *Gwillim v. Stone*, 3 Taunt. 433. Nor, it seems, for the delivery of an abstract of the lessor's title. *Temple v. Brown*, 6 id. 60.

A memorandum not signed by the lessor nor lessee is neither a lease nor an agreement, but may be looked at for the purpose of parol evidence. *Rex v. St. Martin's, Leicester*, 4 Nev. & M. 202; 2 Ad. & E. 210.

[1] We have already seen that all persons seised in fee-simple, fee-tail for life, or for years, of lands, may grant leases for any term commensurate with their respective interests. With respect to the commencement of a lease for years, as it is a mere chattel, it may be made to commence either *in præsenti* or *in futuro*, according to the agreement of the parties; and the lease that is to commence *in præsenti* is called *inter esse;* and the lease that is to commence *in futuro* is called *inter esse termina*, or future interest. *See* 2 Bl. Com. 144. A lease to commence after the determination of a prior lease shall begin presently, if the prior lease was void at law. *See* Cro. Car. 397, 398. So, a lease intended to commence *in futuro*, which misrecites the prior lease, on which it depends in a material point, shall begin immediately. A lease "from the day of the date," and from henceforth, is the same thing. *See* Cro. Jac. 258.

[2] If the demise be from year to year, so long as both parties please, it is a lease only for a year certain, and is determinable as well at the end of the first as of any subsequent year. *Doe v. Smaridge*, 7 Q. B. 957. *See ante*, p. 299.

A house and land were demised for the term of six months, and so on from six months to six months, until one of the parties should give the other six calendar months' notice of his intention to determine the tenancy: it was held that this was a lease for one year at least. *Reg. v. Chawton*, 1 Q. B. 247.

Where lands were demised to J. H., his heirs, executors, and assigns, for ever, at a yearly rent, with a proviso for re-entry in case of non-payment of rent, it was held that the deed created only a tenancy from year to year. *Doe v. Gardener*, 12 C. B. 319. *See ante*, p. 299.

If an annual rent is reserved, the holding is from year to year, although the contract of demise provides that the tenant shall quit at a quarter's notice. But if it is expressly agreed that the tenant is always to be subject to quit at three months' notice given to him at any time, the tenancy will be a quarterly tenancy. *Doe v. Grafton*, 21 L.J.Q.B. 276.

Where a wharf, warehouse and buildings, were let on the terms that a quarter's rent should be paid down on the day of the commencement of the tenancy, and should be continued to be paid in advance during the continuance of the hiring, it was held that this was a quarterly, and not a yearly hiring. *Wilkinson v. Hall*, 4 Scott, 301. *Towne v. Campbell*, 3 C. B. 921.

It is repugnant to the notion of a tenancy from year to year that the option of determining it should rest solely with the tenant: in a tenancy from year to year, the lessor must have the same privilege. *Doe d. Crago*, 6 C. B. 90. *Doe d. Taniere*, 18 L. J. Q. B. 49. *See*, further, as to what words will create a tenancy from year to year, Landlord and Tenant, *ante*, p. 299.

[3] The reservation of a yearly or quarterly

X. Of the Covenants of the Lease. *See* also vol. iii. p. 443.

(A) *To give Possession.*[1]

(B) „ *pay Rent.*[2] *See* also vol. iii. p. 476.

(C) „ *pay Taxes.* *See* Landlord and Tenant, *ante*, p. 304.

(D) „ *Repair.*[3] *See* also vol. iii. p. 478.

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rent is not incompatible with a tenancy at will. *Doe v. Davies*, 7 Ex. 91. *Doe v. Cox*, 11 Q. B. 122. *See ante*, p. 301.

[1] Every lessor binds himself to give possession, and not to give to the party to whom he demises a mere right to take possession from a wrongdoer by an action of ejectment (*Coe v. Clay*, 5 Bing. 469. *Jinks v. Edwards*, 11 Ex. 775); and every lessee binds himself to accept possession and pay rent. *Stanley v. Hayes*, 3 Q. B. 105.

[2] A covenant for the payment of rent at a specified time, but without mentioning any place, is analogous to pay a sum of money in gross on a day certain; and it is incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money. *Haldane v. Johnson*, 8 Ex. 689.

In the case of a yearly tenancy, at a yearly sum, where no time of payment is mentioned, the rent is payable once a year. *Collett v. Curling*, 10 Q. B. 785.

In the absence of all fraud and deceit, the tenant is bound by his express covenant or contract, and must pay his rent, although he has not had that beneficial use and enjoyment of the demised premises which was anticipated. Thus, in the case of a demise of the eatage of a meadow, the tenant was held liable on his covenant to pay rent, notwithstanding the grass, at the time of the demise, was unfit for cattle, from deleterious matter in manure spread over it previous to the demise, but of which the lessor was ignorant. *Sutton v. Temple*, 12 Mee. & W. 52. So, in the case of an unfurnished house, it is no answer to an action for rent that the house was uninhabitable by reason of its being infested with bugs, although a cross-action might be maintained on an implied covenant that the house was fit for the purpose for which it was demised. *Hart v. Windsor*, 12 Mee. & W. 68.

If the tenant loses the benefit of the enjoyment of any part of the demised premises by the act of the landlord, the rent is thereby suspended. But to have this effect the act of the landlord must not be of the character of a temporary trespass or constructive eviction, but an actual dispossession of the tenant. *Delaney v. Fox*, 2 C. B. (N. S.) 768. *Upton v. Townend*, 17 C. B. 64. *Carpenter v. Parker*, 3 C. B. (N. S.) 238. *Wheeler v. Stevenson*, 30 L. J. Ex. 46. *Hills v. Sughrue*, 15 Mee. & W. 253. *Jervis v. Tomkins*, 1 H. & N. 195. *Brown v. Royal Insurance Society*, 28 L. J. Q. B. 277.

Although houses become ruinous and fall down, and buildings, fences, and superstructures erected upon the soil, and crops growing thereon, be destroyed by floods, or burnt by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues. *Marquis of Bute v. Thompson*, 13 Mee. & W. 493. *Lofft v. Dennis*, 1 E. & E. 481; 28 L. J. Q. B. 168. *Arden v. Pullen*, 10 Mee. & W. 321. *Leeds v. Cheetham*, 1 Sim. 146. *Bayne v. Walker*, 3 Dowl. 233.

If the lessee has covenanted to pay rent, "damage by fire excepted," and part of the demised premises is destroyed or injured by fire, the whole of the rent is not thereby suspended, but the tenant is entitled to a reasonable abatement. *Bennett v. Ireland*, Ell. Bl. & Ell. 326.

A tenant who has been compelled by a superior landlord, or other incumbrancer having a title paramount to that of his immediate landlord, to pay sums due for ground rent, or other like charges, may treat such payments as payments in satisfaction, or part satisfaction, of rent due to his immediate landlord, and may plead them as far as they extend in bar to an avowry for rent in arrear. *Graham v. Allsopp*, 3 Ex. 198. *Taylor v. Zamira*, 6 Taunt. 524. *Jones v. Morris*, 3 Ex. 742.

If the rent is to be paid free of all outgoings, it must be paid free of land-tax and tithe-commutation rent-charge. *Parish v. Sleeman*, 8 W. R. 106, Ch. *Sweet v. Seager*, 2 C. B. (N. S.) 119.

[3] In the absence of any express covenant or agreement, there results from the demise and acceptance of the lease by the lessee an implied covenant or promise, according as the demise is by deed or parol agreement, to use the property demised in a tenant-like and proper manner, to take reasonable care of it, and restore it at the end of the term for which it is demised in the same state and condition in which it was at the time of the demise, subject only to the deterioration produced by ordinary wear and tear, and the reasonable use of it for the purpose for which it was known to be required. The extent of the liability of the tenant depends upon the duration and value of his term and interest therein. A tenant for life is responsible for permissive as well as commissive waste; but a tenant at will or from year to year is responsible only for commissive waste. *Harnett v. Maitland*, 16 Mee. & W. 256. A tenant for a term of

(E) *For Quiet Enjoyment.*[1] *See* also vol. iii. p. 483.

XI. Of Cancellation of the Lease.[2]

XII. „ Assignment of the Lease.[3]

XIII. „ Underleases.[4]

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years is not, in the absence of any covenant or promise to that effect, bound to do substantial repairs. He must not suffer a roof of thatch to remain uncovered so as to let the timbers rot. And if windows are broken by the wind or hail, he is liable for the non-repair of them, if the consequence of his neglect is that the building is damaged from rain. He is bound to cleanse the drains and sewers. *Russell v. Shenton*, 3 Q. B. 449.

There is no implied covenant on the part of a landlord to repair. *Gott v. Gandy*, 2 E. & B. 845; 23 L. J. Q. B. 1. The obligation of the landlord in this respect depends, therefore, upon the terms of the contract. A covenant by the lessee to repair and maintain the premises during the term, and deliver them up upon its expiration in good and sufficient repair, is construed with reference to the age and nature of the building, its condition at the time, the length of the lease, and any other of the surrounding circumstances material to the question. If the house is old, it is a sufficient compliance with the covenant if he repair, and maintain it in repair, as an old house. No obligation is cast upon him to replace old materials with new. *Harris v. Jones*, 1 M. & Rob. 175. *Payne v. Haine*, 16 Mee. & W. 545; 16 L. J. Ex. 130. If the covenant is to maintain the house in repair, "the same being first put into repair by the lessor," the obligation does not attach until after the lessor has put the premises in repair. *Neale v. Ratcliffe*, 15 Q. B. 916. *Connock v. Jones*, 3 Ex. 233. *See* further, Landlord and Tenant, *ante*, p. 296.

[1] The covenant for quiet enjoyment in general extends only to the acts or eviction of persons having lawful title, or claiming under the lessor. Shep. Touch. 166. *Anon.* Lofft. 460; Bull. N. P. 161. *Broking v. Cham*, Cro. Jac. 425. Accordingly, under the covenant by the lessor that the lessee shall quietly enjoy, &c. without interruption or disturbance by the lessor, or any person claiming under him, is not broken by an entry of the land-tax collector to distrain for arrears of land-tax due from the lessor; for in such case the disturbance is not by a person claiming by title from the lessor. *Stanley v. Hayes*, 3 Q. B. 105. But it has been held that a covenant that the lessee shall quietly enjoy against all claiming or pretending to claim a right in the premises, extends to all interruptions, be the claim legal or not, provided it appear that the disturber do not claim under the lessee himself. *Chaplin v. Southgate*, 10 Mod. 384; 1 Comyn, 230. Of course, if the lessee be ousted or molested by the lessee himself it will be a breach of the covenant; as, if he darken his ancient windows by building on the adjoining land, or place some structure on the demised premises (*Kidder v. West*, 3 Lev. 167), as erecting a gate obstructing the tenant's access to the house. *Andrews v. Paradise*, 8 Mod. 319. *Morris v. Edgington*, 3 Taunt. 24.

If the lessor merely covenants against the acts of a particular person, a molestation by that person can be the only ground of a breach of covenant. *Foster v. Mapes*, Cro. Eliz. 213. *Perry v Edwards*, 1 Stra. 400.

[2] The cancellation of a lease by the mutual consent of the parties does not destroy the estate vested in the lessee; and the lessor may therefore maintain an action of debt on the demise for the recovery of the rent. *Lord Ward v. Lumley*, 5 H. & N. 87; 29 L. J. Ex. 322.

[3] An assignment must, by the Statute of Frauds, be in writing. It must be properly stamped. *Baker v. Gosling*, 1 Bing. N. S. 246; 1 Scott, 58.

Although leases (reserving a rent of not less than two-thirds of the improved value) may be created by parol for a term not exceeding three years, yet such lessee cannot assign by parol. *Anon.* Vent. 382. *Botting v. Martin*, 1 Camp. 317.

A term of years to commence in future may be assigned. *Theobalds v. Dufrey*, 9 Mod. 101.

An assignee of a lease containing covenants running with the land is liable, after he has assigned over, for a breach incurred after the assignment to him, and before his assignment over. *See* vol. iii. p. 487. Assignees of all a debtor's property in trust, for the creditors, are not bound to accept a lease of which they were ignorant when they executed the assignment, and which they think likely to be injurious to the creditors. They may put up such a lease for sale, to try whether it can be made beneficial, without rendering themselves chargeable as assignees of the lease; but if they treat the estate as their own, and do anything which is injurious to the owner, they are chargeable as assignees of the lease. *Carter v. Warne*, 1 M. & M. 479.

An assignee who enters under a void lease, but occupies to the end of the term, is liable for repairs. *Beale v. Sanders*, 3 Bing. N. S. 850; 3 Scott, 58.

Tenant being under covenant not to assign, executed a deed under the arrangement clauses of the Bankruptcy Act (24 & 25 Vic. c. 104, s. 192), which was afterwards duly registered:—*Held*, a breach of the covenant. *Holland v. Cole*, 31 L. J. Ex. 481.

[4] Underleases are necessarily extinguished whenever the original lease terminates by effluxion of time, or by any other

XIV. Of Forfeiture and Re-Entry.[1]

event provided for by the original contract. *Burne v. Richardson*, 4 Taunt. 720. That which cannot be supported as an assignment shall be good as an underlease against the party granting it. *Palmer v. Edwards*, Dougl. 186.

Under a proviso that all assignments of a lease shall be void if not enrolled, underleases are not included. *Kinnersley v. Orpe*, id. 56.

If the lessee of a term underlets for a longer term than his own, it is a demise and not an assignment. *Baker v. Gostling*, 1 Bing. 19; 4 M. & Scott, 539. And an underlease is not an assignment to the effect of working a forfeiture, under a proviso not to assign. *See* Wils. 234. It has, therefore, become usual to insert a proviso in leases, that the lessee, &c., shall not let, set, transfer, or assign over, the whole or any part of the premises. *See* 2 T. R. 435.

The landlord or original lessor cannot sue an under-tenant on a covenant for rent contained in the original lease (*see* 11 East, 52); nor is the under-tenant bound by any of the covenants contained in the original lease.

[1] Forfeiture (*see* also vol. iii. p. 164; id. iv. p. 499) may take place either by some act in law which is inconsistent with the interest supposed to be demised, or by the breach of a condition, which may give a title of re-entry, or make the lease itself *ipso facto* void. The only conveyance by which a lessee for years can create a forfeiture of his estate is a feoffment, because it is the only way in which he can create a freehold by disseisin. To make a feoffment valid nothing is wanting but the possession, and when the feoffor has it, though it be but a naked one, the livery will create a freehold by disseisin.

If a tenant for years, the reversion or remainder being in the king, make a feoffment in fee, this is a forfeiture, although no reversion or remainder can be divested out of the king; and the reason given is in respect of the solemnity of the feoffment by livery tending to the king's disherison. *See* Co. Litt. 251, b. So, if the lessee sues a writ or resorts to a remedy which claims or supposes a right to the freehold; or where, in an action grounded on the lease, he resists the demand under the pretence of a higher interest in the land; or if he acknowledges the fee to be in a stranger, he is estopped by the record from claiming anything under the lessor. *See* 3 Leon. 169; Moore, 211; Gouldsb. 40; Godb. 104; 4 Leon. 3; Dy. 209, pl. 51, in marg.; 2 Leon. 52; Co. Litt. 339. Conditions for re-entry, and provisos for the cessation of terms, usually relate to the non-payment of rent, the commission of waste, or the alienation of the lease, without the license of the lessor. Such conditions, as they tend to the defeasance of the estate before its natural termination, in many cases in which the law itself has provided an adequate remedy, are regarded with some degree of jealousy. Whenever a condition is reserved for non-payment of rent, the utmost precision is required by the common law in the performance of certain previous ceremonies, in order to enable the lessor to take advantage of it. There must be a demand made for the rent, although, by special consent of the parties, a re-entry may be for default of payment without any demand. *See* vol. iii. p. 164; vol. iv. p. 499; Bro. Abr. Demaunde, 19; Bro. Abr. Cond. 216; Ab. Entry Congeable, 2, 14, 39. The demand must be of the precise rent due. *See* 1 Leon. 304; Cro. Eliz. 309; Cro. Jac. 390; 1 Roll. Abr. 367. The demand must be made upon the land. If there be a house upon it, the demand must be made there; and where there is no house, it must be made upon the most notorious place upon the land. It must be made upon the precise day when the rent is due and payable by the lessee. *See* Cro. Eliz. 73. The rent must be demanded a convenient time before sunset, although the rent be not due till the last moment of the natural day. A demand must be made in fact, and so averred in pleading, although no one should be on the land ready to pay the rent. *See* 1 Roll. Abr. 458. If, after all these requisites have been performed, the tenant refuses to pay the rent, then the reversioner is entitled to take advantage of the condition for re-entry by the common law. *See* 1 Saund. 287, a. n. 16; 1 Ven. 332. In all these cases of forfeiture, or other cessation of the lessee's estate, the lessor has a power to re-enter. But this right may be waived by an act of the lessor, indicating his intention of not availing himself of his privilege. Thus, acceptance of rent up to a time subsequent to the forfeiture, if received as rent under the lease, and not as a penalty incurred, or as a satisfaction for the time since occupied by the tenant, is a waiver of any previous forfeiture. *See* Cowp. 243. So where a lessor brought an action of covenant on a proviso of re-entry, it was holden to be a waiver of the right to enter, as it was an admission that the lease still subsisted. *See* Esp. Nisi Prius, 463. But where the lease is absolutely void, nothing implied can amount to a confirmation of it, or be deemed a relinquishment of the lessor's right to enter; as, if a tenant for life grant the premises for a longer term than the duration of his own interest, this demise being of course void, no acceptance of rent by the person next entitled can be a confirmation of the lease so granted; for, being void at its creation, no subsequent act can establish it. *See* Dougl. 50, 52, n.; Cowp. 482. And where lessee entered under a void lease, it has been ruled that he shall not be deemed even tenant at will, but merely at sufferance, and, therefore, not entitled to any notice to quit. *See* Esp. Nisi Prius, 464. This doctrine, however, of law, must be understood not to extend to the case where the person in remainder has re-

ceived rent of the lessee, which is an acknowledgment of the tenancy, and entitles him to notice. *See* 7 Term Rep. 83. And where the lease is not absolutely void, but voidable only, the lessor must show by some explicit act that he means to take advantage of his right. *See* Co. Litt. 211.

If the lessee of a term give up possession to a party claiming adverse title to his lessor, it is a forfeiture. *Doe d. Lloyd v. Powell*, 5 B. & C. 308; 8 D. & R. 35.

To constitute a disclaimer there must be a renunciation by the party of his character of tenant, either by setting up the title of a rival claimant, or by asserting a claim of ownership in himself. *Doe v. Cooper*, 1 Scott, N. R. 41. *Hunt v. Aligood*, 30 L. J. C. P. 313.

If it be provided that in case of non-payment of rent it shall be lawful for the lessor "to enter upon the premises for the same until it be fully satisfied," the lessor will be entitled to enter and hold possession until the arrears of rent are satisfied; but when they are satisfied, the lessee will be entitled to re-enter and hold under the lease as before. *Doe v. Bowditch*, 15 L. J. Q. B. 267.

Where there is a proviso for re-entry in case of non-performance of covenants, and the lease contains a general covenant to repair, and also a covenant to repair within a certain time after notice, the landlord may at once bring ejectment for breach of the general covenant (*Baylis v. Le Gros*, 4 C. B. (N. S.) 537); but if he give notice under the second covenant, this is a waiver of the forfeiture incurred by a breach of the general covenant, and he cannot bring ejectment until after the three months have expired. *Doe v. Meux*, 4 B. & C. 606.

The mere wrongful payment of rent to a person not entitled does not operate as a disseisin of the landlord, or disclaimer of his title, so as to amount to a forfeiture of the lease. *Doe d. Dillon v. Parker*, 1 Gow. 180. But where the defendant, in ejectment, alleged that the person through whom the lessor of the plaintiff claimed a title in fee, held only as tenant to the defendant:—*Held*, that such an assertion of title, operating as a disclaimer of the title of their landlord, amounted to a forfeiture of the lease or subsisting tenancy, and that notice to quit need not be proved. *Doe d. Jefferies v. Whittick*, 1 Gow. 193.

Where, by the terms of a lease of coal-mines, it was rendered absolutely void on a cessation of working for two years:—*Held*, that a subsequent receipt of rent would not set up the lease: the distinction is where the lease is rendered void, or only voidable, and a power of re-entry reserved on the doing or omitting to do a particular thing. In the former case no act of the lessor can renovate the lease, but in the latter the forfeiture may be waived by the lessor, with knowledge of it, receiving rent subsequently accruing due, or doing any other act acknowledging a subsisting tenancy. *Doe d. Bryan v. Banks*, 1 Gow. 221.

Where bankruptcy or insolvency was to be a forfeiture, and the lessee was convicted of felony:—*Held*, that if a forfeiture, it was waived by the receipt of rent. *Doe d. Griffith, v. Pritchard*, 2 Nev. & M. 489. *Doe d. Gatehouse v. Rees*, 4 Bing. N. S. 384; 6 Scott, 161.

Where certain duties were to be performed in addition to the payment of rent, whether a performance by the lessee's tenants was a compliance, it was held to be a question for the jury. *Doe d. Tucker, R. v. Morse*, 1 B. & Adol. 365.

Under a lease not to assign without license, an invalid assignment is no forfeiture. *Doe d. Lloyd v. Powell, supra.*

A covenant by a lessee that he will not let or underlet for more than a year, does not prevent him from granting leases to commence at a future day. *Croft v. Lumley*, 6 H. L. C. 737.

If a proviso of re-entry is insensible, it is nugatory. *Doe v. Carew*, 2 Q. B. 317.

If the clause of re-entry provide that the lessor shall, upon a contingency that has happened, re-enter and hold the demised premises as if the lease had never been made, the lessor holds the premises only from the time of the re-entry, so that the lessor, by taking advantage of the forfeiture and re-entering, does not deprive himself of his remedies upon the covenants of the lease for any breach of those covenants up to the time of the re-entry. *Hartshorn v. Watson*, 4 Bing. N. C. 78; 5 Scott, 506.

If the landlord does not avail himself of the forfeiture, the liability of the lessee upon the covenants of the lease remains unaffected by it; but if he bring ejectment, the landlord cannot, in general, sue the lessee in respect of breaches of covenant that have accrued subsequently to the commencement of the action. *Jones v. Carter*, 15 Mee. & W. 718.

Acceptance of rent, or the bringing of an action for rent accruing due after the forfeiture, will be considered as a waiver of the forfeiture, if at the time the lessor received the rent he had notice of the breach of covenant. *Croft v. Lumley*, 5 E. & B. 648; 27 L. J. Q. B. 321. *Dendy v. Nicholl*, 4 C. B. (N. S.) 376; 27 L. J. C. P. 220. *Cotesworth v. Spokes*, 30 L. J. C. P. 221. But a receipt of rent is no waiver of the breach of a continuing covenant to repair. *Doe v. Jones*, 5 Ex. 498; 19 L. J. Ex. 405.

It has been held, that where a breach of covenant had continued upwards of twenty years with full knowledge of it on the part of the lessor, and no attempt had been made to take advantage of the breach, the jury ought to be directed to presume a license on the part of the lessor to the tenant to commit the breach of covenant, so that neither the lessor nor his assignee could avail himself of the breach to work a forfeiture. *Gibson v. Doey*, 2 H. &N. 615; 27 L. J. Ex. 37.

A court of equity has power by the 22 & 23 Vic. c. 35, s. 4, to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has been committed without fraud or gross negligence, and there is an insurance on foot in con-

XV. Of the Surrender of the Term.[1]

XVI. ,, Termination of the Lease.[2]

formity with the covenant to insure. By sect. 8, relief may be given in certain cases in favour of purchasers of leasehold estates with covenants annexed thereto and broken, where the purchaser has bought without notice. See *Reynolds v. Pitt*, 19 Ves. 134. *Gregory v. Williams*, 9 Hare, 683.

As to the relief against forfeiture by non-payment of rent, or omission to insure, in case ejectment is brought thereupon, *see* Ejectment, vol. iv. p. 175; 23 & 24 Vic. c. 126, ss. 1, 2.

[1] Surrenders by act and operation of law take place where the owner of a particular estate has been a party to some act, the validity of which he is afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. Thus, if lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former lease. So if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon. The tenant for life is thereby estopped from disputing the seisin in fee of the remainderman; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accept from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. The acts *in pais* which bind parties by way of estoppel, are all acts which anciently were, and, in contemplation of law, continue to be, acts of notoriety, not less formal and solemn than the execution of a deed; such as livery entry, the acceptance of an estate, and the like. *Per Cur. Lyon v. Reed*, 13 Mee. & W. 306. An invalid lease does not operate as a surrender of a prior subsisting lease. *Doe v. Poole*, 11 Q. B. 713; 17 L. J. Q. B. 143. *Doe v. Courtney*, 11 Q. B. 702. Nor does an agreement for an increased rent constitute a new tenancy. *Doe v. Geekie*, 5 Q. B. 841. *Crowley v. Villy*, 7 Ex. 319.

An open and notorious shifting of the actual possession of corporeal property in execution of an agreement between the lessor and lessee and a third party, to substitute such third party as the lessee in the place of the original lessee, constitutes a surrender by operation of law of such original lease. 2 Platt on Leases, 505. Where, therefore, a landlord grants a new lease to a stranger, with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law. *Davison v. Gent*, 1 H. & N. 744. *Thomas v. Cook*, 2 B. & A. 120. *Nicholls v. Atherstone*, 10 Q. B. 944; 16 L. J. Q. B. 371. *Reeve v. Bird*, 1 C., M. & R. 31. The substituted tenant must have been expressly received as such by the landlord (*Graham v. Whichelo*, 1 C. & M. 194. *Doe v. Williams*, 6 B. & C. 41. *M'Donnell v. Pope*, 9 Hare, 707. *Matthews v. Sawell*, 8 Taunt. 270), pursuant to an agreement to that effect. *Cocking v. Ward*, 1 C. B. 868. *Kelly v. Webster*, 12 C. B. 283; 21 L. J. C. P. 163.

An agreement between landlord and tenant holding under a parol demise from year to year, that the tenancy should be determined followed by the departure of the tenant, an entry and taking possession on the part of the landlord becomes an actual surrender by act and operation of law. *Dodd v. Acklom*, 7 Scott, N. R. 423. *Furnivall v. Grove*, 30 L. J. C. P. 3. Where the tenant abandons the premises and the landlord enters for the purpose of repairing the premises, or airing the rooms, or of letting the house, and not with the intent of taking possession as owner, this will not amount to a surrender. *Bessell v. Landsberg*, 7 Q. B. 638. *Griffith v. Hodges*, 1 C. & P. 419. And the mere circumstance that the defendant delivered the key to the landlord does not, where there has been no entry or taking possession by the landlord, constitute evidence of a surrender. *Cannan v. Hartley*, 19 L. J. C. P. 323. *See* 9 Mee. & W. 770; 8 Ad. & E. 118; 10 C. B. 6.

If a lessee from year to year grant an underlease of part of the premises demised to him, and then surrenders his term, the surrender will not destroy the estate and interest of the under-lessee, if the latter has not concurred in and been a party to the surrender. *Pleasant v. Benson*, 14 East, 237; Co. Litt. 338, b. The surrender does not relieve the lessee from his liability in respect of breaches of covenant which have accrued prior to the surrender. *Attorney-General v. Cox*, 3 H.L.C. 240. *See* form of plea, B. & L. 372.

[2] A lease may also be determined by force of a condition indorsed upon the back thereof, if it be before the sealing and delivery, as well as by force of a condition within the deed. *See* Cro. Jac. 454. It is now clearly held, that to avoid the consequences of bankruptcy, landlord may insert a clause that the lease shall determine on the bankruptcy or insolvency of the tenant. *See* 15 Ves. 258; 18 id. 433; 14 Sim. 230; Smith, R. & P. P. 92, 93, 517.

The ordinary means whereby a lease determines is by the period expiring for which the lands, &c. were demised; or upon the contingency happening that was to create, as it were, such period.

The lessor may reserve to himself a right

XVII. Remedies and Actions connected with.

(A) *For Breach of the Agreement to grant or accept a Lease.*[1]

(*a*) *Specific Performance.*[2]

to determine the lease and resume possession of the demised premises at any time, on giving notice of his intention to the lessee. *Doe v. Kennard*, 12 Q. B. 244.

When the lease is determinable by notice, the notice must be in strict conformity with the terms of the power of defeasance, and when performance of all the covenants that have been entered into by the lessee is made a condition precedent to his right to determine the lease, these covenants must be strictly fulfilled. *Friar v. Grey*, 5 Ex. 584. *Chapman v. Townes*, 6 Mee. & W. 100. *Porter v. Shephard*, 6 T. R. 665. 2 Platt on Leases, 461. A notice to determine, signed by two out of three commissioners, is sufficient. *Coombes v. Dutton*, 5 Mee. & W. 468.

[1] If either of the parties to an agreement for a lease refuse to perform the stipulations which it contains, besides the relief which a bill in equity for a specific performance may afford him, the party injured has one of two remedies at common law: viz. an action on the covenant, if the agreement be by deed; or an action on the contract, if it be either by writing without deed or by parol, provided in the latter instance the contract be to be performed within a year from the making thereof. *See* Woodf. 27. If the agreement be by writing without deed, or by parol, damages for a breach of it may be recovered in an action upon a special *assumpsit*. By the 4th sect. of the Statute of Frauds, no action shall be brought to charge, &c., upon any contract or sale of lands or tenements, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised. *See* vol. iv. p. 538.

A landlord who executes a lease which puts it out of his power to perform an agreement is liable to an action. *Ford v. Tiley*, 6 B. & C. 325.

To enable a plaintiff to recover for not accepting a lease, he must have assented to the offer. *Routledge v. Grant*, 4 Bing. 653; 1 M. & P. 717.

A contract provided that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee: — *Held*, that it was not necessary to aver that a lease was tendered to the lessor for execution. *Price v. Williams*, 1 Mee. & W. 6.

Where there was a written agreement to sell and assign the unexpired term of eight years, of a lease and goodwill of a public-house, it was held that the purchaser could not refuse to perform the agreement, on the ground that when it was entered into there were only seven years and seven months of the term unexpired. *Belworth v. Hassel*, 4 Camp. 140.

Case lies by a lessee for years against his under-lessee for damaging the premises, because he is liable to the first lessor. *Cudlip v. Rundall*, 4 Mod. 9. *Hicks v. Dowling*, 12 id. 100.

If a man describe himself in the beginning of an agreement to grant a lease as making it on behalf of another, but in the subsequent part of it say that he will execute the lease, he is personally liable. *Norton v. Herron*, 1 R. & M. 229; 1 C. & P. 648.

A. agreed to underlet his house to B., the latter paying for the furniture at an appraisement: — *Held*, that B. was excused from the performance of the agreement, because A., at the time he quitted the house, was in arrears for rent to the landlord. *Partridge v. Sowerby*, 3 B. & P. 172. Where there was a negotiation for letting upon the terms of a tenant finding a surety to join him as security, and the agreement was, in fact, never signed, nor the surety offered, no tenancy is created. *Doe d. Bingham v. Cartwright*, 3 B. & A. 326. And if a tenant give a reference as to respectability, it is for the jury to determine whether answers received were what ought to have been satisfactory to the landlord. *Ward v. Smith*, Ex. Ch. 11 Price, 19.

To an action on an agreement to take a house, it seems questionable whether it would be a good defence to show that it was burnt down before the party could take possession. *Phillipson v. Leigh*, 1 Esp. 398. *Bullock v. Dommitt*, 2 And. 608. *See* cases cited, 2 Platt on Leases, 120.

[2] *Specific Performance.* — A court of equity will enforce the performance of a contract to grant a lease; and where a specific performance has become impossible, owing to the lessor's having disposed of the premises to another, the court will direct a reference to the master, to inquire what damage the plaintiff has sustained by the non-fulfilment of the lessor's contract. *See* 12 Ves. 394; 2 Platt, 621. With respect to mere parol contracts, it is an established principle that an unwritten agreement, when part performed, is not within the provisions of the Statute of Frauds, and will be decreed to be executed by a court of equity. *See* 2 Bro. C. C. 566; 2 Atk. 100. As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or auxiliary to its execution. Delivery of possession, or payment of money, therefore, is a sufficient part performance of an agreement not reduced into writing. *See* 3 Atk. 4. But a tenant guilty

(B) *For Breach of Covenants of the Lease.*[1] *See* also Covenant, vol. iii. pp. 443–526.

(C) *For Double Rent and Value in case of Holding Over. See* Double Rent and Value, vol. iv. p. 128.

LEASE and RELEASE.[2]

of waste, or want of good husbandry, whilst holding under an agreement for a lease, is not entitled to a specific performance. The refusal of a tenant to execute a lease when tendered, declaring himself satisfied with the agreement, cannot be considered as a repudiation of the contract, and is not a sufficient ground for refusing a specific performance. *See* 1 Ves. & B. 73. Variations verbally agreed upon will not prevent the execution of a written agreement, if the situation of the parties in all other respects remains the same. See *Price v. Dyer*, 17 Ves. 356.

[1] Covenants which run with the land, as covenants to repair, &c., pass with the reversion to the heir or devisee, and not to the executor, unless the reversion pass to the executor, as being of a term only. But the executor may sue for damages caused to the personal estate of the testator by the breach of such covenants during the lifetime of the testator. *Jones v. King*, 4 M. & S. 188; 5 Taunt. 418. *Kingdon v. Nottle*, 1 M. & S. 354. *Raymond v. Fitch*, 2 C., M. & R. 588. *Ricketts v. Weaver*, 12 Mee. & W. 718.

The assignee of the reversion may sue the lessee or his assignee upon the covenants of the lease (32 Hen. 8, c. 34. *Brett v. Cumberland*, Cro. Jac. 522), and is liable to be sued by either for breach of the covenants on his part to be observed (*Palmer v. Edwards*, 1 Dougl. 186. *Thursly v. Plant*, 1 Wms. Saund. 240. *Jourdain v. Wilson*, 4 B. & A. 266), provided the lease and assignment were under seal. *Beely v. Parry*, 3 Lev. 154. If by parol, the assignee of the reversion may, however, maintain an action for use and occupation. *Standen v. Chrismas*, 10 Q. B. 142; 16 L. J. Q. B. 265. *Bickford v. Parson*, 5 C. B. 929; 17 L. J. C. P. 192. And if a tenant holds on under an assignee of the reversion, and continues in the enjoyment of all the benefits secured to him by his original lease, he may be presumed to have agreed with the assignee to hold upon the same terms as he held under the original lessor. *Arden v. Sullivan*, 14 Q. B. 832; 19 L. J. Q. B. 269.

Where the reversion consisted of a term of years, and was assigned to the reversioner in fee, the reversion of the term merged at common law in the reversion in fee, and all its incidents were thereby extinguished. *Webb v. Russell*, 3 T. R. 393. But by 8 & 9 Vic. c. 106, s. 9, when the reversion expectant on a lease of any tenements or hereditaments of any tenure shall be surrendered or merge, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incident to and obligations on the same reversion as but for the surrender and merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

If the lessee assign over his term, and the lessor accept the assignee as his tenant, the lessor cannot have an action of debt against the first lessee, although he may sue on the covenant, if any, to pay the rent. 1 Wms. Saund. 240; 2 id. 302, n. *Wadham v. Marlowe*, 8 East, 314. *Spencer's case*, 1 Smith's L. C. 43.

The assignee of a term is liable for breaches of covenant happening whilst he was assignee, but not for those committed after assignment by him. *Paul v. Nurse*, 8 B. & C. 486. *Harley v. King*, 2 C., M. & R. 18. *Taylor v. Shum*, 1 B. & P. 21.

Where the plaintiff declares on a demise made by himself, he is not obliged to set out any title to the lands demised, but may rely on the deed alone; but in an action by the assignee of the reversion, the plaintiff must allege that the lessor was seised or possessed of some estate which would legally pass by assignment to the assignee (1 Wms. Saund. 233, a. *Cuthbertson v. Irving*, 4 H. & N. 742; 6 id. 135); and this allegation is traversable. *Weld v. Baxter*, 1 H. & N. 568; 26 L. J. Ex. 112. *Carvick v. Blagrave*, 1 B. & B. 531.

A declaration on a lease need only state the covenant not performed. *M'Allen v. Churchill*, 11 Moore, 483.

A memorandum on a margin of the lease ought to be received in evidence. *Cowne v. Garment*, 1 Bing. N. S. 318; 1 Scott, 275.

Where a lease has been stolen, secondary evidence of its contents may be given. *Doe d. Pearson v. Rees*, 7 Bing. 725.

Where a lease is in the hands of a tenant, and it appears that no counterpart can be found, the court will permit the landlord to inspect and take a copy of the lease. *Doe d. —— v. Slight*, 1 Dowl. P. C. 163. *Wallis v. Littell*, 11 C. B. (N. S.) 369; 31 L. J. C. P. 100.

As to the action for use and occupation, *see* Landlord and Tenant, *ante*, p. 296.

[2] Is, in fact, a bargain and sale for a year, and a common-law release, operating by way of enlargement of estate, and owes its rise to the following circumstances:—The framers of the Statute of Uses foresaw that freehold estates would thenceforth become transferable by parol only, without any form or ceremony whatever. The Statute of Enrolments was therefore passed in the same parliament, which would have introduced an almost universal register of conveyances of

LEAVE and LICENSE, Plea of. *See post*, Trespass.

LECTURES, Copyright in.[1]

LEET.

real estates, but for the omission of bargains and sales for terms of years. In the reigns of Hen. 4, and Edw. 4, it was not unusual to transfer freehold estates in the following manner:—A deed of lease was made to the intended purchaser for three or four years; and after he had entered into possession, a deed of release of the inheritance was executed to him, which operated to enlarge his estate into a fee-simple. When it was found that the Statute of Uses transferred the actual possession without entry, the idea of a lease and release was adopted. A bargain and sale for a year was made by the vendor to the person to whom the lands were to be conveyed: by this a use was raised in the bargainee, without any enrolment, to which the statute transferred the possession. Thus the bargainee became immediately capable of accepting a release of the freehold and reversion; and accordingly a release was made to him, dated the day next after the day of the date of the bargain and sale, all which was considered as equal to a feoffment, with livery of seisin.

This conveyance is now disused in consequence of the enactments of the 4 Vic. c. 21. Sect. 1 provides, "that every deed or instrument of release of a freehold estate or deed, or instrument purporting or intended to be a deed or instrument of release of a freehold estate, which shall be executed on or after the 15th day of May, 1841, and shall be expressed to be made in pursuance of this act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and sale, or lease for a year, for giving effect to such release, although no such deed or instrument of bargain and sale or lease for a year shall be executed: Provided that every such deed or instrument so taking effect under this act shall be chargeable with the same amount of stamp-duty as any bargain and sale or lease for a year would have been chargeable with (except progressive duty), if executed to give effect to such deed or instrument, in addition to the stamp-duties which such deed or instrument shall be chargeable with, as a release or otherwise, under any act or acts relating to stamp duties."

By sect. 2, "where in or by any deed or instrument of release of freehold estates executed before the 15th day of May, 1841, any deed or instrument of bargain and sale, or lease for a year, for giving effect to such deed or instrument of release shall be recited, or by any such mention thereof in such deed or instrument of release appear to have been made or executed, such recital or mention thereof shall be deemed and taken to be conclusive evidence of the deed or instrument of bargain and sale or lease for a year so recited or mentioned having been made and executed, and such deed or instrument of release shall also have the like effect as if the same had been executed after the 15th day of May, 1841, whether such deed or instrument of bargain and sale, or release for a year, shall or shall not have been lost or mislaid, or may or may not be produced."

By the 8 & 9 Vic. c. 106, s. 2, "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to be in grant as well as in livery; and every deed which by force only of this enactment shall be effectual as a grant, shall be chargeable with the stamp-duty with which the same deed would have been chargeable in case the same had been a release founded on a lease or bargain and sale for a year, and also with the stamp-duty (exclusive of progressive duty) with which such lease or bargain and sale for any year would have been chargeable." But by 13 & 14 Vic. c. 97, s. 6, the duty payable in respect of a lease for a year under the 8 & 9 Vic. c. 106, is repealed as regards deeds bearing date after the 10th of October, 1850.

[1] By 5 & 6 Wm. 4, c. 65, s. 1, "An Act for Preventing the Publication of Lectures without Consent," "the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures." Any person taking the lectures in short-hand, and publishing it without the author or lecturer's license, is subject to a penalty. Payment for admission to the lecture gives no license to print or publish it. (Sect. 3.) But "nothing in this act contained shall extend to any lecture or lectures, or the printing, copying, or publishing any lecture or lectures, or parts thereof, of the delivering of which notice in writing shall not have been given to two justices living within five miles from the place where such lecture or lectures shall be delivered, two days at the least before delivering the same, or to any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual, in virtue of or according to any gift, endowment, or foundation, and that the law relating thereto shall remain the same as if this act had not been passed." See *Abernethy v. Hutchinson*, 3 L. J. Ch. 209, O. S.

I. How the Court is Constituted, and when it should be Held.[1]

II. Jurisdiction of.[2]

LEGACY.[3] *See* also Executors, vol. iv. p. 360; *post*, Will.

I. Of the different Kinds of Legacies, p. 357.

II. „ Executor's Assent to Payment of, p. 357.

III. Payment of, p. 357.

[1] All persons above fourteen years of age ought to do suit and service to the leet (2 Roll. 56); but an alien cannot be summoned. Palm. 14. The lord of the leet may have a certain term, *pro certa leta*, of all the resiants within the leet. No man can be of two leets. *Rex v. Routledge*, Dougl. 537. A leet may be appended to a hundred, and be in or belonging to a hundred, *ratione hundredi*. *Davies v. Lowden*, Carter, 28. It may extend into one or more manors, or there may be several in one manor. *George v. Lawley*, Skin. 392.

A presentment was quashed where the court appeared to be held above a month after Michaelmas. *Dacon's case*, 1 Vent. 107. But by prescription it may be holden at different times than a month after Easter or Michaelmas. *Rex v. Gilbert*, 12 Mod. 4. *Reg. v. Jennings*, 11 id. 228.

The leet being a court of record, the steward, as judge, may set a reasonable fine for any contempt before him (*Griesley's case*, 8 Co. 386; 8 id. 41, b); but he cannot imprison (1 Rob. 35, 74), and the fine must be recoverable, or it is void (T. Jones, 229), and party may be fined for obstructing the jury in the execution of their duty (And. 49); but they cannot enter shops to examine weights, &c., but must proceed by summons (id. 48).

In a presentation in a court-leet it is not necessary to show how, nor *quo jure*, the court-leet is held (*Rex v. Gilbert*, 1 Salk. 200: 12 Mod. 4); but it ought to appear on what day the court was held. *Dakin's case*, 2 Saund. 291.

A presentment ought to allege the offence to be within the jurisdiction of the court; but it is good though it does not. *Wilton v. Hardington*, Hob. 129. The steward may fine a man for refusing to take the oath of constable. *Fletcher v. Ingram*, 1 Ld. Raym. 70.

A court-leet may amerce generally, and the sum be afterwards ascertained by the affeerors. *Brook v. Hustler*, 11 Mod. 76.

An amerciament in a court-leet is a duty vested in the lord, for which he may distrain (*Matthews v. Carey*, 3 Mod. 138. *Griesley's case*, *supra*), or bring an action of debt. Cro. Eliz. 581.

In debt for an amerciament, it must be shown that the party was summoned to the court at a particular day and place. *Brooke v. Hustler*, *supra*.

An avowry for a time in a leet need not aver it to be by the record (*Scawen v. Garrett*, 2 Ld. Raym. 1173); but it is not sufficient *presentatum fuit* at the leet that the plaintiff did such an act, but he must aver the thing, and not rely on the presentment. *Bainbridge v. Bates*, Raym. 337. So, an avowry for an amerciament for not accepting the office of constable must show that the party had special notice of his election. *Fletcher v. Ingram*, 5 Mod. 124. One who justifies an amerciament in a leet must, in pleading, allege the offence to be done within the jurisdiction. Hob. 129.

In a plea of justification in trespass, the bounds and limits of the leet should be shown. *George v. Lawley*, Skin. 392, n.; Holt, 553. The presentment may be removed by *certiorari* into the Court of Queen's Bench, and then traversed. 1 Saund. 135, c. n.

When presentments in leets are removed by *certiorari* the style of the court must be exactly shown. *The Queen v. Jennings*, 11 Mod. 228.

A court-leet may be forfeited by misuser. *Sir James Smith's case*, 4 id. 56. Indeed it has fallen into desuetude, the business having devolved upon the quarter sessions. 4 Step. Com. 340.

[2] The court-leet is a court of record incident to an hundred, ordained for punishing encroachments, nuisances, fraudulent weights, and offences against the Crown. The steward is the judge. Every one from the age of twelve to sixty years, that dwells within the leet, is obliged to do suit within this court, except peers, clergymen, &c.

The jurisdiction of a leet is confined to things happening before the swearing of the members on the day of their sitting. *Davidson v. Moscrop*, 2 East, 56. And it can only amerce for public nuisances, and not for particular trespass or damage (*Rex v. Dickenson*, 1 Saund. 135; 12 Mod. 136); or for a mere damage to the land (*Ayes v. Cox*, 1 Raym. 100); or a pound-breach. 4 Leon. 12. It has jurisdiction over a charge of selling a loaf of bread short of weight. *Colebrook v. Elliott*, 3 Burr. 1859. And a presentment in a court-leet is the proper remedy where a man is disturbed in a common passage or way (*Pain v. Patrick*, 3 Mod. 294); or for excessive toll (4 Leon. 12); or erecting a pigeon-house, which is a nuisance (Cro. Jac. 491); and for not scouring a ditch in a highway. *Stephen v. Hayns*, Ld. Raym. 250.

A custom for the jury of a court-leet to enter, examine, and break deficient weights and measures, is good. *Wilcock v. Windsor*, 3 B. & A. 43.

[3] A gift by will of personal property. *See* Roper on Legacies; Ward, id.; Williams on Executors.

IV. When a Satisfaction or Extinguishment, p. 358.
V. Duty Payable on, p. 358.
VI. Remedies for Recovery of, p. 360.

I. Of the different Kinds of Legacies.[1]
II. ,, Executor's Assent to Payment of.[2]
III. Payment of.[3]

[1] There are two kinds of legacies; viz. specific and general. A specific legacy is a bequest of a particular chattel, specifically described and distinguished from all other things of the same kind; or, in other words, an individual donation. *See* 1 Atk. 417. Money, therefore, if sufficiently distinguished, may be the subject of a specific bequest (id. 508), or a particular debt. So, a bequest of part of a particular chattel may be a specific legacy. *See* 3 Atk. 103. On the other hand, a mere bequest of quantity, whether of money or any other property, is a general legacy, as of a quantity of stock. *See* 1 Atk. 414, and 2 Ves. 562; 29 Bea. 496; 31 L. J. Ch. 231. And where the testator has not such a stock at his death, it is a direction to the executor to provide so much stock for the legatee. *See* Tolb. 227. The purpose to which a general legacy is to be applied will not alter its nature. *See* 1 P. Wms. 539.

Personal annuities given by will are general legacies. *See* 3 Atk. 693, and 2 Ves. 417. A sum bequeathed out of a debt must be paid, though the demand is recovered by the testator; otherwise of a bequest of the debt itself, which would be a specific legacy. *See* 2 Stra. 824; 2 Wms. Exors. 864. An executor is not compellable to pay a legacy without security being given to him by the legatee to refund, if necessary. So, in some cases, the executor may be directed to give security to the legatee for the payment of the bequest made. *See* 1 Ch. Cas. 136.

[2] An executor, by paying legacies where there are not sufficient assets to discharge the debts, renders himself personally responsible to the creditors for such improper disbursements. 2 Wms. Exors. 994. Hence, as a protection to the executor, the law imposes a necessity of his assent to a legacy before it can be absolutely vested; but very slight acquiescence suffices. *See* 1 Vern. 94. It may be either expressed or implied; and if an executor once assents to a legacy, he cannot afterwards retract. *See* 3 Atk. 238. The assent is not a matter of law, but a question of fact for the jury. *Mason v. Farnell*, 12 Mee. & W. 678; 13 L. J. Ex. 142. *Elliott v. Elliott*, 9 Mee. & W. *See* 10 Hare, 179; 5 Bea. 164. Slight evidence will suffice. 1 Vern. 94; 6 C. P. 126; 3 East, 120.

The assent of an executor to a legacy when inconsistent with his duty is of no avail. *Doe d. Hays v. Sturges*, 2 Marsh. 505; 7 Taunt. 217.

[3] If a legacy be bequeathed to an infant, the executor is not justified in paying it to him during his minority, or even into the hands of his father, without the sanction of a court of equity (*see* 4 Bac. Ab. 429), unless the amount be inconsiderable, and incapable of bearing the expense of an application to the Court of Chancery. *See* 2 Atk. 81. But the difficulties connected with this subject are materially diminished by the stat. 36 Geo. 2, c. 52, s. 32, enabling the executors to pay legacies bequeathed to infants into the Bank of England, with the privity of the Accountant-general, to be placed to the account of the legatee.

Where a legacy is given to a married woman, paying it to her alone is not sufficient without her husband joining her in discharging the executor. *See* Toll. Ex. 320. And this the latter, in cases where the husband has made no provision for the wife, may decline paying the legacy if it be 200*l.*, unless he will make an adequate settlement on her. *See* 5 Ves. jun. 742. It is a general rule, that if a legatee die before the testator, or before the condition upon which the legacy is given be performed, or before it becomes a vested interest, the legacy is extinguished. Nor is it an exception that the legacy is left to A., his executors, administrators, or assigns. *See* 1 Bro. Ch. Rep. 8, and 3 Madd. Rep. 403. And although in bequest of a legacy to A., the testator should express an intention that it should not lapse in case A. died before him, this is not sufficient to exclude the next of kin. *See* 3 Atk. 572. But a bequest may be so specifically framed as to prevent the death of the legatee operating to the destruction of the legacy. Neither does the rule extend to a legacy to two or more jointly, for such a legacy is not extinguished by the death of one, but will vest in the survivor. But where the legacy is to two or more severally, or to be divided between them, share and share alike, and one dies, his share will lapse. The rule has no reference to cases where the legacy is given to some other person after the death of the first legatee, for in such instances the legatee in remainder shall have it immediately.

If the legacy be made to carry interest, though the words "to be paid" or "payable" are omitted, it is a vested and transmissable bequest.

Subject to the exceptions noticed in the preceding passages, if the legatee die before the testator, the legacy is a lost or lapsed bequest, and sinks into the residue of the testator's estate; and where the legacy is to arise out of the real estate, and the legatee dies, even after the testator, but before the

time of payment, it lapses for the benefit of the heir.

If the father of an infant legatee be living he is bound to maintain his child, and the interest of the legacy cannot be applied for that purpose, unless in cases of extreme necessity, arising from the distressed and embarrassed circumstances of the parent.

Where a testator bequeaths to his creditor a legacy equal to or greater in amount than his debt, it will be viewed as given in satisfaction of the demand; though if it be less, or if the will contain an express direction for payment of debts, or if the legacy be upon a condition or a contingency, it will not be deemed a satisfaction of the pre-existing legal debt.

In case the estate be sufficient to answer the debts and specific legacies, but not equal to the payment of the general legacies, they are subject to abatement in equal proportions; but in such instances nothing is to be abated from the specific legacies. *See* 2 Fonbl. 374; 2 Bl. Com. 513; 1 P. Wms. 679. But in case of a deficiency of general assets, that is to say, of assets to pay debts, specific legacies, although not liable to abate with the general legacies, must abate. On the same principle, legatees that have been paid their legacies, whether they have given security so to do or not, are bound to refund their legacies, or a rateable part of them, in all cases of a deficiency of assets for the discharge of debts. *See* 2 Bl. Com. 513. But a legatee is not bound to refund at the suit of the executor, unless the payment of the legacy was compulsory, or unless the deficiency was created by debts which did not appear till after the payment of the legacy; in either of which cases the executor as well as the creditor may compel the legatee to refund. *See* 2 Vent. 358; id. 260.

It seems that an executor cannot refuse to pay a legacy until a receipt or discharge be given. *Green v. Croft*, 2 H. Black. 30.

A legatee of a specific bequest of wines, which arrived in the port of London before the death of the testator, but the entry of the wines was not made until after event, is not subject to the payment of the duties, the executor being chargeable with them. *Sewart v. Denton*, 2 Chit. 456.

Where there is no time mentioned within which the legacy must be paid, the executor has one year before he can be compelled to pay it, except it be a specific donation; and then, after assent, he may be compelled immediately to convey it to the legatee.

Interest upon a legacy is in general payable only from a year after the death of the testator, unless the legatee be a legitimate child or grandchild of the testator. *See* 3 Atk. 66. Where the legatee is an infant he is entitled to interest from the expiration of one year from the testator's decease, without demanding payment of the legacy; but if the legatee be of full age he can claim no interest but from the time of making the demand after one year of the testator's decease; and although a legacy be devised to be paid at a certain time, it carries interest only from such time as it is demanded after the period appointed for the payment.

If an annuity be given by the will, it commences immediately on the testator's death; and, consequently, the first payment is to be made at the expiration of a year next after that event.

The rate of interest allowed on all legacies, when paid in the currency of this country, is four per cent.

[1] It is a rule established in the courts of equity, that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt. 2 Wms. Exors. 1167, 5th ed.

A. devised to each of the children of B. 50*l.*, to be paid to B. for their use; B. left each of his children 260*l.* if they attained the age of twenty-one years:—*Held*, that the latter was no satisfaction of the former legacy. *Pullen v. Cresy*, 3 Aust. 830. *Field v. Mostyn*, 3 id. 831, n. And where A. bequeathed to B. 1200*l.*, and appointed C. executor; C. had sufficient assets, but did not pay the legacy; C. afterwards bequeathed to B. an annuity of 70*l.*, and expressed it to be in satisfaction of the debt or sum of 1200*l.*, but which annuity B. did not accept:—*Held*, that the 1200*l.* was money had and received to the use of B. *Gorton v. Dyson*, Gow. 78, n.; S. P. 1 B. & B. 219.

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt, if any exist, are found among the testator's property, the courts of equity do not consider the legacy to the debtor as necessarily or even *primâ facie* a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release. And if such intention does not appear clearly expressed or implied on the face of the will, evidence from other sources will be admitted. 2 Wms. Exors. 1173, 5th ed.; 2 Rop. Leg. 61, 3d ed.

A relinquishment of a debt by a testator to A., is only a personal bequest, and if A. dies before testator, the bequest becomes void. *Izon v. Butler*, 2 Price, 34.

A legacy is never deemed a satisfaction of a legal demand, when that demand was unliquidated at the time the legacy was given. *Le Sage v. Coussmaker*, 1 Esp. 187. A bequest, "free from any charge or liability in respect thereof," is free from legacy-duty. *Wastrick v. Varley*, 30 Bea. 241.

[2] By 55 Geo. 3, c. 184, 1 Geo. 4, c. 9, 9 Geo. 4, c. 13, rates of duties per cent payable out of real or personal estates, on legacies, an-

nuities, and residues, value 20*l.* and upwards, to children or their descendants, or to the father or mother, or other lineal ancestor of the deceased, 1*l.*; to brothers and sisters, or their descendants, 3*l.*; to brothers and sisters of the father or mother, or their descendants, 5*l.*; to brothers and sisters of the grandfather or grandmother, or their descendants, 6*l.*; to any person in any other degree of collateral consanguinity, or to a stranger in blood, 10*l.* Legacy to the husband or wife exempt.

By the 8 & 9 Vic. c. 76, s. 4, the gifts by will or testamentary instrument which shall be liable to the legacy duty are specifically defined. As to succession duty, *see* 16 & 17 Vic. c. 51; *post*, Succession Duty.

An executor who has paid the amount of legacy duty on an annuity, may recover the amount from the legatee in an action for money paid to his use. *Hales v. Freeman*, 4 Moore, 21; 1 B. & B. 391.

The duty is to be paid upon the aggregate amount of the testator's property at the time of the executor delivering into the Stamp Office the note of what he intends to retain as residuary legatee. *Attorney-General v. Lord Cavendish*, Wightw. 82.

When a legacy is bequeathed to a daughter and a son-in-law, it is liable to the payment of 1*l.* per cent as to one moiety, and 10*l.* per cent as to the other. *Attorney-General v. Bacchus*, 9 Price, 30.

A legacy bequeathed by will of a person dying in 1771, of a sum of money to an executor, to pay the interest thereon to testator's natural child for her life, and on her death to pay over the principal to her children; the interest of which had accordingly been paid to the legatee for life, up to her death, which happened in 1812, her children having died long before that time, and previously disposed of their interest in the bequest:—*Held* to be within the 48 Geo. 3, c. 149, sched. 3. *Attorney-General v. Manners*, 1 Price, 411.

Real property directed to be converted into personal estate to pay legacies, is liable to the duty imposed by the 48 Geo. 3, c. 147, although the residuary legatee take the real estate *in statu quo*. *Attorney-General v. Holford*, 1 Price, 426.

Where there is a direction to sell land and pay legacies out of the proceeds the duty attaches upon the sale. *Attorney-General v. Metcalfe*, 6 Ex. 43. *Attorney-General v. Simcox*, 1 Ex. 749. But if there be a discretion, it seems the duty will not attach, although the trustee elect to sell. *Attorney-General v. Smith*, 1 Macq. H. of L. 760. *In re Evans*, 2 C., M. & R. 206. *Hobson v. Neale*, 8 Ex. 368; 17 Beav. 178. *Contra*, *Attorney-General v. Mangles*, 5 Mee. & W. 120. *Attorney-General v. Simcox*, *supra*.

If a testator devises real estate to trustees, with directions to sell it and invest the money arising from such sale in the purchase of other real estate, no duty is payable, though the estate be sold and the proceeds paid to the person entitled to the estate to be bought. *Mules v. Jennings*, 8 Ex. 830. *Heal v. Knight*, 8 Ex. 839, n. a.

It seems that if the deceased, whether a British subject or a foreigner, die domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable; but if he die domiciled out of England, then the whole of his personal property, wherever it happen to be at the time of his death, is to be regarded as situate in the country of domicile, and therefore exempt. 2 Wms. Exors. 1484, 5th ed. *Thompson v. Advocate-General*, 12 Clark & Fin. 1; 13 Sim. 153. *Attorney-General v. Napier*, 6 Ex. 217.

The duty is payable on bequests of personal property in India by will there, and administration granted under it there, if it be remitted to England and applied under an administration granted in England. *Attorney-General v. Beatson*, 7 Price, 560.

There is nothing illegal in a testator's framing his will so as to avoid the duty. *In re Evans*, *supra*.

Where, from the whole tenor and context of the will, the trustees have a discretion to sell real estate and convert it into personalty, until such discretion exercised the legacy duty does not attach. *Attorney-General v. Mangles*, *supra*.

The court held, upon the construction of the 55 Geo. 3, c. 184 (Stamp Act), in connexion with antecedent acts made *in pari materiâ*, and defining what the legislature meant by the term "legacies," extending it to any gift payable out of any personal estate of which the testator has a disposing power, where a fund was limited by settlement after previous life estates to the husband and wife, to the appointees of the latter, and in default of appointment amongst her next of kin, that the legacy duty was payable on the fund so appointed. *In re Cholmondeley*, 1 C. & M. 149; 3 Tyr. 10.

A legacy charged on land by the execution of a power created by will, is subject to legacy duty. *Attorney-General v. Pickard*, 3 Mee. & W. 552. *Attorney-General v. Henniker*, 7 Ex. 331. But not if originally made by deed. *Attorney-General v. Lord Hertford*, 14 Mee. & W. 284.

A deed of gift may, under circumstances, render the donation contained in it subject to the legacy duty. *Attorney-General v. Jones*, 3 Price, 368. Though, where a testatrix in her lifetime gave to the plaintiff a promissory note, with a verbal engagement on the part of the plaintiff that the amount should not be demanded until after her death:—*Held* not to be void, or a fraud on the legacy duty. *Woodbridge v. Spooner*, 1 Chit. 661.

Under a bequest to pay debts, the creditors are liable for the duty (*Foster v. Ley*, 2 Bing. 269; 2 Scott, 438); and the appointee under a power is liable to the legacy duty. *Platt v. Routh*, 6 Mee. & W. 756; overruling the *Attorney-General v. Staff*, 2 C. & M. 124. *Attorney-General v. Pickard*, *supra*; affirmed in error, 6 Mee. & W. 348.

The legacy duty attaches on a devise which takes effect after the 55 Geo. 3 came into operation. *Attorney-General v. Hancock*, 2 id. 563.

VI. Remedies for Recovery of.[1]

LEGES posteriores priores contrarias abrogant. 1 Rep. 25, b.
Subsequent laws repeal prior inconsistent laws.[2]

LEGITIM.[3]

Upon a gift "by way of annuity, out of or charged upon real estate," the legacy duty attaches (*Attorney-General v. Jackson*, 2 C. & J. 101; 1 Tyr. 50. *Crow v. Robinson*, 31 L. J. Ch. 516); but an annuity free from all deductions is not liable to the legacy duty. *Stow v. Davenport*, 2 Nev. & M. 805; 5 B. & Adol. 359.

The test as to legacy duty is the natural domicile (*Attorney-General v. Dunn*, 6 Mee. & W. 511), and it therefore attaches on foreign stock where the testator is domiciled in England. *In re Ewin*, 1 C. & J. 151; 1 Tyr. 91. *Attorney-General v. Rowe*, 31 L. J. Ex. 341. *See* id. 391; id. Ch. 402. But see *Attorney-General v. Dimond*, 1 C. & J. 356; 1 Tyr. 243.

Legacies bequeathed by a British subject resident in the East Indies out of his personal estate to persons living in England, are liable to the duty if the executor proves the will in England, and pays the legacies here. *Attorney-General v. Cockerill*, 1 Price, 165. See *Attorney-General v. Pottinger*, 6 H. & N. 733.

When a legacy is not paid at the time appointed by the testator, legacy duty is payable not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee. *Thomas v. Montgomery*, 3 Russ. 502. *Bate v. Payne*, 13 Q. B. 900.

A direction for executors to lay out the residue and divide the interest amongst certain poor:—*Held*, not to render the executors liable as beneficial legatees. *In re Wilkinson*, 1 C., M. & R. 142; 4 Tyr. 513. *Attorney-General v. Nash*, 1 Mee. & W. 237.

After a lapse of twenty years, the court refused to compel the executor of an executor to account for duties where assets were not shown. *In re Pigott*, 1 C. & M. 827; 3 Tyr. 859.

On an attachment for not accounting the motion is *nisi*, to be absolute on a certain day, unless cause be shown. *In re Vivian*, 1 C. & J. 409. A new form of writ for the recovery of the duty is prescribed by Reg. Gen. *See* 7 H. & N. 505.

[1] Formerly it was held that *assumpsit* might be sustained against an executor to pay a legacy in consideration of assets (*Atkins v. Hill*, Cowp. 284. *Hawkes v. Saunders*, id. 289. *Anon.* 11 Mod. 91. *Rose v. Butler*, Salk. 415; but now it is settled that legacies are not recoverable at law, but only in equity, or in the spiritual court. *Deeks v. Strutt*, 5 T. R. 690. Nor can an action be supported for the amount of the plaintiff's distributive share of the personal estate of an intestate, admitted by the administrator to be in his hands. *Jones v. Tanner*, 7 B. & C. 542; 1 M. & R. 420. But an action lies for the recovery of a specific chattel after the executor has assented to the bequest. *Doe d. Lord Say and Sele v. Guy*, 3 East, 120. And after an executor has admitted to the legatee that he has received the money and holds it to his use, the legatee may recover it at law as a debt. *Topham v. Morecraft*, 8 E. & B. 972. So, where an executor has stated an account with a legatee, and debited himself absolutely with a certain sum retained in his hand for such legatee, he ceases to hold the money in his character of executor, and an action on an account stated will lie against him. *Bond v. Nurse*, 10 Q. B. 244. *Hart v. Minors*, 2 C. & M. 700.

Where an executor agrees with a legatee to allow him interest on his legacy, if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead *plene administravit* in bar to an action by the legatee. *Wasney v. Earnshaw*, 4 Tyr. 806.

The jurisdiction of the county court extends to the recovery of a demand not exceeding 50*l.*, which is the amount, or part of the amount, of a distributive share under an intestacy, or of any legacy under a will. 9 & 10 Vic. c. 95, ss. 65; 13 & 14 Vic. c. 61, s. 1. See *Fuller v. Mackey*, 2 E. & B. 573; 22 L. J. Q. B. 416. *Phillips v. Hewston*, 25 L. J. Ex. 133. *Longbottom v. Longbottom*, 8 Ex. 203; 22 L. J. Ex. 74. *Winch v. Winch*, 13 C. B. 128; and vol. iii. p. 352.

[2] "The rule touching the repeal of laws is *leges posteriores priores contrarias abrogant*, but subsequent acts of parliament in the affirmative, giving new penalties and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding ordained by preceding acts of parliament without negative words." *Per Lord Hardwicke: Middleton v. Crofts*, 2 Atk. 674.

The general rule is, that a more ancient statute will not be repealed by a more modern one, unless the latter expressly negative the former; or unless the provisions of the two statutes are manifestly repugnant: in which latter case the earlier enactment will be impliedly modified or repealed. 1 Bl. Com. 89. See *Reg. v. Mayor of London*, 16 L. J. Q. B. 191. *Phipson v. Harvett*, 1 C., M. & R. 473. *Middleton v. Crofts*, *supra*. *Williams v. Pritchard*, 4 T. R. 2. *Reg. v. St. Edmunds, Salisbury*, 2 Q. B. 84. *Rex v. Borton*, 12 Ad. & E. 470. *Dakins v. Seaman*, 9 Mee. & W. 777; 2 Dwarr. Stats. 674.

[3] Legitim, in Scottish law, is a share which each living child takes in the movable estate of the father at his death, and which the father cannot interfere with by will. Pat. Comp. 551.

LEGITIMACY, Declaration of.[1]

LEGITIMATION per subsequens Matrimonium. In the Scottish law, the legitimation of a bastard by the subsequent marriage of his parents. Pat. Comp. 551.

LETHAL Weapon. Scotch. Deadly weapon.

LETTER of Credit. *See* Bankers' Cheque, vol. ii. p. 123.

LETTERS.[2]

of Marque.[3]

LEVARI Facias.[4] *See post*, Outlawry.

de Bonis Ecclesiasticis. *See post*, Sequestration.

[1] By the 21 & 22 Vic. c. 93 ("An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the right to be deemed Natural-born Subjects") "any natural-born subject of the queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person being so domiciled or claiming as aforesaid, may in like manner apply to such court for a decree declaring that his marriage was or is a valid marriage, and such court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on her majesty, and on all persons whomsoever."

The petition is accompanied with an affidavit verifying it, and denying collusion. (Id. sect. 3.) The attorney-general must be made a respondent. (Id. sect. 6.) *Sheddon v. Patrick*, 2 S. & T. 170; 30 L. J. P. & M. 217. The decree is not conclusive against persons not cited. (Sect. 8.) The court may award costs to any person cited. (Sect. 5.)

[2] The receiver of a letter has a sufficient property in the paper to entitle him to maintain detinue against the sender, into whose hands it had come as a bailee (*Oliver v. Oliver*, 11 C. B. 139); but he has only a qualified property, and has no license to publish its contents to the world. 2 Atk. 342; Amb. 737; 4 Burr. 2330; Ves. & B. 21–27.

[3] As the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from the subjects of a foreign power, and as such power may by a vigorous retaliation be induced to afford redress, without occasioning a general war, our laws have in some respects armed the subject with power to impel the prerogative, by directing the ministers of the Crown to issue letters of marque or reprisal upon due demand, the prerogative of granting which is nearly allied to and plainly derived from the king's prerogative of making war, this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs. In this case, letters of marque and reprisal, words used as synonymous, and signifying, the latter a taking in return, and the former, the passing the frontiers in order to such taking, may be obtained with a view to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. *See* 1 Bl. Com. 258, 259. It has been observed that this custom of reprisals seems dictated by nature herself; we find in the most ancient times very notable instances of its exercise: but in such cases the necessity is obvious of calling in the sovereign power to determine when reprisals may be made, else every private sufferer would be a judge in his own cause. In pursuance of which principle it is declared by 5 Hen. 5, c. 7, that if any subjects of the realm are oppressed in the time of truce by any foreigners, the king shall grant marque in due form to all that feel themselves grieved, which form is thus directed to be observed:—"The sufferer must first apply to the Lord Privy Seal, and he shall make out letters of request under the privy seal; and if, after such request of satisfaction made, the party required do not with convenient time make due satisfaction or restitution of the party grieved, the Lord Chancellor shall make him out letters of marque under the great seal, and by virtue of these he may attack and seize the property of the aggressor's nation, without hazard of being condemned as a robber or pirate." *See* 1 Bl. Com. 259; 1 Kent, Com. 61; Emerigon, c. 12, s. 36; Marsh. Ins. 225.

[4] This writ commands the sheriff to levy or make, of the lands and chattels of the

LEX loci contractus. *See* Foreign Laws, vol. iv. p. 494.

non cogit ad Impossibilia. Co. Litt. 231, b. *The law does not seek to compel the performance of that which it is not possible to do.*[1]

semper dabit Remedium. *The law will always provide a remedy.*[2]

LIBEL. *See* also Slander ; Slander of Title.

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defendant, the sum recovered by the judgment. *See* the form of the writ, 10 Went. 340. The sheriff, however, is not thereby authorised to sell or extend the lands, or deliver them to the creditor, but must obtain the amount of the debt from the issues and profits of the land and from the sale of the chattels. He may, therefore, collect the rents from the tenants, cut down corn, and other crops growing upon that part of the land which is in the debtor's possession (Godb. 290; Plowd. 441, a; Finch, 101; Comb. 470; 2 Inst. 453); may seize and sell all the defendant's goods and chattels, and all the beasts, even those of a stranger (1 Salk. 395; 1 Ld. Raym. 305), he may find levant and couchant upon the land. 2 Saund. 68, n. 1. It may issue out of the Crown Office for a fine (*Rex v. Cudmore*, Comb. 251), or by custom out of a hundred court. *Wright v. Crump*, 7 Mod. 1. *Simpson v. Mayhill*, Comb. 125. But see *Simpson v. Merrill*, Carth. 54. This writ is now entirely superseded by the writ of *elegit*, except in case of outlawry.

[1] "The law itself," said *Sir W. Scott*, "and the administration of it, must yield to that to which everything must bend—to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities; and the administration of laws must admit that general exception in the consideration of all particular cases." *The Generous*, 2 Dods. 323. See *Paradine v. Jane*, Aleyn, 27. *Evans v. Hutton*, 5 Scott, N. R. 670. *Brewster v. Kitchell*, 1 Salk. 198. *Doe d. Lord Anglesea v. Churchwardens of Rugely*, 6 Q. B. 107. If a person, however, absolutely engage by his contract to do an act, the performance is not excused by an inevitable accident or other contingency preventing performance, even although unforeseen and not within his control, for it was his own fault that he did not qualify his contract. See *Hadley v. Clark*, 8 T. R. 267. *Marquis of Bute v. Thompson*, 13 Mee. & W. 487. *Atkinson v. Ritchie*, 13 East, 533. *Spence v. Chadwick*, 16 L. J. Q. B. 313. *Hills v. Sughrue*, 15 Mee. & W. 253. *Brown v. Royal Ins. Co.*, 28 L. J. Q. B. 275. And even although the thing was at the time of the contract impossible of performance, it seems that such impossibility will form no answer to an action for the recovery of damages. See *Tufnell v. Constable*, 7 Ad. & E. 805. *Hall v. Wright*, 29 L. J. Q. B. 43. *Spence v. Chadwick*, 16 L. J. Q. B. 313. If the condition of a bond be impossible at the time of making it, the condition alone is void, and the bond shall stand single and unconditional. *Sanders v. Coward*, 15 Mee. & W. 48. *Duvergier v. Felows*, 5 Bing. 265; 2 Bl. Com. 340; Co. Litt. 206, a. If an obligation be defeasible on performance of a certain condition, and the performance of the condition become impossible by the act of the obligee, the obligor is excused from the performance of it. See *Heyward v. Bennett*, 3 C. B. 417. *Main's case*, 5 Rep. 21, a; Com. Dig. Condition, L. 6. *Hockster v. De la Tour*, 22 L. J. Q. B. 455. *Holme v. Guppy*, 3 Mee. & W. 389: *per Parke, B.* But if the condition become impossible by the act of the obligor, such impossibility forms no answer to an action on the bond. *Beswick v. Swindells*, 3 Ad. & E. 883. *See* also vol. iii. p. 205, n. [5]. Add. Cont. 1221–1224.

[2] If a man has a right he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. *Per Holt, C. J.: Ashby v. White*, 2 Ld. Raym. 953. See *Winsmore v. Greenbank*, Willes, 577. Com. on *Ashby v. White*, 1 Smith, L. C.

"Wherever the common law imposes a duty, and no other remedy can be shown to exist, or only one, which has become obsolete or inoperative, the Court of Queen's Bench will interfere by *mandamus*." 12 Ad. & E. 266; judgment, 7 Q. B. 451.

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(A) *By Action*, p. 370.
(*a*) *Of the Parties*, p. 370.
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VI. Publication or Suppression of Libel, with Intent to Extort Money, p. 381.

I. Of the Distinction between Libel and Slander.[1]

[1] A libel is usually defined to be a malicious defamation of another, expressed in writing or printing, or by signs, pictures, and representations; but the term, as latterly expounded in the courts of law, is of much more extensive application. With respect to individuals, anything is deemed a libel which tends to injure their feelings or reputation; and, with respect to the government, anything is libellous that tends to hold it up to hatred, contempt, or disesteem. In the case *De Libellis famosis*, 5 Co. 125, b, a libel is described as being either in writing, or without writing. A libel in writing is, when an epigram, rhyme, or other writing, is composed or published to the scandal or contumely of another; a libel without writing may be by pictures and signs. *See* Holt on Libel; Starkie on Slander, &c.; Cooke on Defamation. A printing or writing may be libellous, though the scandal be not directly charged, but obliquely and ironically. Holt, 425. Thus, if a man were to write of J. N., "There is a vast difference between my character and his: I never robbed my master," or any similar expressions, it would be the same as if he had directly charged J. N. with having robbed his master. 2 Lev. 150; 1 Vent. 276; Com. Dig. Action on the Case for Defamation, E. 8. So, where the imputation is conveyed indirectly, or by way of question, or conjecture, or exclamation, or by expressing one or two letters only of a name (1 Hawk. c. 73, s. 5), but not by merely claiming a superiority for the party's goods. *Young v. Macrae*, 32 L. J. Q. B. 6.

There is a material difference between the malignity and injurious consequences of slanderous words spoken and written. *Aus-*

II. Of a Seditious Character.[1]

III. Against great Ministers of State, &c.[2]

IV. „ Individuals.[3]

(A) *What amounts to.*[4]

tin v. Culpeper, 2 Show. 314. *Warner v. Ellisor*, 1 Keb. 293, pl. 117. *King v. Lake*, Hard. 470. *Leicester v. Walter*, 3 Camp. 214; 2 Camp. 251. Hence an expression which, when verbal, is not defamatory, may become so when reduced to writing (*Thorley v. Lord Kerry*, 4 Taunt. 355), for the crime in a libel does not arise merely from the scandal, but from its permanent tendency and more extended diffusion. *Bradley v. Methwyn*, cited 2 Selw. 1012, n. Thus, to say one is a dishonest man is not actionable; but to publish such an assertion in writing or print is (*Rex v. Smith*, Skin. 124); or so to publish that a man is a swindler (*D'Anson v. Stuart*, 1 T. R. 748), which, if spoken, is not actionable, unless said with reference to his trade. See *Saville v. Jardine*, 2 H. Black. 531. So, to write that he is a villain (*Bell v. Stone*, 1 B. & P. 331), or that the plaintiff is an itchy old toad, is actionable. *Villers v. Monsley*, 2 Wils. 403.

[1] A man may lawfully discuss and criticise the measures adopted by the queen and her ministers, provided he do it fairly and temperately, with decency and respect, and without imputing to them any corrupt or improper motive. *Rex v. Lambart*, 2 Camp. 398. But if a man curse the queen, wish her ill, give out scandalous stories concerning her (see *Rex v. Harvey*, 2 B. & C. 257; 3 D. & R. 464), or do anything that may lessen her in the esteem of her subjects, may weaken her government, or may raise jealousies between her and her people; or if he deny the queen's right to the throne, in common and unadvised discourse (for if it be by advisedly speaking it amounts to *præmunire*)—all these are seditious. 4 Bl. Com. 123. In *Rex v. Tuchin* (5 St. Tr. 532; Holt, 424), *Lord Holt* said, that if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist. Nothing can be worse to any government than to endeavour to procure animosities as to the management of it. This has always been looked upon as a crime, and no government can be safe unless it be punished. And *Lord Ellenborough*, in *Rex v. Cobbett*, (Holt on Libel, 114; Stark. on Libel, 529), said, that if a publication to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, &c. are punishable; and whether the defendant really intended by his publication to alienate the affections of the people from the government or not, is not material. If the publication be calculated to have that effect, it is a seditious libel. *Rex v Burdett*, 4 B. & A. 95. *Rex v. Harvey, supra.*

An information was granted for commenting on a book, in which there were several seditious sentences (*King v. Eades*, 2 Show. 468); so, for stating that his majesty was affected with mental derangement (*Rex v. Harvey, supra*); but refused where the objectionable passages contained merely reflections on the government, and were not likely to excite sedition. *Rex v. Woodfall*, Lofft. 776.

It is questionable whether the mere writing of a libel with intent to excite hatred and contempt of the Queen's government be an indictable offence before publication. *Rex v. Burdett*, 3 B. & A. 717.

[2] It is a libel to publish of a Protestant archbishop that he attempts to convert Catholic priests by offers of money and preferment. *See* 5 Bing. 17. So to charge an overseer with oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon particular tradesmen. *Woodard v. Dowsing*, 2 M. & R. 74. So, writings which tend to degrade, revile, and defame persons in considerable stations of power and dignity in foreign countries, may be proceeded upon here as libels, and the writers punished, particularly when such writings have a tendency to interrupt the pacific relations between the two countries. *Per Lord Ellenborough*, in *Rex v. Peltier*, Holt on Libel, 78, &c. In the case just cited, an information was filed against Peltier for a libel on Napoleon Buonaparte, then First Consul of the French republic. *See* also *Rex v. D'Eon*, 1 W. Black. 517.

[3] A contract to indemnity against publishing libellous matter is illegal. *Shackell v. Rosar*, 2 Bing. N. S. 634. An editor is not liable to his principal for inserting a libel in his literary publication. *Colburn v. Patmore*, 1 C., M. & R. 73; 4 Tyr. 677.

[4] It is libellous to publish anything which tends to render another ridiculous (*Villers v. Monsley*, 2 Wils. 403), or represents him devoid of remorse or humanity (*Churchill v. Hunt*, 1 Chit. 480), or to be immoral, even in matters not punishable by law. *Tuam, Archbishop of, v. Robson*, 5 Bing. 17.

Writings vilifying the characters of persons deceased are libels, and may be made the subject of an action or indictment. 5 Co. 125, a.

To render a libel on the dead punishable, it must be alleged to have been published with a design to bring contempt on the family of the deceased. *Rex v. Topham*, 4 T. R. 127.

There is a difference between publications relating to public and private individuals. Every subject has a right to comment upon those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked

or corrupt motives is unquestionably libellous. *Parmiter v. Coupland*, 6 Mee. & W. 105. See *Cathercole v. Small*, 15 id. 344.

An action cannot be sustained for anything written against a party concerning his conduct in an illegal transaction (*Yrissari v. Clement*, 3 Bing. 432; 2 C. & P. 223); as a person who keeps a public room for pugilistic exhibitions. *Hunt v. Bell*, 7 Moore, 212.

Where a man complains of a libel, written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaint; but fraud *ultra* that transaction is not to be imputed to him. *Yrissari v. Clement*, 3 Bing. 441: *per Best, C. J.* Charging a man, therefore, with cheating at dice is actionable, notwithstanding gaming and playing at dice are illegal. *Greville v. Chapman*, 5 Q. B. 744.

Where the circumstances under which the communication was made do not present any justifiable occasion for speaking or writing the defamatory matter, or show it to have been done either in pursuance of some duty or for the purpose of enforcing a right, the communication is deemed in law to be malicious, and the circumstance of the jury having negatived actual malice in such cases does not get rid of the effect of legal malice, and does not render the communication justifiable. *Wenman v. Ash*, 13 C. B. 854: *per Maule, J.*

With respect to particular Instances of Libel. — It is libellous to publish of a person soliciting relief from a charitable society that she prefers unworthy claims, and that she has squandered away the funds of the benevolent in printing circulars abusive of the society's secretary. *Hoare v. Silverlock*, 12 Q. B. 624. It is a libel to impute to a physician of character and eminence that he is concerned in vending quack medicines; therefore, if a vendor of pills falsely, and without his authority, advertise his pills as being prepared and furnished by a physician in practice, he is guilty of a libel upon the physician. *Clark v. Freeman*, 11 Beav. 117.

To describe a man in writing as being in insolvent circumstances and unable to pay his debts (*Metropolitan Saloon Co. v. Hawkins*, 4 H. & N. 146; 28 L. J. Ex. 201), or as being "a mere man of straw" (*Eaton v. Johns*, 1 Dowl. N. S. 602), or "unfit to be trusted with money," is libellous. *Cheese v. Scales*, 10 Mee. & W. 488. So writing of the publisher of a newspaper that he is "a libellous journalist," is a libel, for the words either mean that the plaintiff has been habitually publishing libels in his paper, or that he has permitted them to be published from base and malicious motives. And on this ground it was held that it was no sufficient justification to show that on one occasion the plaintiff published a libel, although such evidence went in mitigation of damages. *Wakley v. Cook*, 4 Ex. 518. So publishing of a publican that his license has been refused. *Bignell v. Buzzard*, 3 H. & N. 217; 27 L. J. Ex. 355.

So a letter respecting a lawyer, stating "He will give vexatious and ill counsel, and stir up a suit and milk your purse, and fill his own large pockets:" — *Held*, actionable. *King v. Lake*, 2 Vent. 28.

Where a letter contained these words, "If you will be misled by an attorney who only considers his own interest, you will have to repent it. You may think, when you have ordered your attorney to write to Mr. B., he would not do any more without your further orders; but if you once set him about it he will go to any length without further orders:" — *Held*, that the jury were properly directed to consider whether these expressions were meant of the profession in general or of the plaintiff in particular. *Godson v. Horne*, 1 B. & B. 7.

Charging an overseer with illegal practices towards paupers, whether an offence within the 55 Geo. 3 or not, is a libel. *Woodard v. Dowsing*, 2 M. & R. 74.

An advertisement that a bill drawn by the plaintiff contained a forged acceptance, or was obtained by fraud, does not amount to a libel on the plaintiff. *Stockeley v. Clement*, 4 Bing. 162; 12 Moore, 376. So, an advertisement offering a reward for such information as to enable a debtor to be discovered, is not a libel. *Lay v. Lawson*, 4 Ad. & E. 795. *See ante*, vol. i. p. 216, and *Atkins v. Perrin*, 3 F. & F. 179.

The words "honest lawyer" may be libellous. *Boydell v. Jones*, 7 Dowl. P. C. 210; 4 Mee. & W. 446.

The following publication in a newspaper: — "We again assert, against A. S. and A. H. (the plaintiffs), the facts formerly put by us upon record to be such as no gentleman or honest man would resort to." The words, "assert, against," &c., may either mean "in accusation of A. S. and A. H.," or "in contradiction to the assertion of A. S. and A. H.," the former of which amounts to a libellous imputation, the latter not. *Hughes v. Rees*, 4 Mee. & W. 204.

The words of the libel must be understood by the court in their plain and popular meaning. *Rex v. Watson*, 2 T. R. 206. Therefore, where one man said of another that his character was infamous; that delicacy forbade him from bringing a direct charge, but it was a male child complained to him; such words were understood to mean a charge of unnatural practices, and to be sufficiently certain in themselves, without the aid of an inuendo. *Woolnoth v. Meadows*, 5 East, 463. So if a man were to write or say of J. N., "There is a vast difference between my character and his: I never robbed my master," or the like, it would be the same as if he had directly charged J. N. with having robbed his master. *See* 2 Lev. 150; 1 Vent. 276; Com. Dig. Action on the Case for Defamation, E. 8. And the same where the imputation is conveyed obliquely (*Young v. Macrae*, 32 L. J. Q. B. 6; id. E. 1); or indirectly (id. E. 7); or by way of question (id. E. 2), conjecture (id. E. 3), or exclamation (id. E. 6), or by irony (1 Hawk. 73, s. 4), or the like. So, a defa-

(B) *Where contained in the Report of a Trial or Proceedings in Parliament.*[1]

matory writing, expressing one or two letters only of a name, is as much a libel, and punishable as such, as if it expressed the name in full, if it appear evident upon the face of the libel, from context, &c., what name was meant (id. s. 5), or if it appear, from the evidence of persons acquainted with the parties, what person was meant by such initials or letters. *See* Russ. C. & M. 210.

[1] A fair, plain, unvarnished account of the proceedings in a court of justice (*Curry v. Walter*, 1 B. & P. 526; 1 Esp. 457), whether given *verbatim* or in an abridged and condensed form (*Turner v. Sullivan*, 6 L. T. (N. S.) 130); or of the proceedings in parliament, is not a libel. *Rex v. Wright*, 8 T. R. 293. But a highly-coloured account of such proceedings, mixed up with a criminal charge, cannot be justified. *Stile v. Nokes*, 7 East, 493; nom. *Carr v. Jones*, 3 Smith, 49, 503. So, publishing in a newspaper a statement of the evidence given before a coroner's jury is a libel. *Rex v. Hunt*, 1 B. & A. 379. And it has been held libellous and a misdemeanor to publish the depositions taken before a magistrate before the party is tried. *Rex v. Lee*, 5 Esp. 123. *Rex v. Fisher*, 2 Camp. 563. In *Duncan v. Thwaites*, 5 D. & R. 447, it was decided to be no justification to an action for a libel in a newspaper, that the matter complained of is a true, fair, just, and correct report and account of proceedings which took place at a public police-office in the course of a preliminary inquiry, openly and publicly conducted before a justice upon a criminal charge against the plaintiff, although published with no scandalous, defamatory, unworthy, or unlawful motive, but merely as public news. It seems, however, that it is lawful to publish in a newspaper the result of what a justice may think fit to do upon a matter of criminal charge previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case. So, in *M'Gregor v. Thwaites*, (4 D. & R. 695; S. C. 3 B. & C. 24), where, to a declaration for a libel in a newspaper, defendants pleaded, first, that the libellous matter was a true and earnest account of a statement made by A. and B. before a magistrate; and second, that the facts therein stated were true; and the jury found for defendants on the first plea, and for plaintiff on the second: — *Held*, that plaintiff was entitled to judgment *non obstante veredicto* on the first plea, on the following grounds: — 1. The statement, though correct, did not relate to a matter of which the magistrate had cognisance; 2. The defendants had printed and published that which would have been actionable as oral slander and publication; and 3. Supposing the matter actionable as oral slander, defendants had not by their plea offered themselves as witnesses to prove the words against the authors. In *Flint v. Pike* (6 D. & R. 528; S. C. 4 B. & C. 473), plea to an action for a libel, purporting to be a report of a trial, that the alleged libel was in *substance* a true report of the trial: — *Held*, bad on demurrer. Counsel, in the discharge of their duty, are privileged to utter matter injurious to individuals; but the subsequent publication of such matter is unlawful.

"We are not prepared," said *Lord Campbell*, in *Lewis v. Levy*, 27 L. J. Q. B. 289, "to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful, nor that the publication of such inquiries is universally unlawful. One of the resolutions of this court, in *Duncan v. Thwaites* (3 B. & C. 556), lays down the doctrine, that the report of a preliminary examination before a magistrate is unlawful where the party accused has been committed or held to bail for an indictable offence; there the actual pendency of a prosecution was a main ingredient in the decision: but where the party accused has neither been committed nor held to bail, but absolved by the magistrate, we think we are at liberty to hold that an impartial and correct report of the proceedings is lawful. In the cases relied upon to establish the general doctrine that reports of preliminary proceedings before magistrates are not lawful, it will be seen that there were either vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it."

If the magistrate conducts the preliminary investigation respecting an indictable offence in private, publication of the proceedings would be unlawful; but if he sit *foribus assertis*, the court in which he sits is to be considered a public court of justice, provided the magistrate has jurisdiction over the matters brought before him, and authority to inquire into them. *Lewis v. Levy, supra. M'Gregor v. Thwaites, supra.* "If," said *Lord Campbell, C. J.*, "magistrates publicly hear slanderous complaints, respecting matters over which they have no jurisdiction, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in ale-house." 27 L. J. Q. B. 288. And it is not lawful to publish even a correct account of the proceedings of a court of justice, if such account contain matters of a scandalous, blasphemous, or indecent nature. *Rex v. Carlisle*, 3 B. & A. 167. So, it would seem, if it contain matter defamatory of a third person, who is neither a party to the suit nor present at the time of the inquiry. *Lewis v. Clement*, 3 B. & A. 702. And it was held to be a libel to state in a report of the Insolvent Court that the landlord colluded with the tenant to put in a fictitious distress. *Haire v. Wilson*, 9 B. & C. 643.

Where the libel complained of is the report of a trial, it is for the jury to say whe-

(C) *Where contained in the Report of a Meeting.*[1]
(D) „ *Critical Review of a Book or Artistic Performance.*[2]
(E) *In the course of Judicial Proceedings.*[3]

ther the publication was injurious and malicious. *Chalmers v. Payne*, 2 C., M. & R. 156. *Turner v. Sullivan*, 6 L. T. (N. S.) 1308, a fair report.

A court of general gaol delivery has power to make an order to prohibit the publication of proceedings pending a trial likely to continue for several days, and to punish disobedience to such order by fine. *Rex v. Clement*, 9 Price, 68.

If an M. P. publish his speech as delivered in parliament, and it contain charges of a slanderous nature against an individual (*Rex v. Lord Abingdon*, 1 Esp. 226); even though the speech be published for the purpose of correcting a misrepresentation, the author will be amenable to the law in respect of the publication. *Rex v. Creevey*, 1 M. & S. 273.

The House of Commons, in the years 1835 and 1836, made resolutions that parliamentary papers and reports, printed for the use of the House, should be publicly sold by their printer; and afterwards a report from the inspectors of prisons was ordered by the House to be printed:— *Held*, that if this report contained a libel on an individual, the printer of the House of Commons, who sold it, was liable to an action; and that the resolutions of the House did not render this a privileged publication. *Stockdale v. Hansard*, 7 C. & P. 731. So, an authority by the House of Commons to publish and sell their proceedings and reports:— *Held*, not a justification of the party publishing matter libellous of an individual. *Stockdale v. Hansard*, 2 M. & Rob. 9.

Whether proceedings in the House of Commons be a libel a court of law will determine. *Stockdale v. Hansard*, 9 Ad. & E. 1; 2 Per. & D. 1. *See* Commons, vol. iii. p. 154, as to Speaker staying actions.

[1] *Public Meetings.*— The public advantage arising from the publicity of proceedings in courts of justice, upon which the privilege attending the publication of such proceedings depends, does not apply to public meetings. The publication, therefore, of matter defamatory to an individual, is not privileged because the libel is contained in a fair report in a newspaper of what passed at a public meeting (*Davison v. Duncan*, 7 E. & B. 229), or at a vestry meeting. *Popham v. Pickburn*, 31 L. J. Ex. 133); or because it is a reprint of an official report. Id. 7 H. & N. 891; 31 L. J. Ex. 33. *George v. Goddard*, 2 F. & F. 689.

[2] An honest, though mistaken and injurious review of a book, a picture, or other performance inviting public attention and criticism, is not libellous: but a malicious attack upon the character of the author, apart from his performance or his reputation and character as an author or artist, will not be justified. The editor of a newspaper is not, however, justified in calumnious attacks on the private character of the editor of another journal. *Stuart v. Lovell*, 2 Stark. 93. But it is not libellous to ridicule a literary composition, or the author of it, so far as he has embodied himself with his work (*Carr v. Hood*, 1 Camp. 355. *Macleod v. Wakley*, 3 B. & P. 311. *Nightingale v. Stockdale*, cited 2 Selw. *Turnbull v. Bird, infra. Seymour v. Butterworth*, 1862, Q. B.); nor is a paragraph in one newspaper, charging another with being scurrilous and vulgar, actionable. *Heriot v. Stuart*, 1 Esp. 437.

It is open to doubt whether the preaching a sermon in the ordinary mode of a clergyman's duty in the parish church makes it public property, so as to invite observation upon it, and allow the excuse under the general issue of any remarks that a person chooses to publish upon that sermon. See *Gathercole v. Miall*, 15 Mee. & W. 319. *Hearne v. Stovell*, 12 Ad. & E. 719.

Fair criticism on works of a professional artist cannot be the subject of an action, however mistaken in point of taste; but it is for the jury to say if it be unfair and intemperate, and intended to injure the artist in his profession, by imputing to him that he acts on absurd principles of art. *Soane v. Knight*, 1 M. & M. 74. Publishing of a painting publicly exhibited that it was a mere daub, with other strong terms of censure:— *Held*, that it was a question for the jury whether a fair and temperate criticism, or only the vehicle of personal malignity towards the plaintiff. *Thompson v. Shackell*, id. 187. See *Turnbull v. Bird*, 2 F. & F. 508. So, a fair comment on a theatrical exhibition is not a libel, unless it can be proved that the observations are unjust and malevolent, and exceeding the bounds of fair criticism. *Dibdin v. Swan*, 1 Esp. 28.

[3] Allegations and averments introduced in proceedings in a regular course of justice cannot be deemed libellous (4 Co. 146; Cro. Eliz. 230, 247; 1 Saund. 131, b); as in articles of the peace exhibited to justices (4 Co. 146); nor in a report by the president of a military court of inquiry (1 Saund. 131, b. See *Thomas v. Churton*, 31 L. J. Q. B. 139); but, to secure this species of protection for objectionable matter, it must appear that the proceedings were instituted in a court of competent jurisdiction. 4 Co. 146. *See ante*, p. 257, and *Thomas v. Churton*, 31 L. J. Q. B. 139.

Slanderous expressions used in an affidavit in a cause in Chancery cannot be viewed as libellous (*Dawling v. Wenman*, 2 Show. 446. *Moulton v. Claphorn*, W. Jones, 431); so if they are used in a sentence of a court-martial. *Jekyll v. Moore*, 2 N. R. 341; 6 Esp. 63. *Warden v. Bailey*, 4 Taunt. 67. But an order to a governor abroad to dismiss an officer does not therefore authorise his publishing the grounds of his dismissal. *Oliver v. Bentinck*, 3 Taunt. 456.

(F) *Of Privileged Communications.*[1]

Where the declaration complained that the defendant falsely and maliciously, and without any reasonable or probable cause, went before a commissioner for taking oaths in the Court of Chancery, and swore an affidavit stating of the defendant, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in his (deponent's) opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit was made in the course of a judicial proceeding, and could form no ground of action. *Revis v. Smith*, 18 C. B. 126; 25 L. J. C. P. 195. See *Henderson v. Broomhead*, 4 H. & N. 579; 28 L. J. Ex. 360.

[1] Where an occasion exists which, if fairly acted upon, furnishes a legal protection to the party who makes the communication complained of, the actual intention of the party affords a boundary of legal liability. If he had that object in view which the occasion supplies, he is neither civilly nor criminally amenable; if, on the contrary, he used the occasion as a cloak for maliciousness, it can afford him no protection. Stark. Lib. Prel. Dis. p. lxxxvi. *Hopwood v. Thorne*, 19 L. J. C. P. 94. See *Coxhead v. Richards*, 2 C. B. 605. *Bennett v. Deacon*, id. 633. *Wilson v. Robinson*, 7 Q. B. 68.

The occasion may prevent the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. *Toogood v. Spiring*, 1 C., M. & R. 193: *per Parke, B.* See *Somerville v. Hawkins*, 10 C. B. 583. *Croft v. Stevens*, 7 H. & N. 570; 31 L. J. Ex. 143. *Turnbull v. Bird*, 2 F. & F. 508. *Maitland v. Bramwell*, id. 623. *Hancock v. Case*, id. 711. The rule is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice; if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant. *Taylor v. Hawkins*, 16 Q. B. 321: *per Lord Campbell, C. J.*

If the plaintiff makes out a *primâ facie* case of malice, it lies on the defendant to answer it. When it is said that he must prove the truth of his statement, it is not meant in the sense of truth absolutely; but he must show that the assertion was made in the honest belief of its being the truth. *Fountain v. Boodle*, 3 Q. B. 11: *per Pattison, J. Young v. Macrae*, 32 L. J. Q. B. 6.

As all persons have an interest in the pure administration of justice, and as it is the duty of all persons who witness misconduct on the part of magistrates to try, by all means in their power, to bring such misconduct to the notice of those whose duty it is to inquire into and punish it, it has been held that petitions and memorials prepared *bonâ fide* and forwarded to the proper authorities complaining of the conduct of magistrates, and containing statements and allegations honestly believed to be true, are privileged communications; but if they are made on frivolous grounds, or with knowledge of their being untrue, or without knowledge of their truth or falsehood, and without inquiry when inquiry would have made the truth apparent, and would have shown the allegation of misconduct false, the calumniator will be deemed to have acted from malicious motives, and his statements will not be privileged. *Harrison v. Bush*, 5 E. & B. 354; 25 L. J. Q. B. 25. *Sturt v. Blagg*, 10 Q. B. 906.

A letter of complaint, written to the Postmaster-General, *bonâ fide*, of even imaginary grievances, would be privileged, and the defendant, under the general issue, may show that it was written under such circumstances as would make it a protected communication. *Woodward v. Lander*, 6 C. & P. 548.

A letter, written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged as an official communication; but if made *bonâ fide*, and without malice, such communication is not actionable as libellous, though some of the charges may not be true. *Blake v. Pilfold*, 1 M. & Rob. 198. See *Humphrey v. Stillwell*, 2 F. & F. 590. *Maitland v. Bramwell*, id. 623. *Hancock v. Case*, id. 711.

A petition addressed by a creditor of an officer in the army to the Secretary at War, and with a view of obtaining through his interference the payment of a debt due, containing a statement of facts which, though injurious to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable. *Fairman v. Ives*, 1 D. & R. 232; 5 B. & A. 642. Though it may be the duty of all persons to give information to his majesty's proper officers concerning abuses, yet a false statement would be considered as evidence of a malicious intention so as to support an action for a libel. *Robinson v. May*, 2 Smith, 3. But when the Commander-in-Chief directed a military inquiry to be held to investigate the conduct of an officer, who afterwards sued the president of such court for a libel stated to be contained in the report, and by him transmitted to the Commander-in-Chief:—*Held*, that such a report was a privileged communication. *Home v. Bentinck*, 4 Moore, 563; 1 B. & B. 514; 2 B. & P. 130; 8 Price, 225.

If a petition to parliament be referred to a committee, an action will not lie for printing and publishing a number of copies for the use of the members, although the mat-

ter therein contained be false and scandalous; but if such petition be printed before it is referred to a committee, an action will lie. *Lake v. King*, 1 Mod. 58, 59; 1 Saund. 133; *see* 5 E. & B. 354; 25 L. J. Q. B. 25; 10 Q. B. 906. Expulsion from a Quakers' society, for reasons assigned in their books, the entry therein is not a libel. *Rex v. Hart*, 1 Black. Rep. 386.

Disclosures made *bonâ fide* in the course of an investigation set on foot by the plaintiff himself, are privileged and protected. If, therefore, the plaintiff, or another party at the plaintiff's request, write to the defendant asking information upon some point affecting the plaintiff's character, the occasion is privileged; and therefore, if the defendant merely relates what he has heard, and believes to be true, no action will lie. *Hopwood v. Thorn*, 8 C. B. 316. *Croft v. Stevens*, 7 H. & N. 570; 31 L. J. Ex. 143. *Toogood v. Spryring*, 16 M. & R. 193. *Someville v. Hawkins*, 10 C. B. 583.

A criminatory communication made by a clerk of the peace to the justices at quarter sessions is privileged, provided it is confined to a statement of facts pertinent to a matter which it is his duty to investigate, and contains nothing but what the clerk of the peace believes to be true; but if irrelevant calumny is introduced into it, or it contains strictures upon the motives and conduct of others which the facts stated do not warrant, he will exceed his privilege, and subject himself to an action for damages. *Cook v. Wildes*, 5 E. & B. 340; 24 L. J. Q. B. 367. See *Ram v. Lumley*, Hutt. 113.

A statement *bonâ fide* made in giving the character of a servant, however depreciatory, is privileged (*Patterson v. Jones*, *infra*. *Kelly v. Partington*, id.); or, if written in answer to a letter sent with a view of extracting an unfavourable statement, no action can be sustained. *King v. Waring*, 5 Esp. 14. See *Patterson v. Jones*, 8 B. & C. 584. *Kelly v. Partington*, 5 B. & Adol. 645.

If a good character is given of a servant, and then circumstances occur which show that the character was not deserved, it is the duty of the person who gave the good character to communicate the discovery to the person to whom it was given, and such communication, if made *bonâ fide*, is privileged and protected. *Gardner v. Slade*, 13 Q. B. 801; 18 L. J. Q. B. 334. *Manby v. Witt*, 18 C. B. 544. *Child v. Affiech*, 9 B. & C. 403.

The defendant having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each in the absence of the other that they were discharged because they had both been robbing him, each brought an action for the words so spoken to the other: it was held that the statement was privileged. *Manby v. Witt*, 18 C. B. 544.

A director of two companies, in both of which the plaintiff was an officer, brought before the directors of one of the companies alleged acts of dishonesty, for which the plaintiff had been dismissed from his situation in the other:—*Held*, privileged. *Harris v. Thompson*, 13 C. B. 348.

If A. be surety for B., A., if acting *bonâ fide*, may lawfully state to C., in an unreserved manner, his views of B.'s conduct. *Dunman v. Bigg*, 1 Camp. 269, n.

An opinion expressed in a letter by a person interested in the discovery of the fact, to another person also interested, that an anonymous letter was in the handwriting of A., was held a privileged communication in action by A. for a libel in so writing of him. *Croft v. Stevens*, *supra*.

Charges made by a ratepayer against the constable of a district to a meeting of ratepayers, met to investigate the constable's disposal of the money of the inhabitants, are privileged, and may be made by letter if the ratepayer be prevented from attending; the party alleging such letter to be libellous must prove the absence of the ratepayer to have been wilful. *Spencer v. Amerton*, 1 M. & Rob. 470. *Fairman v. Ives*, 5 B. & A. 644. *Wenman v. Ash*, 13 C. B. 845. If B., a tradesman, be discharged from serving A., one of his customers, A. stating as the reason of it that B. charged for goods never delivered, and B. after this write a letter to A., vindicating himself, and imputing the dishonesty to a servant of A., this is a privileged communication if it be *bonâ fide* and without malice. *Coward v. Wellington*, 7 C. & P. 531. So, if A. is going to have dealings with B., and he make inquiries of C., who gives A. information respecting B., this is a privileged communication; as every one is quite free to state his opinion *bonâ fide* of the respectability of a party thus inquired about. *Storey v. Challands*, 8 C. & P. 234. *Coxhead v. Richards*. So, where a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote to her a letter containing imputations on the plaintiff's character and desiring a diligent and extensive inquiry into the plaintiff's character:—*Held*, that this was a letter written on a justifiable occasion; and that the defendant was justified in writing the letter, provided the jury be satisfied that in writing it the defendant acted *bonâ fide*, although the imputations contained in the letter were false, or based upon the most erroneous information; and that if the defendant used expressions, however harsh, hasty, or untrue, yet *bonâ fide*, and believing them to be true, he was justified in so doing. Communications of this kind should be viewed liberally by juries; unless they see clearly that there was a malicious intention of defaming the plaintiff, they ought to find for the defendant. *Todd v. Hawkins*, id. 88. *Wenman v. Ash*, *supra*. *Blogg v. Sturt*, 10 C. B. 905. *Cooke v. Wilder*, 24 L. J. Q. B. 367. But, where A. offered himself as a candidate to represent a place in parliament, B., a voter for that place, published in a newspaper statements of A., reflecting on his character:—*Held*, that the fact, that A. was a candidate and B. a voter did not bring this case within the rules respecting privileged communications. *Duncombe v. Daniell*, id. 222. So, if A. has sold goods to B., a tradesman, and before the delivery of

V. Of the Remedies for Libel.

(A) *By Action.*

(*a*) *Of the Parties.*[1] (*b*) *Of the Venue.*[2] (*c*) *Of the Declaration.*[3]

them, C., without being asked or solicited in any way to do so, speak words injurious to the credit of B. as a tradesman, this is not a privileged communication; but, if he had been asked by A. as to the credit of B., it would have been so. *King v. Watts*, id. 614. Communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendants of the establishment, are not privileged. *Martin v. Strong*, 1 Nev. & P. 29; 5 Ad. & E. 535. *Bloyg v. Sturt*, *ante*, 369.

An official notice that A. B. and C. D. are excluded from a public society's rooms is not a libel. *Robinson v. Jermyn*, 1 Price, 11. But the insertion in such a notice that the plaintiff is a sharper and swindler would make the document libellous. *Goldstein v. Foss*, 2 C. & P. 252; but *see* S. C. 1 M. & R. 402; 6 B. & C. 154. And an advertisement in a public newspaper, strongly reflecting upon the character of an individual, is libellous, although published with the avowed intention of convening a meeting of the creditors, for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might be obtained by means less injurious. *Browne v. Croome*, 2 Stark. 297; *see* 4 Bing. 162. *See* Advertisement, vol. i. p. 216.

The plaintiff having advertised for sale a bond, executed to him by the defendant, the payment of which had been resisted in a long course of litigation, in which the validity of the bond had been disputed, the defendant published among the persons assembled to bid for the bond at an auction a statement of the circumstances under which the bond was given, and, alluding to the plaintiff, concluded: "His object is either to extract money from the pocket of an unwary purchaser, or, what is more likely, by the threat of publication to extort money from me:"—*Held*, that this exceeded the latitude allowed for privileged communication, or observations on titles by a party interested, and that it was a libel, although no express malice was proved. See *Robertson v. M'Dougall*, 4 Bing. 670; S. C. 1 M. & P. 692; 3 C. & P. 259. *See* also *Delany v. Jones*, 4 Esp. 191.

Where a rector, in a pastoral letter to his parishioners, made an attack upon the plaintiff, who had formerly been the master of a national school in the parish, and been dismissed by him, characterising his conduct as unchristian-like, and warning his parishioners against affording him any countenance in his endeavours to get up a school on his own account; it was held that the communication was not privileged, and that there was evidence of malice. *Gilpin v. Fowler*, 9 Ex. 615; 23 L. J. Ex. 152.

In an action on a libel for publishing a hand-bill, offering a reward for the recovery of certain bills of exchange, and stating that A. B. is suspected of having embezzled them, it is a good defence on the general issue that the hand-bill was published solely with a view to the protection of persons liable on the bills, or to the conviction of the offender. Evidence is admissible in such a case, that the party publishing the hand-bill followed it up by preferring a charge of the same nature against A. B. before a magistrate. *Finden v. Westlake*, 1 M. & M. 461.

[1] The chairman of a company may sue for a libel on the company. *Williams v. Beaumont*, 10 Bing. 260; 3 M. & Scott, 705. So, where words imputing insolvency in trade are spoken of one of the partners in a firm, such individual partner may maintain an action of slander and recover damages for the injury done to him; and it is not necessarily to be considered as an injury to the partnership, for which a joint action can only be maintained. *Harrison v. Bevington*, 8 C. & P. 708.

In general, a joint action for a libel cannot be sustained, except in the case of partners, where the libellous matter is published of them in the way of their trade, and where an allegation to that effect can clearly be supported in evidence. *See post*, Partners; Slander. With regard to defendants, although it is a settled rule that a joint action cannot be supported against two for verbal slander, yet a joint one may be sustained for composing and publishing a libel. *See* 2 Saund. 117, n; Latch. 262; Burr. 985; Bac. Abr. Actions in general, C. So it lies against a corporation. *Whitfield v. S. E. Railway*, 1 E., B. & E. 121; 27 L. J. Q. B. 229.

Where several concerned in publishing the same libel are reprehensible in different degrees, the court will not, after a recovery against one, stay an action brought subsequently against the rest. *Martin v. Kennedy*, 2 B. & P. 69.

[2] Although the venue in an action for libel is transitory, yet it is a general rule that the venue cannot be changed, except where the writing and publication are confined to the same county, when it may be changed into such county. *Pinkney v. Collins*, 1 T. R. 571. *Freeman v. Norris*, 3 id. 306. *Kerry v. Thorley*, 49 Geo. 3; 2 Selw. 1015. Or where the libel is sent out of England as a letter, the venue may be changed into the county in which the letter was written. *Metcalf v. Markham*, 3 T. R. 652.

[3] By the 15 & 16 Vic. c. 76, s. 61, it is enacted, "that in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment, to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of such libel or slander; and where the words or matter set forth with or without the alleged meaning show a cause of action, the declaration shall be sufficient." *See* 1 E., B. & E. 346; 27 L. J. Q. B. 253.

(1) *Form of Count for Libel.*[1]

The declaration must allege that the defendant falsely and maliciously wrote and published, or contain an averment equivalent thereto. *Baldwin v. Elphinston*, 2 Black. Rep. 1037.

An allegation that a libel was printed by the defendant's authority, imports that it was printed by a third person. *Burdett v. Abbott*, 14 East, 1. It must be stated that it was published "of the plaintiff." *Lowfield v. Bancroft*, 2 Stra. 934. *Rex v. Marsden*, 4 M. & S. 164. *Clement v. Fisher*, 2 B. & C. 459; 1 M. & R. 281.

Where in an action on the case for exhibiting an inscription opposite to the plaintiff's house, insinuating that it was a house of ill-fame, it was alleged in the declaration that the plaintiff carried on the business of a retailer of wines there: — *Held*, that such an allegation might be rejected as surplusage, there being no evidence that the publication of the inscription was of and concerning the plaintiff as such retailer of wines. *Spall v. Massey*, 2 Stark. 559.

The words of the libel ought to be stated on the record; saying that the defendant published a false and malicious libel, purporting thereby, &c. is bad. *Wood v. Brown*, 1 Marsh. 522; 6 Taunt. 169. But the words "to the tenor following," imports the very words themselves. *Rex v. Beere*, 12 Mod. 218; 1 Ld. Raym. 415. "To the effect following," is, it seems, not sufficient. See *Jones v. Stevens*, 11 Price, 235.

Malice should be alleged; but the word "maliciously" is not exclusively proper. *Croft v. Boite*, 1 Saund. 242. Nor is the word "falsely," in all cases essential. *Rowe v. Roach. Same v. Hoar*, 1 M. & S. 304.

If separate passages of a libel are set out in one count of the declaration, they should be described as separate and distinct parts. *Tabart v. Tipper*, 1 Camp. 352.

Where the libel is in a foreign language, it must be set forth, first, in the original tongue, and then in a translation. *Zenobio v. Axtell*, 6 T. R. 162.

In setting forth the libel, it may be accompanied by appropriate inuendoes, in order to illustrate and explain the nature and bearing of the libel, and to give it force and application. An inuendo is generally introduced thus: "Meaning thereby that the plaintiff," &c. It can only be made available as explanatory of some matters already expressed: it serves to apply the slander to the precedent matter, but cannot be used to *add* to, or *enlarge*, *extend*, or change the sense of the previous words. The matter to which it alludes must always appear from the antecedent parts of the declaration. 1 Saund. 248, n. 4; 8 East, 480; 9 id. 95; Cro. Eliz. 421; Comb. 460; 2 Y. & S. 146, n.; 4 Bing. 489; 6 B. & C. 159; 2 C. & P. 252. *Gompertz v. Levy*, 1 Per. & D. 214.

The libel must be actionable on the face of it, or an inuendo to make it so. *Adams v. Meredew*, 2 Y. & J. 417. *Burnett v. Long*, 3 H. L. Ca. 413.

Where the new matter, stated as an inuendo, is not necessary to support the action, it may be rejected as surplusage. *Roberts v. Camden*, 9 East, 95. Although an inuendo cannot extend, it may narrow and limit the plaintiff's case on proof. *Smith v. Carey*, 3 Camp. 461.

A declaration on a libel on an officer of a company need not allege the plaintiff's employment with precision, nor the whole of the letter containing the libel, unless it qualifies the libel. *Rutherford v. Evans*, 6 Bing. 451; 4 C. & P. 74.

So in an action for a libel in a review, it is sufficient to set out the contents of an index (referring to an article in the body of the review), which is of itself a libel; and no reference need be made to the article itself, if the index contain, *per se*, *primâ facie* libellous matter. *Buckingham v. Murray*, 2 C. & P. 46.

Where the declaration on a libel stated that certain prosecutions had been preferred against M., and that, "in furtherance of such proceedings, certain sums of the parish funds had been appropriated to discharge the expenses;" but the libel charged the money to have been so applied after the proceedings had terminated; the court held, that, it being immaterial to the defamatory character of the libel when the money was so applied, the variance was immaterial. *May v. Brown*, 3 B. & C. 113; 4 D. & R. 670. But a count in a declaration in an action for libel, charging that the defendant wrote of the plaintiff that he was a "man Friday" to another, was held bad, for want of an averment to show that, by the term "Friday," as applied to the plaintiff, degradation and subserviency were intended to be imputed to him. *Forbes v. King*, 1 Dowl. P. C. 672. So where a declaration purported to state a paragraph in a newspaper (the libel), that plaintiff had formerly a house in P., and some time prior to that he had one in M., in both of which he contrived, &c., omitting the words "of which:"—*Held*, a material variance. *Cooke v. Smith*, 1 M'Clell. 250.

The declaration should conclude with damages, either general, which the law supposes has been sustained; or special, in which the party has actually sustained, in consequence of the publication of the calumniatory matter. The special damages must be the legal and natural consequence arising from the libel, and not on a mere wrongful act of a third party (8 East, 1; 2 B. & P. 289); or a remote consequence. 1 Camp. 58, 60; 1 Taunt. 39. *See post*, Slander. No special damage can be proved which is not specifically stated in the declaration; it suffices to state it with as much certainty as it is reasonably capable of. *Evans v. Harris*, 26 L. J. Ex. 31. It was formerly usual to insert several counts in the declaration, stating the cause in various forms, according to the discretion of the pleader; but since large powers of amendment were given this is unnecessary.

[1] The following count is prescribed by 15 & 16 Vic. c. 76, sched. 33:—

(*d*) *Of Inspection*[1] *and the Pleas.*

(1) *Not Guilty.*[2]

That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called the the words following; that is to say, "he is a regular prover under bankruptcies:" the defendant meaning thereby that the plaintiff had proved, and was in the habit of proving, fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious.

[1] The court has allowed the defendant to inspect and take fac-simile copies by photograph, &c. *Davey v. Pemberton*, 11 C. B. 628.

[2] The general issue is "Not guilty." Under this plea the defendant cannot give in evidence the truth of the words, even in mitigation of damages, though he may show that the plaintiff was generally suspected to be guilty of the crime imputed to him (1 M. & S. 284; 10 B. & C. 272); but must justify specially, stating all the circumstances. *See* Reg. Gen. (Pl.) H. T. 1853. When, however, the defence is, that the libel was published, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this may be given in evidence under the general issue, because it proves that the defendant is not guilty of the *malicious* slander charged in the declaration; as, where a master honestly and fairly gives the character of a servant to a person who asks his character, under pretence of hiring him. *See* 1 Saund. 130, n.; 1 Cro. Jac. 90; Pop. 69; Bull. N. P. 8; 1 T. R. 110; 1 B. & P. 523; 2 Camp. 257. *See ante*, 369, and *Lillie v. Price*, 5 B. & Adol. 645. *Hood v. Silverlock*, 9 C. B. 82. *Lewis v. Levy*, 27 L. J. Q. B. 287.

Defendant may plead not guilty as to part, and justify the rest; or not guilty to the whole, and a further plea as to part: the latter is the usual and preferable course.

[3] A plea of justification should not in general be put upon the record, unless the defendant be satisfied that he can support it in evidence; because, if pleaded unsuccessfully, it would materially increase the damages, though not affect the costs. *Halford v. Smith*, 4 East, 567. Formerly the truth of the alleged libel was no defence, even to an action. *King v. Roberts*, 2 Selw. *Rex v. Swinton*, Bul. 9. But it is now a settled principle, that if the matter of the libel be true, the defendant may plead it in justification. *Anon.* 11 Mod. 100. *TAnson v. Stuart*, 1 T. R. 750. *Plunkett v. Cobbett*, cited 2 Selw. But in such a plea, if there be anything specific in the accusation, specific facts ought to be stated. *Holmes v. Catesby*, 1 Taunt. 543. *Edwards v. Bell*, 8 Moore, 467; 1 Bing. 403. Hence, a justification to a charge of swindling must specify the particular acts of fraud upon which the defendant founds his justification. *TAnson v. Stuart*, 1 T. R. 748. And where the plaintiff declared against the defendant for a libel in an account of a trial, imputing to him the crime of perjury and judicial delinquency in his character of clerk of the court of requests; and the defendant endeavoured to justify as to such parts of the supposed libel as purport to contain an account of the trial of the plaintiff for an assault, &c., and of the fact, circumstances, and statements which occurred: — *Held*, too general and indefinite. *Carr v. Jones*, 3 Smith, 491.

(2) *Justification.*[3]

A plea of justification must justify the whole. *Ingram v. Lawson*, 6 Scott, 775; 7 Dowl. P. C. 125; 5 Bing. 66. If not, the plaintiff will be entitled to damages on the part not answered. *Cooper v. Lawson*, 1 Per. & D. 15 (*Cooke v. Smith*, 1 M'Clell. 250), or the defendant may demur. *Clarkson v. Lawson*, 6 Bing. 266; 3 M. & P. 605.

If the libel imputes a specific act, the plea may assert generally that the accusation is true. 1 Wms. Saund. 244, n. b; 10 Mee. & W. 361; 16 id. 159.

If a libel be severable, the plea may be drawn accordingly. *Clarkson v. Lawson*, 6 Bing. 587; 4 M. & P. 356. That the publication containing the alleged libel was a privileged communication need not be pleaded. *Lillie v. Price*, 5 Dowl. P. C. 432; 1 Nev. & P. 16.

To an action for a libel, imputing breach of confidence as an attorney, the defendant may plead that the plaintiff disclosed confidential communications. *Moore v. Terrell*, 1 Nev. & M. 559.

A plea of justification, stating circumstances inducing suspicion that the plaintiff was guilty of the offence imputed, is bad on demurrer. *Mountney v. Watton*, 2 B. & Adol. 673. So, a justification that there was reason for thinking the imputation was true from what had been said, was holden bad on demurrer for not stating what had been said, and by whom. *Lane v. Housman*, 1 Price, 76. And a plea justifying a libel as being a report of proceedings in a court of justice will not afford any answer to libellous matter not part of the report. *Lewis v. Clement*, 3 B. & A. 702. The plea should state the evidence adduced on the trial, and not give the result of the proofs merely. *Lewis v. Walter*, 4 B. & A. 605. A plea that the libellous matter is true in substance and effect, means that it is true in every material particular; and if the defendant does not prove such statement to be true, the plea is not proved, although he prove facts of the same description. *Weaver v. Lloyd*, 4 D. & R. 230; 2 B. & C. 678; 1 C. & P. 295. *Flint v. Pike*, 4 B. & C. 473.

So, it is no justification to an action for a libel in a newspaper, that the matter complained of is a true, fair, just, and correct report, and account of proceedings which took place at a public police-office, in the course of a preliminary inquiry, openly and publicly conducted before a justice, upon a criminal charge against the plaintiff, although published with no scandalous, defamatory, unworthy, or unlawful motive, but merely as public news. It seems, however, that it is lawful to publish in a newspaper the result of what a justice may think fit to

(3) *That Apology was Printed in subsequent Number of Journal, and Tender of Amends.*[1]

(*c*) *Of the Evidence.*[2]

do upon a matter of criminal charge previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case. *Duncan v. Thwaites*, 5 D. & R. 447; 3 B. & C. 556. *Lewis v. Levy*, 27 L. J. Q. B. 289.

When the first and second counts of a declaration alleged composing and publishing of two libels, and the defendant in his pleas of justification stated that the libels so set forth were one and the same supposed libel, and not other and different supposed libels: — *Held*, that such pleas were bad. *Edmonds v. Walter*, 2 Chit. 291.

A plaintiff cannot, upon a trial of an action for a libel, object that a plea of justification is insufficient, because, however inadequate it may be, the defendant is entitled to a verdict on that plea if it be proved, as the plaintiff should have demurred. *Edmonds v. Walter*, 3 Stark. 7.

The defendant cannot plead that he disclosed the name of the party who informed him of the defamatory matter. *De Crespigny v. Wellesley*, 5 Bing. 392; 2 M. & P. 695.

It is clearly no justification of a libel that a particular person communicated the libel to defendant, unless in the libel he names his authority; and in such case, the plea must give the very words used, and not their substance, though he need only prove the material fact. *Lewis v. Walter*, 4 B. & A. 605. See *Maitland v. Goldney*, 2 East, 426.

A stranger who justifies a publication defamatory of another's title, under the party claiming title, must show that it was made by his authority. *Rowe v. Roach. Same v. Hoar*, 1 M. & Sel. 304.

It is no bar to the action that the plaintiff has been in the habit of libelling the defendant, although it may operate in mitigation of damages. *Finnerty v. Tipper*, 2 Camp. 76.

The defendant may plead the Statute of Limitations; that is, that the cause of action did not accrue within six years next before the commencement of the action. 21 Jac. 1, c. 16. It seems that the defendant is entitled to particulars as in other actions. *Early v. Smith*, 12 Ir. C. L. Rep. App. 35.

[1] By 6 & 7 Vic. c. 29, s. 2, "in any action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper, or other periodical publication, a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared, should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action, and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to the payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions of libel had not been excepted from the personal actions in which it is lawful to pay money into court (under 3 & 4 Wm. 4, c. 42), and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea."

An apology and payment into court cannot be pleaded, together with not guilty, to the same part of the declaration. *O'Brien v. Clement*, 15 Mee. & W. 435; 2 D. & S. 676. The apology must not be merely sufficient in its terms, but must have appeared as prominently in the newspaper as the libel. *Lafone v. Smith*, 3 H. & N. 705; 28 L. J. Ex. 33. *See* vol. i. p. 376.

The payment into court is conditional upon the plea being proved; and if the plea be not proved, the defendant is entitled to take the money out again, and the plaintiff is entitled only to the damages found by the jury. *Lafone v. Smith*, 4 H. & N. 158.

[2] *Evidence for the Plaintiff.* — The libel must be produced, and before it is read it must be proved that it was *published* by the defendant. The mode of publication may be shown, in order to enhance the damages. The publication may be by selling the libel, distributing it gratis, reading it to others (if he knew the tendency of it before), or by sending it and having it delivered to another person, or even to the party libelled by it. *See* Bac. Abr. Libel, B. 2; 1 Hawk. c. 73, s. 11. So, evidence of the defendant's procuring another person to publish the libel is sufficient to maintain a count charging the defendant with having published it.

As to Evidence of Publication.—Upon a count charging the defendant with having composed, printed, and published a libel, proof that he composed and published it (*Rex v. Williams*, 2 Camp. 646), or even that he only published it, will be sufficient to maintain it. *Rex v. Hunt*, id. 583. He cannot, however, be compelled to answer interrogatories to show that he composed or published it. *Tupling v. Ward*, 6 H. & N. 749.

If it be proved that the libel was bought in the shop of a bookseller of a person acting in the shop as the servant of the bookseller, this will be *primâ facie* evidence of a publication by the bookseller (*Rex v. Almon*, 5 Burr. 2686), even though it be proved that

the master was not privy to the sale. *The King v. Walter*, 3 Esp. 21. The delivery of a newspaper to the officers of the Stamp Office is a sufficient publication. *Rex v. Amphlit*, 4 B. & C. 35.

Proving that defendant wrote what another dictated is evidence of a publication. *Rex v. Bear*, 2 Salk. 418.

A libel in a private letter must be proved to have been addressed to a third person, not to the party himself. *Phillips v. Jansen*, 2 Esp. 624. Unless it can be shown that the defendant knew it would be opened by a third person, although addressed to the plaintiff. *Delacroix v. Thevenot*, 2 Stark. 63.

A person who, having a copy of a libellous caricature, shows it to another on being requested so to do, is not guilty of maliciously publishing. *Smith v. Wood*, 3 Camp. 323.

Where the libel is in a foreign language, and set out in that language with a translation, the latter must be proved to be correct. *Rex v. Peller*, 2 Selw. 1.

Sending a letter to the plaintiff's wife containing a libel on her husband is a publication. *Wenman v. Ash*, 13 C. B. 836; 22 L. J. C. P. 190. So a letter to another's correspondent is sufficient. *Ward v. Smith*, 6 Bing. 749; 4 C. & P. 302.

A letter addressed to a person in Scotland with the seal broken, and a post-mark of a place in England, where it was proved to have been received and forwarded, is evidence of publication. *Warren v. Warren*, 1 C., M. & R. 250; 4 Tyrw. 850.

A certified copy of the affidavit lodged at the Stamp Office, and a newspaper containing the libel, corresponding with the paper described in the affidavit, is evidence of publication. *Mayne v. Fletcher*, 9 B. & C. 382.

A count charging the defendant with publishing a libel purporting to be a letter from A. to B., and another charging generally that the defendant published the libellous matter, is not sustained by proof of a publication in which the defendant stated that in a debate in the Irish House of Commons, several years before, the Attorney-General of Ireland read such a letter, and then stated the libellous matter, as said by him, in commenting upon the letter; for the characters of the several libels are essentially different, though the slander imputed may be the same. *Bell v. Byrne*, 13 East, 557.

As to Evidence of Malice, &c.—Malice may be inferred from the libel itself. *Rex v. Creevey*, 1 M. & S. 273, 284. *Rex v. Lord Abingdon*, 1 Esp. 226. To prove malice, evidence of the defendant having published other copies of the same libel is admissible (*Plunkett v. Cobbett*, 5 Esp. 136); or other libels (*Lee v. Hudson*, Peake, 166. S. P. *Rex v. Pearce*, id. 74. *Charlter v. Barret*, id. 22. S. P. *Rustell v. Macquester*, 1 Camp. 49, n. *Plunkett v. Cobbett*, 2 Selw. N. P. 1019); provided they expressly refer to the subject of the libel complained of. *Finnerty v. Tipper*, 2 Camp. 73. *May v. Brown*, 4 D. & R. 670. *Raikes v. Richards*, 2 C. & P. 562. But this course, it is said, cannot be adopted when the publication in question is not equivocal. *Stuart v. Lovell*, 2 Stark. 93.

A subsequent publication, brought out even after issue joined, may be evidence to show the motives of the party. *M'Leod v. Wakley*, 3 C. & P. 311.

Under plea of not guilty the plaintiff cannot go into evidence to show that the allegations in the libel are false. *Stuart v. Lovell, supra.*

In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney, by his admission or by a copy of the roll of attornies; proof that he acted as such is sufficient. *See* 1 N. R. 196; 2 Esp. 526.

Where a libel imputed to the plaintiff incompetency and unskilfulness in a particular transaction, in which the plaintiff had been employed by the defendant, it was held that it was not competent to the plaintiff to give evidence of general competency and skilfulness, without meeting the specific instance relied upon by the plaintiff. *Brine v. Bazalgette*, 3 Ex. 694.

The declaration in an action for libel alleged that the plaintiff was a good and faithful subject, &c., and that he was a medical practitioner; and stated the libel to have been published of and concerning him, and of and concerning him in his said practice. No evidence was given of any license or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "physician extraordinary to several ladies of distinction," and "doctor, or rather quack:"—*Held*, that this did not withdraw the claim to damages in the medical capacity from the consideration of the jury; but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character. *Long v. Chubb*, 5 C. & P. 55.

Libel on a surgeon. *Plea*, "that he had faithfully and honestly discharged his duties to his medical brethren:"—*Held*, that a medical witness could not be asked as to the conduct of the defendant in the profession. *Ramage v. Ryan*, 9 Bing. 333; 2 M. & Scott, 421.

In an action for a libel, which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book, but no evidence was given of the payment of any subscription:—*Held*, that there was evidence to go to the jury in support of the allegation in the declaration. The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—*Held*, that the plaintiff could not go into evidence to show that his wife was a respectable person, as on these pleadings she must be taken to be so:—*Held*, also, that the plaintiff could not go into evidence to show that his wife had become ill and died soon after the publication

of the libels. *Guy v. Gregory*, 9 C. & P. 584. See *Lynch v. Knight*, 8 Jur. 724. *Parkins v. Scott*, 31 L. J. Ex. 331.

Where it was to be plainly inferred from the general terms of the libel that it was the object of the writer to represent the plaintiff as holding a situation of trust and confidence, and that he had abused it:— *Held*, that it was quite sufficient to sustain the plaintiff's allegation in his declaration of his holding such situation. Statements in a libel render it unnecessary to give evidence of the truth of averments in the declaration corresponding with those statements, and have the effect of dispensing with formal proof. *Bagnall v. Underwood*, 11 Price, 621.

If the declaration in case for a libel state, *inter alia*, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel, charging him among other things with having taken the chair at the said place, but not saying anything of the character of the meetings there, it will not be a ground of nonsuit should the plaintiff, at the trial, fail to prove that the meetings were such as he described in his inducement. *Chalmers v. Shackell*, 6 C. & P. 475.

Where the libel (a song) from which the publication took place was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost:—*Held*, sufficient. *Johnson v. Hudson*, 7 Ad. & E. 233, n.

In an action against the publisher of a magazine containing the libel, evidence of personal malice of the editor against the plaintiff:—*Held*, inadmissible. *Robertson v. Wylde*, 2 M. & Rob. 101.

If, in a libel, asterisks be put instead of the name of the party libelled, to make it actionable it is sufficient that the party should be so designated, that those who know the plaintiff may understand that he is the person meant, and it is not necessary that all the world should understand it; but if witnesses who state that they understand that the plaintiff is the person, also say that they were enabled so to understand by the perusal of another libel with which the defendant had no concern, their evidence ought to be laid out of the case. *Bourke v. Warren*, 2 C. & P. 307.

In an action for a libel the defendant has a right to have the whole of the publication read, from which the passages charged are extracts. *Cooke v. Hughes*, 1 R. & M. 112. As, where the libel was contained in a newspaper:—*Held*, that the defendant had a right to have other parts of the same paper referred to in the libel read, as part of the plaintiff's case. *Thornton v. Stephen*, 2 M. & Rob. 45.

In an action for libel, general evidence that the plaintiff has been in the habit of libelling the defendant, is inadmissible. *Wakley v. Johnson*, 1 R. & M. 422.

Where the terms of the libel are equivocal, subsequent words of the same import may be given in evidence; *aliter*, where the words are unambiguous, and the subsequent words of themselves actionable. *Pearce v. Ornsby*, 1 M. & Rob. 455. *Symmons v. Blake*, id. 477.

On the trial of an action against the publisher of a monthly periodical, for a libel contained in it, articles published from month to month, alluding to the action, and attacking the plaintiff, are receivable as evidence *quo animo* the libel was published, and as showing that the publisher of the work considered it as applying to the plaintiff. *Chubb v. Westley*, 6 C. & P. 436.

In an action on the case for a libel in a newspaper, the plaintiff cannot give evidence of the contents of a placard in the window of a third person, although the placard states what will appear in the defendant's newspaper respecting the plaintiff, and that which it foretold does appear accordingly, unless there be evidence to show it was published by the defendant. *Raikes v. Richards*, 2 C. & P. 562. In an action for a libel contained in an article against church-rates, written by the defendant, and published in the T. S. newspaper, the MS. in the handwriting of the defendant, addressed "To the Editor of the T. S.," and sent to the T. S. office, is evidence to show that the defendant intended the article to be published in that newspaper. The plaintiff may also, for the same purpose, give in evidence handbills on the same subject, published by the defendant about the same time; and, to show that the libel was published with an intent to injure the plaintiff, evidence may be given that one of the handbills was carried backwards and forwards before his door. *Bond v. Douglas*, 7 id. 626. The post-mark on a letter:—*Held* to be *primâ facie* evidence of a publication. *Shipley v. Todhunter*, id. 680.

As to the Evidence for the Defendant, &c.— The defendant may prove that he did not write or publish the libel at all, or he may contend that the publication is not libellous, or that he was justified in publishing it. 1st. He may prove that he was not concerned in the writing or publishing of the libel in question; and, in the case of a newspaper, he may prove he is neither printer, publisher, nor proprietor of it, nor otherwise interested or concerned in it, provided he have not signed the affidavit deposited at the Stamp Office. He may also prove that he was a mere innocent agent in the publication; as, for instance, that he carried and delivered the letter containing the libel without knowing its contents, or delivered one paper by mistake for another (4 T. R. 127, 128), or the like. 2d. He may prove that the writing in question is not libellous; and for that purpose a defendant has been allowed to give in evidence other passages in the same newspaper or publication, plainly referring to the subject of the libel in question, or fairly connected with it, though disjoined from it by other matter, and in a different type, in order to prove that his intention was not such as was imputed to him

by the prosecutor, or that the passage in question would not fairly bear the construction attempted to be given to it. *Rex v. Lambert and Perry*, 2 Camp. 400. 3d. He may show that he was justified in publishing the matter alleged to be libellous; as, for instance, that it formed part of a speech delivered by him as a member of parliament (*see* 4 Hen. 8, c. 8; 1 Wm. & M., st. 2, c. 2): but this privilege, we have seen, extends only to his speaking in the house; for if he afterwards publish his speech, he is amenable for it in the same manner as any other person. *Rex v. Creevy*, 1 M. & S. 273. *Rex v. Lord Abingdon*, 1 Esp. 226. So, he may prove that the matter alleged to be libellous was contained in a petition to parliament, and published to its members only; or contained in articles of the peace, or in some other regular proceeding in a court of justice (1 Hawk. c. 73, s. 8), or the like. See *Fairman v. Ives*, 1 D. & R. 252. But in no case will the defendant be allowed to prove the truth of the libel in justification, unless he has pleaded specially the truth of the alleged slander. *Rex v. Burdett*, 4 B. & Ald. 95.

By the 6 & 7 Vic. c. 96, s. 1, "in any action for defamation, it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." Although under the general issue the defendant cannot contend that the alleged libel is true, yet he may show grounds of suspicion, not amounting to actual proof of the plaintiff's guilt. *Knobel v. Fuller*, Peake, Ev. 287. *Eames v. Merle*, 2 Selw. *Earl of Leicester v. Walter*, 2 Camp. 253. But general evidence of the plaintiff's bad character and ill repute in his business, as a practising attorney, cannot be admitted to contradict an allegation in the declaration that he, during, &c., exercised the business of an attorney with great credit, &c., with a view of mitigating the damages under the general issue, or in support of pleas averring that the plaintiff was a disreputable attorney, &c. *Jones v. Stevens*, 11 Price, 235: overruling —— *v. Moor*, 1 M. & S. 284; and *Earl of Leicester v. Walter*, 2 Camp. 251. So, evidence to prove that the libel was merely a repetition of common rumours, which were prevalent at the time of the facts imputed to the plaintiff, and on which the libel was founded, is inadmissible for the purpose of reducing the damages. *Waithman v. Weaver*, 11 Price, 257, n. The plaintiff's own allegations in his declaration may be used in support of the plea of not guilty. *Stockdale v. Taite*, 4 Ad. & E. 1016. But evidence that the plaintiff libelled the defendant is not admissible, unless it appear that it came to his knowledge. *Watts v. Fraser*, 2 Nev. &. P. 157; 7 Ad. & E. 223.

A plea of justification, in an action for a libel, contained three material allegations, as to one of which the jury, in the course of the summing up, expressed themselves satisfied that the proof failed. The judge told them that, to warrant a finding in favour of the defendant, they must be satisfied that all three of the allegations were substantially made out. The jury, after two hours' deliberation, returned a verdict for the defendant upon that plea. The court refused to set it aside. *Napier v. Daniell*, 3 Scott, 417. In an action for a libel, to support a plea of justification, stating that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff if he were on trial for those offences; but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages. *Chalmers v. Shackell*, 6 C. & P. 475. And in an action for libel published in a newspaper, the defendant cannot go into evidence in mitigation of damages to show that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages; but the defendant may show that he copied the libel from another newspaper, and omitted several passages contained in that newspaper which reflected on the character of the plaintiff. *Creevy v. Carr*, 7 C. & P. 64. So, where a libel purported to be a report of what had occurred before one of his majesty's commissioners of inquiry respecting corporations: — *Held*, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but he might give such evidence in mitigation of damages: — *Held*, also, that if he did so the plaintiff might give evidence in reply, to show the inaccuracy of the report. *Charlton v. Watton*, 6 C. & P. 385. But *semble*, that, in an action for libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, and the plaintiff in consequence is not prepared with evidence to sever the defendant's proof. *East v. Chapman*, 1 M. & M. 46; S. C. 2 C. & P. 570. In an action for a libel, the defendant cannot, under the general issue, give evidence of any fact in mitigation of damages which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part. *Vessey v. Pike*, 3 C. & P. 512. So, in an action for a libel, imputing to the plaintiff, a medical officer of a poor-law union, that he had neglected two pauper patients, the defendant justified that the imputations were true: — *Held*, that the book in which the plaintiff, under the Poor-Law Commissioners, made entries as to the cases of the pauper patients,

(*f*) *Question for the Jury.*[1]

(*g*) *Of the Damages.*[2]

was not admissible in evidence in his favour. *Meyrick v. Wakley*, 8 C. & P. 283; 3 Nev. & P. 284. A plea of justification to a libel, in which the defendant justifies on the ground that the plaintiff was guilty of bigamy, requires the same strictness of proof as is required on the trial of an indictment for bigamy. If in justifying a libel that the plaintiff was guilty of "polygamy" in marrying three wives, who were all living at the same time, the defendant pleads that the plaintiff was guilty of "polygamy" in marrying three persons named, who were all living at the same time; it is sufficient proof of the marriages to show the actual marriages as to two, and reputation and cohabitation as to the third, because, if by the term "polygamy" the offence of bigamy is meant, the substance of the issue is made out by proof of the two marriages; and if by the term "polygamy" the mere fact of these marriages is meant, as distinct from the crime of bigamy, evidence of reputation and cohabitation is receivable. *Wilmett v. Harmer*, 8 C. & P. 695.

Where a libellous letter refers to a newspaper as containing the slanderous matter imputed to the plaintiff, the defendant may give the newspaper in evidence in mitigation of damages under the general issue. *Mullett v. Hulton*, 4 Esp. 248. *Weaver v. Lloyd*, 1 C. & P. 296.

Evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification which were in the record have been withdrawn before trial, and the plaintiff in consequence is not prepared with evidence to answer the defendant's proof. *East v. Chapman*, 2 C. & P. 570; 1 M. & M. 47. And a defendant has been permitted, under the general issue, to prove that the substance of the libel charged in the declaration has been previously published in a newspaper, and held not necessary to lay a basis for this evidence by producing the newspaper. *Wyat v. Gore*, Holt, N. P. 299. The defendant has a right to have the whole of the publication read from which the passages charged are extracts. *Cooke v. Hughes*, 1 R. & M. 112.

Where the libel contains several distinct imputations, and the plea alleges the truth of all, and is traversed generally, if the evidence fail as to any one of them, the verdict will be entered generally against the defendant. *Reg. v. Newman*, 1 E. & B. 558.

[1] It is the duty of the judge to tell the jury the legal definition of a libel, and then for the jury to say whether the facts constitute the offence. *Parmiter v. Coupland*, 6 Mee. & W. 105.

The judge is not bound to tell the jury whether the matters amount to a libel or not. *Baylis v. Lawrence*, 3 Per. & D. 526; 11 Ad. & E. 920.

The conclusions to be drawn from an alleged libel, as well as malice, are questions for the jury. *Wright v. Woodgate*, 2 C., M. & R. 573.

The court refused a new trial where the judge told the jury the question was whether the tendency of the libel was injurious to the plaintiff, and the intention was to be collected from the libel itself. *Fisher v. Clement*, 10 B. & C. 472.

Where a plea to an action of libel justifies that the facts charged against the plaintiff are true, and the comments *bonâ fide*, it is properly left to the jury to consider, not only whether the facts are proved, but whether also the comments are *bonâ fide*, if they are of themselves actionable, and are not necessary inferences from the facts. *Cooper v. Lawson*, 8 Ad. & E. 746; 1 Per. & D. 15.

Where a newspaper copied a libellous paragraph from another, adding the word "Fudge" at the end, it was held that it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken. *Hunt v. Algar*, 6 C. & P. 245.

[2] In an action for libel, the rule of law is not that, if the plaintiff relies only on general injury to his business, he may show by witnesses the general diminution of that business, because the law assumes the existence of a general injury, and if the plaintiff seeks specific damages he must give specific evidence. In such an action, after the plaintiff has proved the publication of the libel in one newspaper, evidence may be given, for the purpose of showing malice, that the defendant went to the editor of another newspaper and procured the insertion of the libel in that paper, stating that he had got it inserted in one already; and the circumstance of there being a count in the declaration, charging the second insertion as a distinct publication, will not make any difference as to the admissibility of the evidence. *Delegall v. Highley*, 8 C. & P. 444.

In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the woman being the plaintiff's wife; the plaintiff cannot go into evidence to show that soon after the libel his wife became ill, and the effect of the libel accelerated her death (*Guy v. Gregory*, 9 C. & P. 584), for illness induced by slanderous imputations against a woman's character cannot be regarded as a natural consequence of the slander, and is not, therefore, any ground of increasing the damages. *Allsop v. Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315.

(*h*) *Of the Costs.*[1]

(B) *By Indictment.*

(*a*) *When it lies.*[2]

(*b*) *Of the Indictment.*[3]

In mitigation of damages, libels published by the plaintiff on the defendant cannot be given in evidence, unless the defendant can show that those proceeding from the plaintiff were connected with the libels proceeding from the defendant. *May v. Brown*, 3 B. & C. 113; S. C. 4 D. & R. 670. Where a libellous print was inserted in a publication, and referred to in the letter-press:—*Held*, that the editor and printer were liable for the publication, but that the defendant might show, in mitigation of damages, other libellous attacks published on the defendant in the plaintiff's works. *Watts v. Fraser*, 7 C. & P. 369; 2 Nev. & P. 157; 1 M. & Rob. 449. In an action for a libel upon a ship, imputing unseaworthiness, the plaintiff may give evidence of special damage, although he had not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 14th of November, it was held that, in the estimate of damages, the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action. *Ingram v. Lawson*, 9 C. & P. 326.

In a joint action of libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they have sustained in their joint trade in business. *Haythorn v. Lawson*, 3 C. & P. 196.

If matter be clearly libellous malice is immaterial, and the want of it no ground for reducing damages. *Blackburn v. Blackburn*, 4 Bing. 395; 1 M. & P. 33; 3 C. & P. 146.

Other libels offered in evidence, when admissible, in mitigation of damages, must be shown to apply clearly to the defendant. *Tarpley v. Blaby*, 7 C. & P. 395; 2 Bing. N. S. 437; 2 Scott, 642.

[1] The plaintiff is not entitled to costs if the damages are under 40*s.*, unless the judge certify under the 3 & 4 Vic. c. 24, s. 2. *Sherwin v. Swindall*, 12 Mee. & W. 783; 1 D. & L. 999. *Foster v. Pointer*, 8 Mee. & W. 395. No certificate under the County-Courts' Acts is necessary, actions of libel being excepted from the operation of these statutes. 13 & 14 Vic. c. 61, s. 11.

Under pleas of not guilty and justification, the defendant recovered on the first plea, but gave no evidence on the second:—*Held*, the plaintiff was entitled to the costs of that issue. *Empson v. Fairfax*, 3 Nev. & P. 385.

Where there are several defendants, some demur and others plead, those who have judgment on demurrer cannot tax their costs on that judgment. *Forbes v. Gregory*, 1 C. & M. 435; 1 Phil. c. 679; 3 Tyr. 385.

Where a count alleged a variety of libels, the plaintiff was held merely entitled to the costs of those parts of the counts which refer to him, the greater part of the inuendoes being negatived by the jury. *Prudhomme v. Fraser*, 4 Nev. & M. 512. *See* Costs, vol. iii. p. 392.

[2] Whenever an action can be sustained for a libel without laying special damage, an indictment will also lie. 5 Co. 1256.

A libel on a private individual is punishable by indictment before justices of the peace at sessions. *Rex v. Sumner*, 1 Sid. 270; 1 Lev. 139. So of public bodies of men (*Rex v. Osborne*, 2 Barnard. 138, 166), whether the libel be true or false, *de libellis famosis* (5 Co. 1256), or whether it be published to third persons, or only written in a letter addressed to the party calumniated. *Edwards v. Wooton*, 12 id. 35.

A publication reflecting on the memory of one deceased, not from a fair and honest motive of exciting detestation for his vices, but wantonly to vilify his memory, is indictable. *Rex v. Topham*, 4 T. R. 126.

[3] The offence must have been committed in the county in which the venue is laid; but if a letter containing the libel reach the party to whom it is directed in the proper county (*Rex v. Johnson*, 7 East, 65), even although addressed to him at a place out of the venue, it may be laid in the latter county. *Rex v. Watson*, 1 Camp. 215. And even if a sealed letter containing the libel be put into the post-office in the proper county, it is a sufficient publication of the libel in that county. *Rex v. Burdett*, 4 B. & H. 95. *Rex v. Watson*, *supra*.

In an indictment for libelling the trustees of a workhouse all the trustees need not be named. *Rex v. Griffin*, 7 Mod. 197.

It is no objection to an information for a libel to say that the defendant did, *inter alia*, particular things, although the whole publication be recited. *Rex v. Johnson*, 2 Show. 488.

An information need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter was false. *Rex v. Burks*, 7 T. R. 4. Information held good for publishing a libel against two persons, where the publishing was one single offence; and where several persons were charged in the same information, it was held good, the offence arising out of one joint act. *Rex v. Benfield*, 2 Burr. 983. It must appear, without the addition of inuendoes, that the crime of libelling is complete. *Rex v. Marsden*, 4 M. & S. 164. But upon an information against the defendant for that he, &c., wickedly, &c., did write and publish, &c., a

(*c*) *Plea.*[1]

(*d*) *Evidence.*[2]

(*e*) *Province of the Jury.*[3]

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certain false, scandalous, and seditious libel, of and concerning his majesty's government and the employment of his troops, according to the terms and effect following (setting out the libel *verbatim*), the words "of and concerning" are a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written "of and concerning the king's government and the employment of his troops." *Rex v. Horne*, Cowp. 672.

Where an information alleged that a libel was published of and concerning the government of the country, and the libel did not in express terms charge the acts to have been done by the government or its order, it was held that the court ought to take the whole libel together, and interpret it in the way in which ordinary persons would understand it. *Rex v. Burdett*, 4 B. & A. 314.

[1] The 6 & 7 Vic. c. 96, s. 6, enacts, "that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published; and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matter charged in the alleged libel complained of by the said indictment or information shall in no case be inquired into without such plea or justification: Provided also, that in addition to such plea it shall be competent to the defendant also to plead a plea of not guilty: Provided also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel."

[2] "Whensoever upon the trial of any indictment or information for the publication of a libel under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from the want of due care or caution on his part." 6 & 7 Vic. c. 96, s. 7.

As to the Evidence.—Delivering a libellous letter to the party himself is a sufficient publication to maintain an indictment. *Phillips v. Jansen*, 2 Esp. 624.

Where a number of placards announcing a public meeting had been printed, and the treasurer took twenty-five of them away from the printer, it was held that one of them might be read without any preparatory evidence as to the original MS. *Rex v. Watson*, 2 Stark. 129.

If a libel is alleged to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication with either of those intentions. *Rex v. Evans*, 3 Stark. 35.

In an indictment for a libel, the proprietor of a newspaper is *primâ facie* answerable for what appears in it; but the presumption arising from proprietorship may be rebutted, and an exemption established. *Rex v. Gutch*, 1 M. & M. 433.

It is not competent to the defendant to prove that a paper similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons who have never been prosecuted for it. *Rex v. Holt*, 5 T. R. 436.

[3] A defendant may be acquitted of printing, and found guilty of publishing, a libel. By the 32 Geo. 3, c. 60 (commonly called "Mr. Fox's Libel Bill"), the functions of juries in trials for libel are more precisely ascertained and discriminated. Prior to this act (see *Rex v. St. Asaph*, 3 T. R. 428, n. *Rex v. Withers*, id. *Rex v. Holt*, 5 id. 443. *Rex v. Woodfall*, 5 Burr. 2667) it had been frequently determined, that the only questions for the consideration of the jury were the fact of the publication and the truth of the inuendoes; that is, the meaning of the passages of the libel as stated in the record; and the court alone was competent to determine whether the subject of the publication was or was not a libel. But the 32 Geo. 3, provides that, on every trial of an indictment or information for libel, the jury may give a general verdict of guilty or not guilty, and shall not be required or directed by the

(*f*) *Punishment.*[1]
(*g*) *Costs.*[2]
(C) *By Information.*
(*a*) *When Granted, and how Obtained.*[3]

judge to find the defendant guilty merely on proof of publication, and of the sense ascribed to the libel in the record.

[1] The punishment for either making, repeating, printing, or publishing a libel, is fine and imprisonment proportioned to the nature of the offence and the rank of the offender.

By the 6 & 7 Vic. c. 96, s. 4, "if any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person being convicted thereof shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award."

By sect. 5, "if any person shall maliciously publish any defamatory libel, every such person being convicted thereof shall be liable to fine and imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year."

When a person is brought up to receive judgment, his conduct subsequent to his conviction may be taken into consideration, either by way of aggravation or mitigation of the punishment.

A libel against the mayor of a corporation is not a sufficient cause to disfranchise a man before conviction. *Rex v. the Mayor of Gloucester*, Holt, 450; Forts. 275.

If a clergyman be convicted of libel he may be degraded. *King v. Johnson*, 2 Show. 488.

A party outlawed for a seditious libel may be bailed on his bringing a writ of error. *Rex v. Erbury*, 8 Mod. 177.

[2] The 6 & 7 Vic. c. 96, s. 8, enacts, "that in the case of an indictment or information by a private prosecutor for the publication of any defamatory libel, if the judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried."

If the defendant is found not guilty, he is entitled to costs, although he has not pleaded any matter of justification; and the judge has no power to deprive him of costs by certifying under 4 & 5 Wm. & M. c. 18. *Reg. v. Latimer*, 15 Q. B. 1075.

The special plea referred to is a plea alleging that the matter was true, and that its publication was for the public benefit. 6 & 7 Vic. c. 96, s. 6. See *Reg. v. Newhouse*, 22 L. J. Q. B. 127.

If a prosecutor, having removed an indictment by *certiorari*, give notice of trial for the assizes, and bring down the record, and withdraw it after it has been entered for trial, the judge at the assizes cannot order the prosecutor to pay the defendant the costs of the day, but a motion must be made in the Court of Queen's Bench. *Rex v. Watton*, 4 C. & P. 229.

[3] An information was granted for a libel against the East India Company, although the libellous matter applied only to an individual director. *Rex v. Jenour*, 7 Mod. 400. So it was for accusing the complainant of an unnatural crime. *Rex v. Denison*, Lofft. 148. So for sending a letter, wherein were the words "you are a scoundrel, and have defrauded the king of his duty." *Rex v. Pownwell*, Keb. 58. So for holding up the prosecutor to ridicule, or reflecting on his children. *Rex v. Benfield*, 2 Burr. 984. *Rex v. Kinnersley*, 1 H. Black. 294. But the court have refused to grant a criminal information for printing a report of the proceedings in the House of Commons, though it contained reflections on the character of an individual. *Rex v. Wright*, 8 T. R. 293. So against a printer, who had published an advertisement concerning a married woman by order of her husband. *Rex v. Masters*, Say. 122. Nor can an information be obtained where the contents of the libel are true. *Rex v. Bickerton*, Stra. 498. *Rex v. Draper*, 2 Smith, 391. Hence, it is an invariable rule not to grant an information for a libel without an exculpatory affidavit. *Rex v. Haswell*, and *Rex v. Bate*, 1 Dougl. 387. *Rex v. Miles*, id. 284. And the affidavit must distinctly negative the charge, unless the party libelled be abroad, or the charge be general. *Rex v. Wright*, 2 Chit. 162.

The criminal information should be moved for within two terms. *Rex v. Jollie*, 1 Nev. & M. 483. Under circumstances, the court granted a second rule for a criminal information. *Rex v. Eve & Parlby*, 1 Nev. & P. 229. A certified copy of the newspaper containing the libel ought to be annexed to the affidavit. *Reg. v. Woolmer*, 4 Per. & D. 137.

The truth of a libel cannot be urged when the defendant is brought up for judgment. *Rex v. Bradley*, 2 M. & R. 152. Nor can affidavits to that effect be used. *Rex v. Halpin*, 9 B. & C. 65.

On motion for criminal information, the rule at N. P., that, after production and proof of the affidavit from the Stamp Office, a paper corresponding with it may be put in and read as published by the parties named there, applies. *Rex v. Donnison*, 4 B. & Adol. 698. An information for a libel, im-

VI. Publication or Suppression of Libel, with intent to Extort Money.[1]

LIBERTY.[2]

LICENSE.[3]

for Dancing. *See* vol. iii. p. 553.

for Retailing Ale, &c. *See* vol. i. p. 277.

puting improper conduct to A., as town-clerk of H.; it was alleged that he was town-clerk, and that it was his duty to issue his precept for summoning the grand jury. The precept was signed both by the mayor and town-clerk:—*Held*, that this satisfied the allegation that he issued his precept, and that the fact that he was an alderman of the borough at the time when he was elected town-clerk made no difference. *Rex v. Hatfield*, 4 C. & P. 244. A widow lady being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and desiring a diligent and extensive inquiry into the plaintiff's character:—*Held*, that this was a letter written on a justifiable occasion, and that the defendant was justified in writing the letter, provided the jury be satisfied that, in writing it, the defendant acted *bonâ fide*, although the imputations contained in the letter were false, or based upon the most erroneous information; and that, if the defendant used expressions, however harsh, hasty, or untrue, yet *bonâ fide*, and believing them to be true, he was justified in so doing. Communications of this kind should be viewed liberally by juries; and unless they see clearly that there was a malicious intention of defaming the plaintiff, they ought to find for the defendant. *Todd v. Hawkins*, 8 C. & P. 88; 2 M. & Rob. 20. An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard, it was asked if the prosecutor had not received certain warning; the prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard, if he had not received the letters:—*Held*, that the letters might be received in evidence, as explanatory of the placard, without proof of the handwriting of them. *Rex v. Slaney*, 5 C. & P. 213. *See* further, Information, Criminal, *ante*, p. 149. As to the formalities of the information, of the pleas, the evidence and costs, *ante*, Indictment for Libel, p. 378.

[1] The 6 & 7 Vic. c. 96, s. 3, enacts, "that if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly offer to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender on being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall alter or affect the law now in force in respect of the sending or delivering of threatening letters or writings."

[2] The word "liberty," signifies a right, privilege, or franchise, not properly the extent of a place. *Lever v. Hosier*, 2 Mod. 48. It is an incorporeal hereditament. *Rex v. Mayor of London*, 1 Show. 280; 2 Mod. 48. As to the direction of writs to be executed in, *see* Execution, vol. iv. p. 344.

[3] A license to be exercised upon land may be granted by parol, but it must be clear and explicit (*Bridges v. Blanshard*, 1 Ad. & E. 536; 3 Nev. & M. 691. *Hewlim v. Shippam*, 5 B. & C. 229. *Cocker v. Cowper*, 1 C., M. & R. 421. *Lee v. Stevenson*, 27 L. J. Q. B. 263); and when given for a valuable consideration and acted upon, it cannot be revoked. *Tayler v. Waters*, 2 Marsh. 551; 7 Taunt. 374. But whilst it continues in its nature revocable it may be countermanded. *Bayshaw v. Bossley*, 4 T. R. 78. *Wallis v. Harrison*, 4 Mee. & W. 538. Or, where a rule of law would be transgressed by holding it irrevocable, *Fentiman v. Smith*, 4 East, 107. And it can only be rescinded where the parties can be placed *in statu quo*. *Winter v. Brockwell*, 8 East, 308.

Lord Eglinton, being possessed of a close of land, on which was erected a stand, which overlooked a racecourse, authorised the issue of tickets for the admission of strangers to the stand during the races, one of which tickets was purchased by the plaintiff for a valuable consideration: it was held that Lord Eglinton had a right, without offering to return the money paid, to revoke the license, and order the plaintiff to quit the stand; and on his refusal to remove him by force. *Wood v. Leadbitter*, 13 Mee. & W. 838. *See Carrington v. Roots*, 2 id. 248. *Taplin v. Florence*, 10 C. B. 174; 15 Jur. 403. *See* the whole subject commented upon and illustrated in *Wood v. Leadbitter*, *supra*.

In equity, if a license be given to enter upon the land, and do acts involving an expenditure of money, and the licensee enter accordingly, and incur such expense, the license cannot be revoked without a tender of compensation. *Powell v. Thomas*, 6 Hare,

LIEGE Poustie. Scotch. *Legitima potestate; i. e.* any time during life other than sixty days before death, or its equivalent, when a party may validly dispose to strangers his heritage. Pat. Comp. 552.

LIEN. *See* Attorney, vol. ii. p. 5; Bankers, id. p. 119; Carriers, vol. iii. p. 293; Innkeepers, vol. v. p. 158; *post*, Principal and Agent; Vendor and Purchaser.

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I. How the Right of Lien may be Created, and of the Distinction between General and Particular Liens.[1]

200. *Laird v. Birkenhead Railway Co.* 1 Johns. 500; 29 L. J. Ch. 218.

Goods sold at an auction on condition to remain on the premises till wanted is an irrevocable license. *Wood v. Manley*, 3 Per. & D. 5.

Formerly, the want of a license (when one was required by statute to sell particular articles or carry on a particular calling) was no answer to an action on a contract. (*Brown v. Duncan*, 1 B. & C. 93), but now a different rule obtains. *Cope v. Rowlands*, 2 Mee. & W. 149. *Smith v. Lindo*, 27 L. J. C. P. 196. *Gallini v. Laborie*, 5 T. R. 242. *Johnson v. Hudson*, 11 East, 180. *Smith v. Manwood*, 14 Mee. & W. 114. *Pidgeon v. Burslem*, 3 Ex. Rep. 470; 18 L. J. Ex. 193.

[1] The word "lien" signifies a right of detaining the property of another until some demand be satisfied. *See* Whitaker's *Law of Lien;* Montague on Lien; Ellis's *Debtor and Creditor;* Chit. *Com. Law;* 2 Selw. N. P. Trover; Petersdorff's *Supplement*, vol. iii.; Bl. Com. 2d ed. Lien; 2 East, 235, 236; id. 25; 2 Camp. 579; 2 Merv. 404; 2 Rose, 357. It either arises by operation of law, or is created by express contract. The manner in which it originates does not affect the nature of the right. The benefit accruing from either of these modes is precisely the same. *See* 4 Taunt. 642; Holt, N. P. 383; 2 Merv. 404. There is no analogy between a lien and a set-off; the former consists in a right to detain the property, the latter in a right to insist on a counter-demand, which can only be enforced by action or suit.

There are two descriptions of liens recognised by the English law — particular and general. *Particular* liens exist where persons have a right to retain possession of property in respect of labour or money expended on the identical chattel which constitutes the subject of controversy. These are always favoured by the courts (1 Atk. 228; Ambl. 252; 1 Bl. Rep. 651); unless the interests of creditors would be injured by giving effect to the right. 3 B. & P. 485. *General* liens are claimed in respect of a general balance. They are viewed by the courts with jealousy.

Per Bayley, J., 1 B. & A. 582: Liens may arise in three ways: 1. By express contract. 2dly. By implied contract, or from general or particular usage of trade. 3dly. By legal relations between the parties.

By implied contract a particular lien may exist in the absence of any express contract or direct stipulation: as, where there is a long-established general usage of trade authorising the detention of the chattel, or where there is a particular usage of trade between the parties, creating an implied acquiescence in the lien. The existence and extent of liens obtained in this manner are always matters of evidence and questions of fact. *See* 6 T. R. 14; 1 Esp. 100.

By legal relation a lien may be created wherever the law imposes an obligation on a party to do a particular act; or where,

II. The Demand must be Certain.[1]

III. „ Right must be Acquired from the Owner or his Agent.[2]

IV. And the Property come into the Possession of the Person claiming the Lien.[3]

V. Fraud will Defeat the Lien.[4]

VI. Of the Persons entitled to a Lien.[5]

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from circumstances, an individual is induced to bestow his labour and expense upon the property in his possession, thereby creating a moral and legal obligation on the owner of such chattel to make a remuneration before he can insist on its removal.

Where the law imposes an obligation on a party to do a particular act, in return it gives him a lien to secure payment. Hence it is that carriers, innkeepers (*ante*, Innkeepers, p. 161; Bac. Ab. Trover, E.; Yelv. 67), have a particular lien for their respective labour and expenses in regard to their particular employment.

[1] There must always be a fixed and certain demand to create a lien by custom. *Hammonds v. Blight*, 2 East, 227. *Drinkwater v. Goodwin*, Cowp. 251. *Lambert v. Robinson*, 1 Esp. 119. *Bishop v. Ware*, 3 Camp. 360. Hence, there is no lien for demurrage (*Phillips v. Rodie*, 15 East, 554); for a lien cannot exist except by express contract, where the amount of the demand can only be ascertained through the intervention of a jury. Id. 574.

Where there is any transaction between the parties unconnected with the usual and ordinary course of dealing, no lien can be created by usage. *Baldwin v. Cole*, 6 Mod. 212.

[2] Any party having the absolute disposition of property may vest in another the right of lien upon it, but not otherwise. *Hollis v. Claridge*, 4 Taunt. 807.

Liens may be acquired through the acts of servants or agents acting within the scope of their employment (*Hussey v. Christie*, 9 East, 433. *Richardson v. Goss*, 3 B. & P. 119. *Pulteney v. Keymer*, 3 Esp. 182. *Weldon v. Gould*, id. 268), but not otherwise. *Hiscox v. Greenwood*, 4 Esp. 174. *Daubigny v. Duval*, 5 T. R. 604. As to factors pleading, *see* 6 Geo. 4, c. 94.

[3] No lien can be acquired unless the property on which it is claimed come into the possession of the party claiming it, or his servant or agent. *Kinlock v. Craig*, 3 T. R. 119. *Man v. Ellis*, 2 East, 523. *See* 4 T. R. 261; Bl. Rep. 413, 423.

Thus, to found the lien of a factor it is necessary that the property upon which it is claimed should have been in the claimer's possession; for if goods, after being consigned to a factor, are stopped *in transitu*, no such right vests in him, notwithstanding he may have accepted bills drawn upon him on the faith of the consignment. *Kinlock v. Steine*, 3 T. R. 119, 783. *Godin v. London Assurance Co.* 1 Burr. 489.

By agreement, however, parties may waive the necessity of taking actual possession; and cases occur where the agreement may be implied, such as where property is at sea, or there are choses in action, in which the delivery of the muniments or documents of the right of property, and performing other acts, are deemed sufficient to create a lien. Whitaker, 62; Cullen, 302–310; Cook, B. L. ch. 8, s. 11; Tath. 160; 2 T. R. 485; 9 Ves. 417; 1 Stark. 143; 7 Taunt. 278.

Where there was an agreement that, in consideration of being permitted to draw bills, the drawers should consign goods to the drawees for sale on their account, the latter to receive the usual commission on the sales and out of the proceeds to indemnify themselves against their acceptance; it was held that the latter, to whom the bills of lading were remitted, were entitled to the goods, though the consignors had become bankrupts before the ship sailed, and their assignees had got possession. *See* 1 B. & P. 563.

[4] A lien cannot be acquired by a creditor upon the property of a trader which is delivered by the trader to the creditor, with intent to give a preference in the event of a bankruptcy. *Alderson v. Temple*, 4 Burr. 2235. *Wilson v. Balfour*, 2 Camp. 579. *Crosby v. Crouch*, 12 East. 256.

A party having possession of property without the express or implied consent of the owner (*Griffiths v. Hyde*, 2 Selw. *Burn v. Brown*, 2 Stark. 272), or by any fraudulent misrepresentation or concealment of facts (*Madden v. Kempster*, 1 Camp. 12. *Lanyon v. Blanchard*, 2 id. 597), or incurring expense therein without consent, cannot retain it as a lien. *Lempriere v. Pasley*, 2 T. R. 485. *Stone v. Lingwood*, Stra. 651. *Exall v. Partridge*, 8 T. R. 310. *Child v. Morley*, id. 610.

[5] It is a general principle, that whatever goods are delivered to a tradesman, or other person, for the execution of the purposes of his trade or occupation upon them, and he incurs expense and trouble, or labour, in the accomplishment of such ends, he may exercise the right of a particular lien. 1 Atk. 228; Say. Rep. 224; 5 T. R. 14; 3 B. & P. 42; 1 East, 4; 1 Bl. Rep. 651; 3 M. & S. 167. To sustain a lien on this ground, there must be something done to the article on which it is claimed. *Sanderson v. Bell*, 2 C. & M. 304. Calico-printers (*Anon.* 3 Esp. 268), farriers (*Brenan v. Currint*, Say. 224. *Kirkman v. Shawcross*, 6 T. R. 14), dyers, provided it be for the price of dyeing, have a lien. *Green v. Farmer*, 4 Burr. 2214. Id. 1 Bl. 651. So, bankers have a lien on all paper securities of their

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employers in their possession. *Jourdaine v. Lefevre*, 1 Esp. 66. *Davis v. Bowsher*, 5 T. R. 488. *Savill v. Barchard*, 4 Esp. 53.

A rule which holds even where, having several bills, they discount as many as will cover the balance (*Davis v. Bowsher, supra;* and on all securities paid as on the running account. *Scott v. Franklin*, 15 East, 428.

The assignee of a banker, who, having fraudulently sold out stock belonging to a customer, and appropriated the proceeds, deposited the securities amongst those belonging to other persons, retains a lien upon such securities, notwithstanding they had been given up to the customer by the banker in contemplation of bankruptcy. *Wilson v. Balfour*, 2 Camp. 579.

Insurance-brokers have a lien upon the policies of their employers in their hands, and upon the money received by them upon those policies, for the amount of their commission, and upon the premiums of the policies themselves (Co. B. L. 556, 567); millers (1 Atk. 235); tailors (5 Edw. 4, fol. 2; Yelv. 67; Hob. 42; Cro. Car. 271; *see* 9 East, 433; 6 Bac. Abr. 694); publishers (*Brook v. Wentworth*, 3 Anst. 881); fullers (*Sweet v. Pym*, 1 East, 4); packers (*Green v. Farmer*, 4 Burr. 2222. *Savill v. Barchard*, 4 Esp. 53); printers (*Blake v. Nicholson*, 3 M. & S. 167); and wharfingers (*Naylor v. Mangles*, 1 Esp. 109. *Spears v. Hartley*, 3 id. 81); provided the goods be actually wharved, have respectively liens (*Syeds v. Hay*, 4 T. R. 260. *Stephen v. Coster*, 1 Bl. Rep. 413, 423): but it seems that a warehouseman (*Attersol v. Briant*, 1 Camp. 410); or the finder of property on land (*Binstead v. Buck*, 2 Bl. Rep. 1117); or in a river (*Nicholson v. Chapman*, 2 H. Black. 254), not rescued from the perils of the sea (*Hartfort v. Jones*, Ld. Raym. 393. *Anon.* 2 Salk. 654. *Hamilton v. Davis*, 5 Burr. 2732), have not liens; nor has a clerk of assize for his fees. *Rex v. Bury*, 1 Leach. 201.

Where a horse is seized as an estray, and the lord of the manor has been at expense in keeping it after proclamation, he has a lien. *Taylor v. James*, Bull. N. P. 45. But the lord should make some demand of certain amends; otherwise a general tender of amends will be sufficient to bar his lien. *Henly v. Walsh*, 2 Salk. 686; 11 Mod. 89. So, goods seized under distress, damage feasant, &c., may be detained until satisfaction of the injury be made. Bradby on Distresses, 205. But where a horse was distrained to compel an appearance, it was holden that, after appearance, the plaintiff could not justify detaining the horse till the keep was paid for. Bull. N. P. 45.

A common carrier has clearly a particular lien. *Yorke v. Grenaugh*, 2 Ld. Raym. 867. *Kirman v. Shawcross*, 6 T. R. 17. *Oppenheim v. Russell*, 3 B. & P. 42.

The master or owner of a ship, whether it be a general or chartered one, has a lien upon the cargo or luggage (but not the wearing apparel actually in use; *see* 2 Camp. 631) of a passenger, for freight, passage-money, primage, average, or salvage, and is not bound to part with it till his demands in this respect are satisfied. *See* Abbot, 276; 12 Mod. 447, 511; 1 Esp. 23; 1 East, 507; 2 Camp. 631; 1 B. & A. 582; 1 M. & S. 147. And the master has a lien upon the goods for freight, though the goods be furnished to the ship by his direction and on his credit. *See* 4 Esp. 22. But the shipowner has no lien for dead freight where the remedy is in damages (*see* 15 East, 547; 3 M. & S. 205); and the owner has not a lien for dead freight or demurrage under a covenant, where the freighter lands the goods and merchandises in the ship, in a penal sum for non-performance of the covenants. *See* 3 M. & S. 205; 2 Mer. 401.

At common-law an agister of cattle has no lien. *Jackson v. Cummings*, 5 Mee. & W. 342. The lien of the Crown on stage-coaches for duties attaches, though passed to assignees. *In re Day*, 1 M'Clell. 384.

A stable-keeper, as such, has no lien (*Judson v. Etheridge*, 1 C. & M. 743; 3 Tyr. 954); but a livery-stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. *Bevan v. Waters*, 1 M. & M. 235; 3 C. & P. 520. And the owner of a stallion has a lien on a mare sent to be covered. *Scarfe v. Morgan*, 4 Mee. & W. 270.

It has been held, that though a traveller has stolen a horse yet the innkeeper has a lien against the right owner. *Yorke v. Grenaugh, supra.* Innkeeper, *ante*, p. 161.

If a person is stopped with a horse under suspicious circumstances, and the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep: he is liable to be sued in trover by the owner of the horse. *Binns v. Pigot*, 9 C. & P. 208. So, where A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting; M. never painted it, but placed it on the premises of B., where it stood three months: — *Held*, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. had placed it there by the authority of A. *Buxton v. Baughan*, 6 id. 674. But where A. applied to B. (the proprietor of a house, with cellars, which he was in the habit of letting), telling him that he wanted cellar room to do a pipe of wine, but adding, that he did not know but very shortly he might want a good deal of room; B., upon this, said that he had better put it into his (B.'s) own cellar, which he did: — *Held*, that, under these circumstances, B. was entitled to detain the wine till a reasonable and proper sum had been paid him for rent. *Gray v. Chamberlain*, 4 id. 260.

[1] A right to a general lien may be im-

VIII. Of the Rights and Liabilities of the Person claiming the Lien.[1]

plied from a general usage of trade. *Rushforth v. Hadfield*, 6 East, 519; 2 Smith, 624. *Whitehead v. Vaughan*, id. 523. And where a jury negatived such a general usage, though proved to have been frequently exercised, the court refused to grant a new trial. *Rushworth v. Hadfield*, 7 East, 224; 3 Smith, 221. But where a carrier had given notice that all goods should be subject to a general lien for any balance due from the owner, and goods were sent by the carrier addressed to A. B., who was merely a factor: — *Held*, that the carrier had not any lien as against the real owner for a balance due from A. B. *Wright v. Snell*, 5 B. & A. 350. A carrier who, by usage of trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcott*, 2 N. R. 64. See *Bock v. Garrissen*, 2 De Gex & G. 34. But railway companies have, by stat. 8 & 9 Vic. c. 20, s. 97, a right as against the owner to detain and sell goods in their hands for the tolls due for the carriage of other goods.

Wharfingers, bankers, insurance-brokers, and attorneys (1 Esp. 109; 3 id. 81; 4 id. 93; 3 B. & P. 124), have, by the custom of their respective trades and professions, a lien upon the property of their employers, not only for debts arising in the execution of the purpose for which the property was delivered, but for a general balance due from their employers in the course of their trade; but this may be qualified, and even apply to goods of different owners, as where the parties are known to be only agents. 32 L. J. Q. B. 57. Calico-printers (*Weldon v. Gould*, 3 Esp. 268; Co. Bank. Law, 429), and packers, have by custom a general lien. *Green v. Farmer*, cited 1 Bl. Rep. 653. S. C. 4 Burr. 2223. *Saville v. Barchard*, 4 Esp. 53.

It seems never to have been decided that fullers have a general lien, except by the particular custom of Exeter. *Sweet v. Pym*, 1 East, 4. Dyers (*Bennett v. Johnson*, 2 Chit. Rep. 455. *Saville v. Barchard, supra*) and millers have only a particular lien. *Green v. Farmer, supra.*

Any person may establish his claim to a lien for his general balance, upon the ground of a particular usage or previous mode of dealing between him and the party from whom he claims it; and proof of their having before dealt on the footing of such lien will be presumptive evidence that they continued to deal upon the same terms. Whitaker, 35; Prec. Ch. 580; 1 Atk. 235; 6 T. R. 19. *Bowman v. Moleskin*, 11 Mee. & W. 833.

It seems that a wharfinger has a general lien. *Holderness v. Collinson*, 7 B. & C. 212; 1 M. & R. 55. *Dresser v. Bosanquet*, 32 L. J. Q. B. 57.

A factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor. *Dixon v. Standfield*, 10 C. B. 398.

[1] A lien is a personal right, and cannot be exerted unless by an agreement between the owner and detainor to that effect. *Daubigny v. Duval*, 5 T. R. 606. *M'Combie v. Davies*, 7 East, 6. *Paterson v. Tash*, 2 Stra. 1178. *O'Connor v. Majoribanks*, 5 Scott, N.R. 394; 13 L. J. C. P. 161. *Robertson v. Showler*, 13 Mee. & W. 609; 14 L. J. Ex. 120.

The holder of property under a lien is, in general, subject to the same liabilities and rights as the owner of such property would be if the same were in his possession (*Man v. Ellis*, 2 East, 523); and, therefore, if goods belonging to A. be delivered by B. to C. for the execution of some of the purposes of his trade, and C. knows they belong to B., and not to A., he cannot detain them for a balance due from the latter. *Man v. Ellis, supra.* So, if the original owner transfer them after they are in possession of the tradesman, he cannot detain them for a balance due from the consignor in other accounts. *Richardson v. Goss*, 3 B. & P. 119. As between a person who has an equitable lien, and a third person who purchases the thing for a valuable consideration, and without notice, the title of the vendee shall be preferred. *Lempriere v. Pasley*, 2 T. R. 484.

The assignee of a policy upon goods by indorsement of the bill of lading takes it subject to the same lien as existed against the assignor. *Man v. Shiffner*, 2 East, 523.

The mere deposit of the documents relating to a ship at sea, in the hands of a *bonâ fide* creditor, will not confer even an equitable lien upon the creditors against the assignees of the owner under a subsequent bankruptcy. *See* 2 Stark. 175.

Property detained as a lien cannot in general be sold, used, or disposed of, by the party detaining, unless by the owner's consent. *See* Holt, N.P. 383; 8 Mod. 172; 1 Stra. 556; Selw.Ca. 125; Yelv. 67; 29 L.J.Ch. 714. Such consent, however, will, under circumstances, be implied: thus, if goods are deposited as a security for a loan of money, such deposit constitutes more than the right of lien, and it is to be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit (*see* Holt, N. P. 383). And so if the thing detained would require use, the detainor may use it, and the owner's consent will be implied; as if the thing detained be a horse, cow, or a pointer dog, the detainor may use it as a prudent man would use his own property. *See* Owen, 123. But a pledge or deposit may be assigned to the extent of the pawner's interest. *See* Bailment, vol. ii. p. 98, and *post*, Pawnbrokers.

IX. Determination of Lien.[1]

The right of the consignor of goods to stop them *in transitu* upon the insolvency of the consignee being considered a common-law right, and therefore paramount to that of the carrier to retain for his general balance, which can be founded only on special custom; it has been determined, that an usage for a carrier to retain goods for the general balance of account between him and the consignee cannot in any case affect the consignor's right to stop the goods *in transitu*, which the latter may exercise at any time before the consignee has acquired complete dominion over the goods, upon paying the carrier for the carriage only of those particular goods. *See* 3 B. & P. 42; 2 N. R. 64. *See post*, Stoppage in Transitu. A factor, to whom goods have been sent for sale, and who has accepted bills of exchange, drawn on him by his principal, to the amount of their value, has a lien on such goods, and the purchase-money arising by the sale, available against the Crown, where the goods or money have been seized by the sheriff under an extent, against the principal, for a debt due to the Crown. *See* 6 Price, 309.

Although a creditor who is entitled to a lien has the same lien against the assignees of a bankrupt as against the original debtor (*see* 7 Vin. 74; 1 T. R. 619; 1 Ves. 331; 2 Vern. 428), yet there is no distinction between the extension of the right of a particular and a general lien after the bankruptcy of the debtor. *See* 8 Taunt. 499; 2 B. & B. 96.

One who, unlike carriers and innkeepers, is not obliged to receive a customer's property, may impose what conditions he pleases on the receipt of it; therefore he may stipulate for a lien for his general balance on any property sent to him in the course of his business. *Kirkman v. Shawcross*, 6 T. R. 14. *Oppenheim v. Russell*, *infra*, 3 B. & P. 42. And there is no objection to any party who, from the nature of his employment, is bound to receive property for the purposes of his trade, making a particular and express contract of the same nature with his employers. *Chase v. Westmore*, 5 M. & S. 180. *Wright v. Snell*, 5 B. & A. 350. *Kirkman v. Shawcross*, *supra*. *Oppenheim v. Russell*, 3 B. & P. 42. Hence a printer employed to print certain numbers, but not consecutive numbers of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of these numbers. 3 M. & S. 167. The circumstance of a person procuring a loan from another, who is already in possession of some of the former property as a security for a prior loan, seems to be evidence that the parties intended that the property should be a pledge for the whole debt. 2 Vern. 691, 698.

A livery-stable keeper has no lien on the horse for his keep (*Yorke v. Greenaugh*, 2 Ld. Raym. 866), or in respect of money paid by him to a veterinary surgeon, for blistering the horse according to the owner's directions. *Orchard v. Rackstraw*, 19 L. J. C. P. 303. *Forth v. Simpson*, *infra*.

The lien of an artificer upon a chattel is strictly confined to work done upon it in making, mending, or repairing it. He cannot set up any claim against the owner for expenses incurred by him in warehousing and taking care of it during the time of its detention. *Brit. Emp. Ship Co. v. Somes*, 27 L. J. Q. B. 397; 8 H. L. C. 338; 30 L. J. Q. B. 229.

A trainer of race-horses has a lien for his charges (M. & M. 236; 4 Mee. & W. 270), and if he holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with a right of lien. *Forth v. Simpson*, 13 Q. B. 685; 18 L. J. Q. B. 263.

A person has a lien upon property placed in his possession as a consideration for his acceptance of a bill which he is liable to pay. *Hammond v. Barclay*, 2 East, 227. And a factor may become surety for his principal on condition of having a lien upon property of his principal, as an indemnity against loss which he may sustain by being surety. *Drinkwater v. Goodwin*, Cowp. 251.

A banker, who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer which may come to his hands, and may put the same in suit. *Bolland v. Bygrave*, 1 R. & M. 271. *See* Grant on Bankers.

Where the property was not originally capable of being detained as a lien it cannot be so afterwards. *Burn v. Brown*, 2 Stark. 273. *Anon.* Taunt. 278.

Where goods are deposited with a party for a particular purpose, he cannot depart from his trust in neglecting to execute it, and detain such goods as a lien for other monies due to him. *Walker v. Caldwell*, 6 T. R. 258; 1 N. R. 48. *Lawson v. Dickenson*, 8 Mod. 306. *Hooper v. Ramsbottom*, 4 Camp. 121.

A party having a lien may maintain trover against the sheriff for taking it under an execution. *Donatty v. Crowther*, 11 Moore, 497.

[1] A lien exists during such time only as the party has possession, either by himself or his agents, of the property, and if he parts with possession after the lien has attached, the lien is gone. *Sweet v. Pym*, 1 East, 4. *Jones v. Pearle*, Stra. 556. *Shaw v. Neale*, 27 L. J. Ch. 444. It may be waived by setting up a claim to retain the chattel on a different ground (*Weeks v. Goode*, 6 C. B. 367); or defeated by setting up two causes for the detention. *Kerford v. Mondel*, 28 L. J. Ex. 303. *Dirks v. Richards*, 4 Man. & G. 574. *Castellain v. Thompson*, 7 L. T. (N. S.) 424.

If a creditor part absolutely with the

possession of a ship upon which he has a lien (*see* 1 Atk. 234), so if the master part with the possession of the cargo, he loses his lien for freight. *See* Abbott, 246. Where a factor, having a lien on goods of his principal for the general balance of his account, gave orders to the warehouseman, in whose warehouse they were, to deliver them up to a broker employed by the principal on the occasion, telling the broker at the same time that the principal intended to sell himself, to save commission, and the broker sold them, and made out bills of parcels to the principal, without taking any notice of the factor, it was decided that such conduct on the part of the factor amounted to the same thing as if he had delivered the goods up in specie to the principal, and that he had therefore lost his lien upon them. *See* Ambl. 252.

If a vendor of goods unconditionally deliver the whole of the goods sold, the lien is divested of the whole (*Owenson v. Morse*, 7 T. R. 64); but in general, the parting with possession of part of a quantity of goods will not deprive a party of his lien on the residue. *Johnson v. Johnson*, 3 M. & S. 167. *Elmore v. Stone*, 1 Taunt. 458. *Hanson v. Meyer*, 6 East, 614. *Chase v. Westmore*, 5 M. & S. 180. *See* 29 L.J.Ex. 714. Hence if a captain, under a bill of lading, deliver to the assignee of the consignee a part of a consignment, the captain has a lien upon the remainder for the freight. *Hanson v. Meyer*, 6 East, 622. The individual, however, parting with possession of part, must not do so in such a manner as shows he intended to part unconditionably with the whole (*Owenson v. Morse, supra*); but if the delivery were conditional, and the condition be not performed, he has a lien upon such part as is in his actual possession. *Knight v. Hopper*, Skin. 647. *Hanson v. Meyer*, 6 East, 618. So, where an agent who has a lien upon property to a certain amount, deposits it with a third person as a security to that amount, apprising him of the lien, and appointing him to keep possession as his servant, the lien is not thereby extinguished. *M'Combie v. Davies*, 7 East, 7. And where the holder of a bill of exchange gave the drawee a letter from the drawer, which contained a navy bill, as the fund out of which the bill was to be paid, and which had been given to the holder as a security for payment of the bill of exchange, and the drawee kept the navy bill and received the proceeds, it was adjudged that the holder had not lost his lien on the navy bill by such resignation of possession. *Pierson v. Dunlop*, Cowp. 571. But in general a lien upon property is not continued in the proceeds when the sale is unauthorised. *Hunter v. Prinsep*, 10 East, 378.

A factor does not, in general, by parting with the possession of goods, forfeit the benefit of his lien against his principal, when he sells them according to authority, and he may retain the proceeds or securities gained by the sale. *See* Camp. 251; 3 B. & P. 449; 5 B. & A. 27.

A party does not lose his lien upon property by compliance with a legislative enactment requiring its deposit in certain places until certain requisites have been complied with. *Ward v. Felton*, 1 East, 507. *Martini v. Coles*, 1 M. & S. 147. And an innkeeper does not lose his lien upon the horse of his guest by putting him out to pasture (2 Roll. Ab. 84); nor can a lien be determined by a wrongful act of a third party. Id. 438. There are some cases, too, where the possession of the property on which the lien exists may be given up to the owner himself, without the lien being divested. Thus, if the commodity upon which the party has a lien be of a perishable nature, he may safely part with it to the owner upon a proper agreement with him that the lien shall await the event of an application to a court of law or equity. Whitaker, 73; 1 Atk. 235; 8 T. R. 199. And where the property upon which the lien exists is delivered up to the owner upon the faith of an assignment, which afterwards turns out to be invalid, it seems the party is still entitled to the benefit of his lien. *See* 2 T. R. 113.

The entering into an agreement, or accepting of another security not collateral to, but unconnected and inconsistent with, the lien, which shows that the creditor placed his reliance for security on such fresh security, discharges the lien, but not otherwise. 1 P. Wms. 737; 1 Atk. 94, 162, 232; 2 T. R. 485; 2 Vern. 566, n. 1; 5 B. & A. 27.

A lien is waived by taking a bill (*Hewison v. Guthrie*, 2 Bing. 755) without expressly reserving the lien. And where a party seizes the goods in execution he loses his lien. *Jabobs v. Latour*, 5 Bing. 130; 2 M. & P. 201.

A lien may be determined by actual payment or tender of the amount of the legal claim for which the goods are detained, but part payment of such demand is not sufficient. *Bach v. Owen*, 5 T. R. 409. Neither is a general tender or offer to discharge the claims sufficient without actual tender, or what in point of law will amount thereto. *Scott v. Franklin*, 15 East, 428.

A lien is divested when the purpose for which the property was deposited in the detainor's hands has been accomplished (*Birdwood v. Raphael*, 5 Price, 593); or by his taking a negociable security. *Horncastle v. Farran*, 3 B. & A. 497; 2 Stark. 590. But if the bills be dishonoured before the articles are parted with, and while the bills are in the hands of the vendor, the lien revives (*Dixon v. Yates*, 2 Nev. & M. 177; 5 B. & Adol. 313); but not if they are then outstanding in the hands of a third person. *Bunney v. Poyntz*, 4 B. & Adol. 568.

Where a lease was deposited with the defendants as a security for the repayment of 150*l.*, on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects the defendants were to be at liberty, after notice, to sell the lease, and deduct the expenses of the sale, the princi-

LIFE Insurance. *See* Insurance, Life, *ante*, p. 176.

Tenant for.[1] *See* Husband and Wife, *ante*, p. 59; Landlord and Tenant, id. p. 296; Lease, id. p. 338.

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pal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered there was an end of all the stipulations as to what was to be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease. *Chilton v. Carrington*, 15 C. B. 105.

Where a party enters into a special agreement inconsistent with the right of lien, he has no right to retain the property. *Hutton v. Bragg*, 2 Marsh. 345; 7 Taunt. 29. *Yorke v. Greenaugh*, 2 Ld. Raym. 867. *Jones v. Thurloe*, 8 Mod. 172.

The lien will be determined if the parties come to a new arrangement, and agree that the debt shall be paid in a particular manner. But a mere right of set-off to an amount equal to that for which the lien is claimed does not destroy it, for in that case there are two parties having mutual claims on one another, with this difference, that the one has a security and the other has not; and in the absence of special agreement to that effect it would be obviously unjust to deprive the former of his advantage. *Pinnock v. Harrison*, 3 Mee. & W. 532: *per Alderson, B.*

If a person having a lien upon property, when it is demanded of him claims to detain it upon a different ground, making no mention of the lien, it will be considered as a waiver of it. *Attersol v. Briant*, 1 Camp. 410. *Burn v. Brown*, 2 Stark. 272. *Ante*, p. 386. But no lien once fairly acquired can be divested, while the property on which it exists remains in possession of the party claiming the lien, by the owners aliening the property to a third person, for such person, though a *bonâ fide* purchaser, must take it subject to the lien. *Godin v. London Assurance Co.* 1 Burr. 489.

Liens acquired without fraud or collusion, before an act of bankruptcy is committed by the person upon whose property they are claimed, are not divested by his subsequently being adjudged a bankrupt. The assignees take the property subject to the same equitable lien as those under which the bankrupt himself enjoyed it. *See* 1 P. Wms. 737; 1 Atk. 94, 102, 232; 2 T. R. 485; 2 Vern. 566; 5 B. & A. 27.

If a party has once given up possession of the goods, and lost his lien, he cannot afterwards revive or recover it by stopping them *in transitu*, and procuring them to be re-delivered to him. *Swcet v. Pym*, 1 East, 4. *Hartley v. Hitchcock*, 1 Stark. 408. And if the seller of goods parts with the possession of them, we have seen, he loses his lien. *Jones v. Pearle*, 1 Stra. 556. But where goods which have been subject to a general lien have been parted with, yet if they once return into the same possession in the course of dealing, the lien will be restored. *See* Paley, P. & A. 187.

Where a policy-broker, who had a general lien on the policy of insurance, had parted with it, afterwards regained possession of it, it was held that his lien thereby revived. *See* 2 Moore, 34; Co. B. L. 580.

A livery-stable keeper may, by express agreement, have a lien for the keep of horses. Where the owner of horses in the possession of a livery-stable keeper, who had such lien fraudulently, took them out of his possession:—*Held*, that the livery-stable keeper might, without force, retake the horses, and that the lien would revive. *Wallace v. Woodgate*, 1 R. & M. 193; 1 C. & P. 575.

Case lies against a party who falsely represents that he has a lien at the suit of a party injured by the misrepresentation. *Green v. Button*, 2 C., M. & R. 707; 1 T. & G. 118.

A party has a lien for his debt, though his remedy for part of it is barred by the Statute of Limitations. *Spears v. Hartly*, 3 Esp. 81.

Where tender in discharge of the lien is pleaded, the sufficiency of the sum tendered may be traversed. *Marks v. Lake*, 3 Bing. N. S. 408; 4 Scott, 137. But upon a plea of lien there can be no set-off unless agreed. *Pinnock v. Harrison*, 3 Mee. & W. 532.

[1] An estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or the happening or not happening of some uncertain event. Estates for life are of two sorts, either expressly created by deed, or some other legal assurance, or deriving their existence from the operation of some principle of law. The first arises where lands are conveyed to a man for the term of his own life or that of any other person, or for more lives than one, in all which cases he is called tenant for life, except where he holds for the life of another, when he is called tenant *pour auter vie*. And where a person having an estate for his or her own life, either by express limitation or by the operation of some principle of law, grants it over, the grantee becomes tenant *pour auter vie*. If lands are conveyed to a person for his own life and that of A. and B., the grantee has an estate of freehold determinable on his own death and the deaths of A. & B.; nor can there be any merger of the freehold during the lives of A. and B. into the estate which the lessee has for his own life; because, though an estate for a man's own life is greater than an estate for the life of any other person, yet here the lessee has not two distinct estates in him, but only one freehold circumscribed with that limitation as the measure of its continuance. By the statute 13 Car. 2, c. 6, s. 2, it is enacted, that if the persons for whose lives estates are granted shall go abroad, and no sufficient proof be made

LIGHTS. *See* also Easements, vol. iv. p. 149; *post*, Nuisance.

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I. Of the Acquisition, Nature, and Extent of the Easement.[1]

that they are alive, in any action commenced for the recovery of the lands by the lessors or reversioners, the judge shall direct the jury to give their verdict as if the persons so remaining abroad were dead; and it has been held that a remainderman is within this statute. Estates for life generally endure as long as the life or lives for which they are granted; but there are some estates for life which may determine upon the future contingencies before the death of the person to whom they are granted. An estate for life is not capable of being entailed under the statute *De Donis*, for all estates tail must be estates of inheritance. Therefore, where an estate for life or lives is limited to a person and the heirs of his body, the latter words only operate as a description of the persons who shall take as special occupants during the life or lives for which the estate is held; and the grantee takes the absolute property, which he may dispose of by deed. An estate for life is subject to merge in the inheritance; therefore, whenever the tenant for life acquires the absolute property or inheritance of the lands, his estate becomes merged or drowned in the fee-simple. Every tenant for life is entitled to estovers; that is, to allowance of necessary wood, which he may take upon the land without any assignment, unless restrained by special covenants, for *modus et conventia vincunt legem;* but affirmative covenants do not restrain. A tenant for life is not subject to the payment of any principal sums charged on the inheritance; therefore, where he pays off an incumbrance of this kind, he becomes a creditor on the estate for the sum so paid, otherwise he must be supposed to have paid it for the benefit of the persons entitled to the inheritance. but if a tenant for life does any act which shows an intention of paying off the charge for the benefit of the inheritance, he will not in that case be deemed a creditor. Tenants for life are, however, bound to keep down the interest of all incumbrances affecting the inheritance; and it has been lately determined that the rents and profits of an estate for life must be supplied not only in payment of all interest due during the possession of the tenant for life, but also of all interest due before the commencement of that estate. Smith, R. & P. P. 452. Although every person having a freehold interest has a right to the custody of the title-deeds, yet *Lord Hardwicke* has said, it was the common practice for the Court of Chancery to direct the title-deeds to be taken from the tenant for life and deposited in the court, for the security of the persons entitled to the inheritance. Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits during the continuance of his estate. He has also the power of alienating his whole estate and interest, or of creating out of it any estate less than his own, unless he is restrained by condition. But if a tenant for life attempts to create a greater estate than his own it must necessarily be void, upon the principle that *nemo dat quod non habet*. If, however, the person entitled to the inheritance is a party to the deed, there the tenant for life may join with him in conveying away the entire inheritance. Estates for life are still in some respects considered as strict feuds, being forfeitable for many of the causes for which feuds were formerly forfeited. Thus, where a tenant for life takes upon him to convey a greater estate or interest than that which he has, whereby the estate in remainder or the reversion is divested, such conveyance will operate as a forfeiture of his estate for life, because it is a renunciation of the feudal connexion between him and his lord; and the person in remainder, or the reversioner, may enter for the forfeiture.

A conveyance by a tenant for life of all his estate, right, title, interest, &c. *habendum* for ninety-nine years, passes a leasehold interest only, not the freehold. *The Earl of Derby v. Taylor*, 1 East, 502.

Although a surrender of a life estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet it may have continuance to uphold a prior interest derived under it. *Doe v. Pyke*, 5 M. & S. 146.

[1] Light and air are for the common benefit of mankind, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. *Embrey v. Owen*, 6 Ex. 353; 15 Jur. 633; 20 L. J. Ex. 212.

By 2 & 3 Wm. 4, c. 71, s. 3, "when the access and use of light to and for dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some covenant or agreement expressly made or given for that purpose by

deed or writing." See *Hutchinson v. Copestake*, 9 C. B. 863; 31 L. J. C. P. 19. The act is retrospective. *Simper v. Foley*, 2 Johns. & H. 553. The twenty years' enjoyment is the period next before any suit or action. *Cooper v. Hubbuck*, 31 L. J. C. P. 323. *Flight v. Thomson*, 8 Clark & Fin. 231.

"The 3rd section," as observed by *Baron Parke*, "is differently worded from the others, and the acquisition of the right to light is much favoured, as a far less time gives an indefeasible right; and the proviso in the 7th sect., which excludes the time when a person otherwise capable of objecting is an infant, idiot, *non compos*, *feme covert*, or tenant for life from the periods of computation, includes it in this. It also differs from the 2d sect. in not requiring that the enjoyment should be by a person claiming right in express terms." *Harbidge v. Warwick*, 3 Ex. 556; 18 L. J. Ex. 245. "The 3d sect. converts into a right such an enjoyment of the access of light over contiguous land as had been had for the whole period of twenty years in the character of an easement, distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing in this respect as those positive easements provided for by the other sections, all of which, after long enjoyment as easements, are invested with the quality of rights. In the first place, the access of light under this section must have been enjoyed for twenty years without interruption, not in the sense of an uninterrupted or continuous user, but without such interruption as is mentioned in the subsequent section; that is, an interruption submitted to for one year after the party shall have had notice thereof, and of the party authorising the same to be made. See *Gale v. Abbott*, 8 Jur. 987. From this it follows, that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time." *Harbidge v. Warwick*, *supra*: *per Parke*, *B.*

If lights have been enjoyed subject to the payment of a rent, this is an enjoyment by consent or agreement, and no right is acquired under the statute, but the payment of rent is not evidence of an interruption of the enjoyment. *Plasterers' Co. v. Parish Clerks' Co.* 6 Ex. 630.

If the facts show that the windows have been only temporarily disused, that the frames and sashes were kept in, or the spaces filled with a temporary hoarding, which could readily be removed, the owner of the window-spaces will not have lost his right to the easement of light and air by the disuse of the windows for any period short of twenty years; but if the window-spaces are obliterated and blocked up, and the adjoining landowner is permitted to build against them, and to incur expense in the reasonable surmise that the windows had been permanently abandoned, the owner of the windows cannot then insist upon his ancient right, and claim damages for an injury which has been brought about by his own negligence and want of care. *Stokee v. Singers*, 8 E. & B. 39; 26 L. J. Q. B. 257.

If an ancient light has been completely shut up with brick and mortar above twenty years it loses its privilege (*Lawrence v. Obee*, 3 Camp. 514); but where lights had been put out without interruption for above twenty years, during the occupation of the opposite premises by a tenant, that will not conclude the landlord of such opposite premises without evidence of his knowledge of the fact. *Daniel v. North*, 11 East, 372. And the occupier of one of two houses, built nearly at the same time, and purchased of the same proprietor, may maintain an action against the tenant of the other for obstructing his light by adding to his own building, however short the previous period of enjoyment. *Compton v. Richards*, 1 Price, 27.

If an ancient window be enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of lights to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was anciently enjoyed. *Chandler v. Thompson*, 3 Camp. 80. See *Hutchinson v. Copestake*, *supra*.

A party, by enlarging ancient windows, cannot, however, acquire a larger right than he before possessed; and if the proprietor of adjoining land cannot, in the exercise of his lawful rights on his own land, obstruct the increased lights without also obstructing the ancient, he may (until at least he restore the windows) lose his right altogether. Thus, where the plaintiff and defendant had houses on the opposite sides of a narrow court, and the plaintiff rebuilt his house on the old foundations, but raised it a story higher, putting in new windows, and altering the dimensions of all the windows in the lower stories, and the defendant then raised his house to the same elevation as the plaintiff's new story, and thereby darkened and obstructed both the new windows in the plaintiff's new story, and all the windows in his lower story, it was held, that as the primary cause of the plaintiff's misfortune was his own act, in raising his own house and opening new windows, he had no ground to complain. *Binckes v. Pash*, 11 C.B. 324; 31 L.J.C.P. 121. The court guarded themselves in this case against being understood to say, that where the owner of a house alters the dimensions of an ancient window in it, he may in no case maintain an action for that which is an obstruction to the window in its new state, and would have been an obstruction to it in its former state. If the wall in which the window is be on the extremity of the owner's land, and the window is enlarged at the lower part of it, the owner of the adjoining land could obstruct the unprivileged part of the window, but would not be justified in building a wall which would obstruct the whole window. But in the case then before the court, there was no mode of obstructing the new and unpri-

II. Actions for Obstructing Light.[1]

LIGHTHOUSES and Light Dues, &c. *See* 17 & 18 Vic. c. 104, ss. 396–412.

vileged windows, and portions of windows, without obstructing the whole of them. *Renshaw v. Bean*, 18 Q. B. 132; 21 L. J. Q. B. 219. See *Cooper v. Hubbuck*, 12 C. B. 456; 31 L. J. C. P. 323. *Salters' Company v. Jay*, 3 Q. B. 111.

Lights in respect of the obstruction of which a right of action is to be enforced, must be substantially the same as the lights which have been gained by user or grant. *Hutchinson v. Copestake*, 9 C. B. 863; 31 L. J. C. P. 19. *Jones v. Tapling*, 11 C. P. 289; 31 L. J. C. P. 342.

A right to light will be acquired by twenty years' enjoyment, notwithstanding the custom of London that house-walls may be raised to any height if upon the ancient foundations; but if an action for obstructing the light be delayed till after the obstruction has continued for a year, the claimant cannot rely upon Lord Tenterden's act, not having enjoyed the light for twenty years before the suit, and the custom will in that case prevail. *Salters' Co. v. Jay*, 3 Q. B. 109. *Truscott v. Merchant Taylors' Co.* 11 Ex. 855.

If a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house in its new state, it is entitled only to the same degree of light which was necessary to it in its former state. *Martin v. Goble*, 1 Camp. 322. A window-frame erected on a party-wall was held not to be a common nuisance within 14 Geo. 3, c. 78, s. 10, or to deprive the owner of it to his right to the windows, which were proved to be ancient lights. *Titterton v. Conyers*, 5 Taunt. 465; 1 Marsh. 140.

A *parol* license to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) cannot be recalled after it has been executed at the defendant's expense, at least not without tendering the expenses. See *Winter v. Brockwell*, 8 East, 300. And acquiescence in an obstruction of lights is a good defence upon equitable grounds. *Davis v. Marshall*, 10 C. B. 697; 31 L. J. C. P. 61.

A party who purchases premises has the same right as to lights as his vendor had. *Swanborough v. Coventry*, 9 Bing. 305; 2 M. & Scott, 362. See *White v. Bass*, *post*.

A., the owner of two adjoining houses, granted a lease of one of them to B.; he afterwards leased the other to C., there then existing in it certain windows. After this B. accepts a new lease of his house from A.:—*Held*, that B. cannot alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows are not twenty years old at the time of the alteration. *Coutts v. Gorham*, 1 M. & M. 396. *Frewer v. Phillips*, 30 L.J.C.P. 356.

The custom of London, which allows a man to build to any height upon ancient foundations (*Shadwell v. Hutchinson*, 3 C. & P. 615), is destroyed by the 2 & 3 Wm. 4. *Cooper v. Hubbuck*, *supra*.

The use of an open space of ground in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land, so as to obstruct the light and air. *Roberts v. Macord*, 1 M. & Rob. 230.

[1] An action on the case may be sustained for obstructing light and air, but not for merely obstructing a prospect. *Knowles v. Richardson*, 1 Mod. 55. *Nerren v. Seaborne*, W. Jones, 326. *Aldred's case*, 9 Co. 57. Total privation of light, however, is not necessary to sustain the action. *Cotterell v. Griffiths*, 4 Esp. 69. A sensible or appreciable diminution will suffice. An upright screen of translucent fluted glass is not necessarily an obstruction. 8 Jur. 987. The owner of a house, although he be not in possession, may maintain the action. *Thomlinson v. Brown*, Say. 216.

Where the facts were, a man erected a house on his own lands, and afterwards sold the house to one, and the lands adjoining to another, who, by putting piles of timber on the land, obstructed the lights of the house; it was resolved, that although it be a new messuage, yet no person who claims the land by purchase under the builder can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant. *Palmer v. Fletcher*, 1 Lev. 122; 1 Keb. 553, pl. 65; Sid. 167. *Cox v. Mathews*, 1 Vent. 237. In *White v. Bass*, 31 L. J. Ex. 283, where *Palmer v. Fletcher* and all the early cases were considered, the court said, "No authority has been cited which goes the length contended for on the part of the plaintiff, that in the absence of any limitation or covenant to restrain the rights of a grantee of part of land, he is to be supposed to take as if an easement had been already acquired in respect of everything existing on the other part. Here there is no limitation or covenant to restrain the rights, and the defendant is entitled to our judgment." See *Swanborough v. Coventry*, 9 Bing. 305; 2 M. & Scott, 362. *Pyer v. Carter*, 26 L. J. Ex. 258. *Clare v. Harding*, 27 id. 286. *Frewer v. Phillips*, 30 L. J. C. P. 356; Gale on Easements.

In an action of trespass for removing boards, on a plea of justification that they obstructed an ancient window through which the light ought to pass, it is sufficient to show that the window was one through which the light ought to be allowed to pass, though the window is proved to have been erected within living memory. *Penwarden v. Ching*, 1 M. & M. 400.

If an erection obstructing window-lights be continued, another action may be maintained, notwithstanding the former recovery. *Shadwell v. Hutchinson*, 2 B. & Adol. 97. So may a party entitled to the renewal of an expired lease (18 Jur. 987. *See* also 3 L. T. 358); or reversioner. 27 L. J. C. P. 330; 5 C. B. 504.

LIMITATIONS, Statute of. *See* Ejectment, vol. iv. p. 169.

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I. The Enactments of the Statutes, and to what they Apply.[1]

(A) *In case of Debt on Simple Contract.*[2]

[1] At common law there was no fixed time within which a cause of action became extinguished; the regulations are wholly statutory. In an action in the tribunals of this country upon a contract entered into in a foreign state, the suit is governed by the English and not by the foreign law of limitations: for all that relates *ad litis ordinationem* is regulated by the law of the country where the action is brought. *Huber v. Steiner*, 2 Scott, 326; 2 Bing. N. S. 202. *British Linen Co. v. Drummond*, 10 B. & C. 903. *Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1 *Ruckmaboye v. Mottichand*, 8 Moore. P. C. 4. *Devine v. Holloway*, 14 id. 290. As to where the Crown is barred, *see* 24 & 25 Vic. c. 62.

The time of limitation in an action on a Scotch obligation will be regulated by the law of England. *British Linen Co. v. Drummond, supra. See* Paters. Comp. ss. 486–489.

[2] The stat. 21 Jac. 1 c. 16, s. 3, enacts, "that all actions of account and upon the case [other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants—an exception now repealed, 19 & 20 Vic. c. 97, s. 9; see *infra*, and vol. i. p. 126] and all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after."

By the 19 & 20 Vic. c. 97, s. 9, "all actions of account and for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this act, and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit."

By the 22 & 23 Vic. c. 49, ss. 1, 4, it seems to be provided that actions for debts incurred by guardians of any union or parish, or the board of management of any school or asylum district, must be commenced within three months after the expiration of the half year in which the debts were incurred, unless the Poor-Law Board, by order, extend the time for a period not exceeding twelve months from the date of the debts. See *Waddington v. Guardians of Poor of City of London*, 28 L. J. M. C. 113.

(*a*) *After Judgment Reversed in Error, &c.*[1]

(B) *Actions upon a Specialty for Rent, &c.*[2]

(C) *In cases of Actions of Tort, &c.*[3]

[1] By the stat. 21 Jac. 1, c. 16, s. 4, it is provided, that if judgment be given for the plaintiff, and reversed by error, and the judgment be arrested, or if the defendant be outlawed and the outlawry reversed, the plaintiff, his heirs, executors, or administrators, may commence a *new* action or suit from time to time, *within a year* after such judgment given or outlawry reversed.

[2] By 3 & 4 Wm. 4, c. 42, s. 3, it is enacted, that "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond [*Sturges v. Darell*, 28 L. J. Ex. 366. *Burrowes v. Gore*, 6 H. L. C. 907] or other specialty, and all actions of debt or *scire facias* upon any recognisance, shall be commenced and sued within twenty years after the cause of such action or suit, but not after, except where the time for bringing the action is specially limited by statute."

If a debt due on simple contract is recited in a deed, the debt does not become a specialty debt, unless the terms of the deed are such as to raise an implied covenant between the parties for the payment of the money. *Joens v. Elwes*, 1 Jur. N. S. 6.

An action founded on the provisions of an act of parliament, such as an action for calls, is an action on a specialty. *Cork and Bandon Railway Co. v. Goodé*, 13 C. B. 826; 22 L. J. C. P. 198. *Shepherd v. Hills*, 11 Ex. 67. It has been held that an action of debt for a penalty due under a bye-law founded on the charter of a chartered company is not grounded on specialty, and that the action will be barred if not commenced within six years after the penalty became due; for although the charter being under the great seal is matter of record, yet the liability sprung out of the consent of the party to become a member of the company, and obey the bye-laws, which is in effect a contract without specialty. *The Master, Wardens, &c. v. Loder*, 20 L. J. Q. B. 414.

By the 3 & 4 Wm. 4, c. 27, s. 42, "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears or interest, shall be recoverable by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in receipt of the profits thereof within one year next before an action or suit, shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

The effect of this section is qualified by 3 & 4 Wm. 4, c. 42, s. 3, which enacts that actions of rent on an indenture of demise, and actions of covenant or debt on any bond or specialty, must be brought within twenty years after the accrual of the cause of action; so that, although the land cannot be charged with more than six years' arrears of rent or interest (*Humfrey v. Grey*, 7 C. B. 567. *Francis v. Grover*, 5 Hare, 39. *Archbold v. Scully*, 9 H. L. C. 360), yet, if there be a covenant for the payment thereof, twenty years' arrears may be recovered by action on the covenant. *Paget v. Foley*, 3 Scott, 120. *Strachan v. Thomas*, 12 Ad. & E. 556. *Hunter v. Nockolds*, 18 L. J. Ch. 407. See *Elwy v. Norwood*, 21 id. 716. As to annuities, *see* 29 Beav. 175; 1 Johns. 112.

[3] The 2d sect. of the stat. 21 Jac. 1, c. 16, provides, that all actions of trespass *quare clausum fregit;* all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle; all actions of debt grounded upon any lending or contract, without specialty; all actions of debt for arrearages of rent; and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued, or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say,) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin, for goods or cattle; and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such action or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words within two years next after the words spoken, and not after: Provided, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debts, action of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, or shall, at the time of any such cause of action given or accrued, fall or come within the age of twenty-one years, *feme covert, non compos mentis*, im-

prisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and return from beyond the seas, as other persons having no such impediment should have done. *See* 20 Hen. 3, c. 8; 3 Edw. 1, c. 39; 32 Hen. 8, c. 2.

The statute is a bar to an action of trover commenced more than six years after the conversion, though the plaintiff was ignorant of the conversion till within six years, the defendant not having committed any fraud to prevent the plaintiff's earlier knowledge. *Grainger v. George*, 7 D. & R. 729; S. C. 5 B. & C. 149: but *see* 4 Esp. 20. And where by a private act of parliament it was enacted, that the London Dock Company should be sued within "six calendar months after the *fact committed*," the court decided that the limitation was from the time of the consequential injury happening, and not from the doing of the act which caused that consequential injury; the act itself not being tortious or injurious, except from those circumstances, which occurred sometime after. *Gillon v. Boddington*, 1 C. & P. 541; S. C. 1 R. & M. 161; and see *Roberts v. Read*, 16 East, 215.

[1] By 5 & 6 Vic. c. 97, s. 5, the period within which any action may be brought for anything done under the authority or in pursuance of any public, local and personal acts, or other acts of a local and personal nature, shall be two years, and in case of continuing damage, then within one year after such damage shall have ceased. See *Richards v. Easto*, 15 Mee. & W. 244. *Cock v. Gent*, 12 id. 234. *Moore v. Shepherd*, 10 Ex. 424.

[2] By sect. 7 of the Statute of James (21 Jac. 1, c. 16), if the persons entitled to any such action are, at the time the cause of action accrues, within the age of 21 years, or a *feme covert*, or *non compos mentis*, such person is at liberty to bring the same action, so as the same is commenced within the time of limitation after coming to or being of full age, discovert, or of sound mind. Imprisonment, or absence beyond the seas, had also the same effect of preventing the statute attaching; but now, by 19 & 20 Vic. c. 97 (Mercantile Law Amendment Act), s. 10, no person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought, is fixed by the act 21 Jac. 1, c. 16, s. 3, or by the act 53 Geo. 3, c. 127, s. 5, or by the acts 3 & 4 Wm. 4, c. 27, ss. 40–42, and c. 42, s. 3, or by the act 16 & 17 Vic. c. 113, s. 20, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being, at the time of such cause of action or suit accrued, beyond the seas, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability, by reason of such person, or some or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

By sect. 11, "where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors, who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were, at the time such cause of action accrued, beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the seas at the time the cause of action or suit accrued, after his or their return from beyond the seas, by reason only that judgment was already recovered against any one or more of such joint debtor or joint debtors who was not or were not beyond seas at the time aforesaid."

By sect. 12, "no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her majesty, shall be deemed to be beyond seas within the meaning of the act 4 & 5 Anne, c. 16, or of this act." See *Flood v. Patterson*, 29 Beav. 295; 30 L. J. Ch. 486.

Before this statute, the absence abroad of one of several joint debtors prevented the statute running against the others. *Firmin v. Anderson*, 7 Q. B. 811. *Towns v. Mead*, 16 C. B. 134. *See* 15 & 16 Vic. c. 76, s. 18.

Where a cause of action has once accrued, and the statute has begun to run, there being then a capacity of suing and being sued, the time of limitation continues to run, and is not stopped by the circumstance of the death of one of the parties, and delay in taking out administration. Any portion of time in which the parties are under disabilities occurring after the time has begun to run, must nevertheless form part of the period of limitation. *Rhodes v. Smethurst*, 4 Mee. & W. 61. *Freake v. Cranefeldt*, 1 Mylne & C. 499.

III. From what Period the Limitation Runs.

(A) *In Actions on Contract.*[1]

(B) „ *for Tort.*[2]

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[1] If a thing is to be done on the happening of a contingent or uncertain event, there can be no cause of action and no limitation of time until the event has happened. *Savage v. Aldren*, 2 Stark. 232. *Fenton v. Emblers*, 1 W. Black. 353. *Bell v. Lake*, Hetl. 138. *Tuckey v. Hawkins*, 4 C. B. 664; 16 L. J. C. P. 201.

If a bond be conditioned for the performance of acts to be done during a succession of years, a new cause of action arises upon each omission; if, therefore, the plaintiff can show a breach within twenty years, he will be entitled to maintain the action. *Amott v. Holden*, 22 L. J. Q. B. 19. *Blair v. Ormond*, 20 id. 452.

If a debt is payable by instalments, but by the terms of the contract, upon default being made in payment of any one instalment the entire debt shall be immediately recoverable, the entire cause of action accrues upon the first default, and the period of limitation begins to run therefrom. *Hemp v. Garland*, 4 Q. B. 524.

The debt on a solicitor's bill does not arise until the termination of the suit to which it has reference. *Whitehead v. Lord*, 21 L. J. Ex. 239.

Where a period of credit is given, the debt is not due until it has expired. *Help v. Winterbottom*, 2 B. & Adol. 431. After the death of the debtor, the creditor is entitled to a reasonable time to bring a fresh action. *Curlewes v. Mornington*, 27 L. J. Q. B. 439.

If a contract has been broken, and the cause of action which has thereupon arisen has been suspended by a subsequent agreement between the parties, which is also broken, and the creditor remitted to his original right of action, the time of limitation will run from the period of the breach of the second agreement, and not from the time of the breach of the original contract. *Irving v. Veitch*, 3 Mee. & W. 110.

In the case of an indemnity against costs, the cause of action accrues at the time the costs are actually paid by the party who is to be indemnified, and not from the time that the costs are incurred. *Collings v. Heywood*, 9 Ad. & E. 633. So, the liability of a surety, and the period of limitation, accrue on the making of default by the principal. *Humphreys v. Jones*, 14 Mee. & W. 1. But the statute only begins to run from the time the surety actually paid, in an action against the principal on the implied indemnity. *Reynolds v. Doyle*, 2 Scott, N. R. 46. And the same rule applies in an action against a co-surety for contribution. *Davies v. Humphreys*, 6 Mee. & W. 169. *Huntley v. Sanderson*, 1 C. & M. 480.

If a man has promised to pay a sum of money as soon as his circumstances enable him to do so, the period of limitation runs from the period of his being able to pay. *Walters v. Earl Thanet*, 2 Q. B. 757. So, when a demand or request of performance is a condition precedent to a right of action for non-performance, the time of limitation runs from the period of making the request or demand (*Buckler v. Moor*, 1 Mod. Rep. 89. *Topham v. Braddick*, 1 Taunt. 572. *Webb v. Martin*, 1 Lev. 48); but not so where the right of action arises, notwithstanding no demand be made. *Collins v. Benning*, 12 Mod. 444. *Emery v. Day*, 1 C., M. & R. 248. Thus, in the case of a promissory note payable two years after demand, the statute does not begin to run until two years after demand proved to have been made. *Thorpe v. Thorpe*, R. & M. 388. Bills and notes payable after date, the time runs from the day they are due.

If the note be payable "on demand" simply, the cause of action arises immediately on the making and delivery of the note without any demand, and the statute runs from the same period (*Norton v. Ellam*, 2 Mee. & W. 461. *Walters v. Earl Thanet*, 2 Q. B. 769), even though if given to secure a banker's account. 3 F. & F. 149. If payable at sight, the statute runs from the time when it was presented for payment. *Holmes v. Kerrison*, 2 Taunt. 323.

The statute runs from the time the cause of action accrued, notwithstanding the plaintiff had not then knowledge, nor the means of acquiring knowledge, of the invasion of his rights, or of the breach of contract (*Granger v. George*, 5 B. & C. 152; 7 D. & R. 732. *Denys v. Shuckburgh*, 4 You. & C. 42. *Howell v. Young*, 5 B. & C. 259); and even although the defendant has resorted to artifice for the purpose of concealing the fact from the knowledge of the plaintiff. *Imperial Gas Co. v. London Gas Co.* 10 Ex. 39; 23 L. J. Ex. 303. *Whitehead v. Howard*, 2 B. & B. 375. *Short v. M'Carthy*, 3 B. & Ald. 626. *Sims v. Brutton*, 20 L. J. Ex. 41; 5 Ex. 802. See *Bonomi v. Backhouse*, El. Bl. & El. 659.

[2] The period of limitations in actions for a tort begins to run from the moment when the cause of action accrued; and this, in general, is upon the doing of the injurious act, and not the happening of the damage resulting therefrom. *Sutton v. Clark*, 6 Taunt. 29. *Nicklin v. Williams*, 10 Ex. 259. *Violet v. Sympson*, 8 E. & B. 344; 27 L. J. Q. B. 138. But if an act be done which at the time was lawful, but in consequence of damage or injury occasioned to another it becomes unlawful, the cause of action will only accrue when such injury happens, and the statute will begin to run from that period. Thus if a man, by digging a basin or canal on his own land, causes a stream of water to flow against his neighbour's wall, and gradually to undermine it, so that at last the wall falls, the period of limitation

IV. Of the Revival of the Remedy by a New Promise, &c. within Six Years.

(A) *By a Promise or Acknowledgment in Writing in cases of Simple Contract Debts.*[1]

runs from the falling of the wall, and not from the time of the construction of the basin or canal. *Gillon v. Boddington*, R. & M. 161. So, where the owner of minerals so excavates the soil as to cause subsequently a subsidence of the surface, the cause of action accrues to the owner of the surface when the damage to the surface happens, not from the time when the excavation was made. *Bonomi v. Backhouse*, 28 L.J.Q.B. 378; 4 Jur. 1182. So if, by digging on his own land, a man wrongfully expose the foundations of his neighbour's wall, and by the consequent action of water, &c. the wall afterwards fall, the time of limitation will run from the latter event. *Roberts v. Read*, 16 East, 217.

The time of limitation runs from the time of the commission of the wrongful act, and not from the time the plaintiff acquired knowledge of that act. *Howell v. Young*, 5 B. & C. 265. It was supposed that the rule might be different if fraud were practised by the defendant for the concealment of the fact. *Granger v. George*, id. 149; 7 D. & R. 730. But it has been held that it is no answer to a plea of the statute, that the cause of action was fraudulently concealed from the plaintiff until within six years before the commencement of the suit; and a replication to that effect is bad, whether pleaded as a legal or an equitable replication. *Imperial Gas Co. v. London Gas Co.* 10 Ex. 39. *Hunter v. Gibbons*, 1 H. & N. 459; 26 L. J. Ex. 1.

Where the injurious act is continuing, and causes continuous damage, the right of action is also continuing. *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; 30 L. J. C. P. 305. See *Violett v. Simpson*, 8 E. & B. 344; 27 L. J. Q. B. 138. Thus, where an action is brought against a justice of the peace for false imprisonment, every continuance of the imprisonment *de die in diem* is, in point of law, a new imprisonment, and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of the making of the warrant. *Hardy v. Ryle*, 9 B. & C. 608. *Massey v. Johnson*, 12 East, 68.

There is no revival of the remedy so as to bar the statute in actions for wrongs, independently of any contract, by acknowledgment, as in the case of debts. *Hurst v. Parker*, 1 B. & Ald. 92. *Tanner v. Smart*, 6 B. & C. 603.

[1] By 9 Geo. 4, c. 14, s. 1, "that in actions for debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence o a new or continuing contract, whereby to take any case out of the operation of the 21 Jac. 1, and 10 Car. 1, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason of any written acknowledgment or promise made and signed by any other or others of them: Provided that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Sect. 2 of 9 Geo. 4, c. 14, enacts, that "if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

By sect. 3, "the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

By sect. 4, "the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

In reference to the provisions of the acts 9 Geo. 4, c. 14, ss. 1, 8, and the Irish act, 16 & 17 Vic. c. 113, ss. 24, 27, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable, thereby duly authorised to

make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself. 19 & 20 Vic. c. 97, s. 13.

The acknowledgment or promise must be in writing, and signed by the party chargeable therewith. Letters to take the case out of the statute must identify the debt. *Waugh v. Cope*, 6 Mee. & W. 824.

The acknowledgment must be signed by the party "chargeable thereby." *Whippy v. Hillary*, 3 B. & Adol. 399; 5 C. & P. 209.

The acknowledgment, merely as such, need not be stamped. *Morris v. Dixon*, 6 Nev. & M. 438; 4 Ad. & E. 845. *Wheatley v. Williams*, 1 Mee. & W. 533. But an instrument which requires a stamp cannot be given in evidence as an acknowledgment, unless a stamp be affixed. An unstamped, or improperly stamped, promissory note, cannot consequently be received in evidence to establish the promise or acknowledgment. *Jones v. Ryder*, 4 Mee. & W. 35.

The renewed promise, when absolute, revives the cause of action from the time of such promise being made, and is considered as a new cause of action; so that, upon the Statute of Limitations being pleaded, the replication, taking issue in substance, asserts that the cause of action did accrue within the prescribed period. *Tanner v. Smart*, 6 B. & C. 603. *Ridd v. Moggridge*, 2 H. & N. 567.

If the acknowledgment of the debt be made under circumstances, or accompanied by expressions which prevent any inference of a promise to pay, it will not satisfy the statute. See *Cornforth v. Smithard*, 5 H. & N. 13; 29 L. J. Ex. 228. *Rackham v. Marriott*, 2 H. & N. 196; 26 L. J. Ex. 315. And the mere insertion of a debt in a petition in bankruptcy is not, therefore, enough. *Everett v. Robertson*, 1 Ell. & B. 19; 28 L. J. Q. B. 24. But a single unqualified acknowledgment will do, for the law will from thence infer a promise to pay. *Smith v. Thorne*, 21 L.J.Q.B. 201. *Dobbs v. Humphreys*, 10 Bing. 449. *Holmes v. Mackrell*, 5 C.B.(N.S.) 794. So if the acknowledgment be accompanied by a suggestion of a mode of payment. *Evans v. Simon*, 9 Ex. 285. *Buckmaster v. Russell*, 10 C. B. 745. But if the words used fall short of an admission of an existing debt, there will be no sufficient acknowledgment (*Collinson v. Margetson*, 27 L. J. Ex. 305); *e.g.* "Doubtless I did owe the money, but I have already paid it." *Bryan v. Horseman*, 5 Esp. 81. *Francis v. Hawkesley*, 28 L. J. Q. B. 370. See *Godwin v. Cutley*, 4 H. & N. 373. Nor will a mere offer avail. *Holmes v. Mackrell*, 3 C. B. 782. *Collinson v. Margetson*, *supra*.

The replication of an acknowledgment must specify the mode of acknowledgment relied on. *Forsyth v. Bristowe*, 8 Ex. 347.

The acknowledgment in writing, to take a case out of the Statute of Limitations, must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Bucket v. Church*, 9 C. & P. 209. So where mutual accounts are set off by the parties respectively, and an agreed balance ascertained, the statute will run from the striking of the balance, in an action for the recovery of its amount. *Ashby v. James*, 11 Mee. & W. 542. *Holmes v. Mackrell*, 5 C. B. (N.S.) 789. *Smith v. Forty*, 4 C. & P. 126.

The amount of the debt may be shown by parol testimony, and need not appear on the face of the writing (*Williams v. Griffith*, 3 Ex. 343); and if the defendant admits the debt, but objects to the amount claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission consequently will give rise to a cause of action, and be a bar to the statute. *Gardner v. M'Mahon*, 3 Q. B. 568.

Where the defendant's promise to pay is qualified and conditional, the condition must be shown to be accomplished, and the promise to have become absolute, so as to support the absolute promise laid in the declaration. *Humphreys v. Jones*, 14 Mee. & W. 3. *Waters v. Earl Thanet*, 2 Q. B. 759.

If, since the stat. 9 Geo. 4, c. 14, a defendant by a letter admit a balance to be due, without stating the amount, this will take the case out of the Statute of Limitations, so as to entitle the plaintiff to nominal damages. The object of the stat. 9 Geo. 4, c. 14, was to procure that in writing for which words were previously sufficient. *Dickenson v. Hatfield*, 5 C. & P. 46; 2 C. & M. 141. But where the defendant in a letter, in answer to an application for the debt, said, "I will see D., or write to him; I have no doubt he has paid it: if by chance he has not, it is very fit it should be:"—*Held*, not a sufficient acknowledgment to take the case out of the statute. *Poynder v. Bluck*, 5 Dowl. P. C. 570. So, where a defendant had written a letter to T., to make a proposition to the plaintiff respecting a debt he owed him, and in this letter he desired T. to arrange with the whole of his creditors; T. wrote a letter to the plaintiff, offering an acceptance for 7*s.* 6*d.* in the pound on the debt:—*Held*, not sufficient to take the case out of the Statute of Limitations. *Gibson v. Baghott*, 5 C. & P. 211.

A verbal acknowledgment of the payment of part of a debt within six years is not sufficient, within the stat. of 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations. *Willis v. Newham*, 3 Y. & J. 518. See *Amos v. Smith*, 31 L. J. Ex. 423.

Enclosing a cheque for part, but denying all liability as to the residue, does not raise a promise to pay. *Brigstocke v. Smith*, 1 C. & M. 483. So a promissory note, improperly stamped, is not admissible as a memorandum to take the case out of the Statute of Limitations, under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp. *Jones v. Ryder*, 4 Mee. & W. 32. But the defendant having a claim against the plaintiff, the latter, at the foot of his bill, acknowledged the debt as follows: "By Mr. Lacy's bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request above, I send you my bill, which I

will thank you to peruse, and, if correct, favour me with a bill for the balance:"—*Held*, that this was a sufficient acknowledgment of the defendant's claim to take it out of the Statute of Limitations. *Waller v. Lacy*, 8 Dowl. P. C. 563; 1 Man. & G. 54; 1 Scott, N. S. 186.

The words, "I have daily been in expectation to give a satisfactory reply respecting the demand of W. against me" (*Morrell v. Frith*, 3 Mee. & W. 402; S. C. 8 C. & P. 246); or giving a list of accounts to collect, and then writing, "You and me will be clear," is not a sufficient promise. *Routledge v. Ramsay*, 3 Nev. & P. 319. So, a memorandum charging a reversionary interest when the same should fall in, is not sufficient. *Martin v. Knowles*, 1 Nev. & M. 421. But a direction, by letter, to draw a bill for the balance, is sufficient to take the case out of the statute. *Dobbs v. Humphreys*, 10 Bing. 446; 4 M. & Scott, 285.

An entry in the bankrupt's last examination:—*Held*, evidence of an account stated, as amounting to an absolute admission of a subsisting debt, and sufficient to take the case out of the statute; but that, the subject being a bill of costs, the plaintiff was not entitled to recover without proof of having duly delivered his bill. *Eicke v. Noakes*, 2 M. & Rob. 350. So, where a letter was written by defendant to plaintiff, containing the following passage: "I wish I could comply with your request, for I am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and very considerably reduce your account: at all events, if it does not, the concern must be broken up to meet it at last:"—*Held*, that this was a sufficient acknowledgment to take the plaintiff's debt out of the statute. *Bird v. Gammon*, 3 Bing. N. S. 883. So an admission in an answer in Chancery. 28 L. J. Ch. 881. *Goode v. Job*, id. Q. B. 1.

A. having become bankrupt in August, 1819, wrote in November, 1826, a letter to B., in which he spoke of a debt of 98*l.* 15*s.* due from him to B., and said, *inter alia*, as follows:—"By the end of next month I shall have my bankers' account here, and shall remit the sum due to you in a draft on them:"—*Held*, in *indebitatus assumpsit* by B. against A. for the sum mentioned, that the latter contained a sufficient promise to answer a plea of the Statute of Limitations. *Lang v. Mackenzie*, 4 C. & P. 463. But a letter sent by a debtor to a creditor respecting a debt, which contains in the introductory part these words, "Which is not to be used in prejudice of my rights now or in any future arrangement that may be made or instituted," cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the Stat. of Limitations. *Cory v. Bretton*, 4 C. & P. 462. So, where a letter, relied on to take the case out of the statute, imported no more than offers on the part of the defendant to surrender his property, with a view to an arrangement with his creditors, provided he were allowed time to arrange his affairs:—*Held*, that they amounted to no more than a conditional offer to pay, and not a general and unqualified acknowledgment from which a promise to pay was to be implied; and not sufficient to take the case out of the operation of the statute. *Fearn v. Lewis*, 6 Bing. 359; 4 C. & P. 173. So where the defendant, being applied to for some money on account, said he had not got any; and afterwards, upon a second application, the account was mentioned, but he made no answer, and, upon being requested to help the plaintiff to 5*l.*, said he was going to H. in the course of the week, and that he would help him to 5*l.* if he could:—*Held*, that, even if it were to be taken to amount to a promise or acknowledgment, it was merely a conditional one, and it was therefore incumbent on the plaintiff to show that the defendant was able to pay that sum. *Gould v. Shirley*, 2 M. & P. 581.

The words, "as soon as convenient," compel the plaintiff to give some evidence as to the convenience. *Edmunds v. Downes*, 2 C. & M. 459; 4 Tyr. 173. Whether conditional or not, is a question for the jury. *Dodson v. Mackey*, 8 Ad. & E. 225, n. For further instances of acknowledgments, see *Morrell v. Frith*, 3 Mee. & W. 403. *Hart v. Prendergast*, 14 id. 741; 15 L. J. Ex. 224. *Spong v. Wright*, 9 Mee. & W. 629. *Edmonds v. Goater*, 21 L. J. Ch. 290. *Cawley v. Furnell*, 20 L. J. C. P. 197; 12 C. B. 291. *Collis v. Slack*, 1 H. & N. 605. *Sidwell v. Mason*, 2 id. 306; 26 L. J. Ex. 407.

What is a sufficient acknowledgment is a question for the jury (*Dodson v. Mackey*, 4 Nev. & M. 327. *Doe d. Carzon v. Edmonds*, 6 Mee. & W. 295. As to whether a promise can be implied from a letter, see *Linsell v. Bowser*, 2 Bing. N. S. 241; 2 Scott, 392, n.

An infant is of sufficient capacity to make an acknowledgment in writing, under the statute, of a debt due for necessaries, and the acknowledgment will be evidence against him for six years after it has been made. *Williams v. Smith*, 4 E. & B. 185; 24 L. J. Q. B. 62.

[1] By 3 & 4 Wm. 4, c. 42, s. 5, it is enacted, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of an indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment or part payment or part satisfaction, or in case the person entitled to such action shall at the time of such acknowledgment be under disability, or the party making such acknowledgment be at the time of making the same beyond the

(C) *By Part Payment of Debt, or Payment of Interest in case of Simple Contract Debts.*[1]

seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas; and the plaintiff in any such action, on any indenture, specialty, or recognisance, may, by way of replication, state such acknowledgment, and that such action was brought within such time aforesaid, in answer to a plea of the statute. If the debtor has made any acknowledgment amounting to a clear admission of the specialty debt, the operation of the statute will be barred. *Moodie v. Bannister*, 28 L. J. Ch. 880.

It has been held, that a recital in a mortgage-deed of the payment of interest up to the date thereof, was such an acknowledgment as took the debt out of the statute (*Forsyth v. Bristowe*, 8 Ex. 721); but that the mere recital of a prior mortgage-deed was not an acknowledgment of the debt, to secure which it was given. *Howcutt v. Bonser*, 3 Ex. 499; 18 L. J. Ex. 262.

A renewal of liability under this statute applies only to money remaining unpaid, and acknowledged to be due, and not to other acts and omissions in breach of covenants. *Blair v. Ormond*, 17 Q. B. 43.

[1] In reference to the provisions of the act 21 Jac. 1, c. 16, s. 3, and of the act 16 & 17 Vic. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payments of any principal, interest, or other money, by any other or others of such co-contractor's or co-debtor's executors or administrators. 19 & 20 Vic. c. 97, s. 13. *See* 3 F. & F. 150. It must be shown that the money was paid as a portion of the claim for which the action is brought (*Tippett v. Heane*, 1 C., M. & R. 252), and of an admitted debt of a larger amount. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditors having received it, and treated it as a part payment only, will not bring it within the statute. *Foster v. Dawber*, 6 Ex. 853; 20 L. J. Ex. 385. If it be doubtful whether it were paid in discharge of all or part, it will not bar the statute. *Waugh v. Cope*, 6 Mee. & W. 829. *Burkitt v. Blanshard*, 3 Ex. 89. And the question of intention is for the jury. *Wainman v. Kynman*, 1 Ex. 118; 16 L. J. Ex. 232. *Baildon v. Walton*, 1 Ex. 617. *Amos v. Smith*, 31 L. J. Ex. 423.

If there are two debts, one barred by the statute and the other not barred, a general payment on account will not revive a debt barred by the statute, if it can be attributed to a debt that is not barred. *Primâ facie* it is to be taken as payment on account of the debt that is not barred. *Walker v. Butler*, 6 E. & B. 506. *Nash v. Hodgson*, 25 L. J. Ch. 188. *Burn v. Boulton*, 2 C. B 476.

By delivery of a bill of exchange as part payment, the operation of the statute is barred, not from the time at which the bill is paid, but at which it was delivered. *Turney v. Dodwell*, 3 E. & B. 136; 23 L. J. Q. B. 137. *Irving v. Veitch*, 3 Mee. & W. 90. *Gowan v. Forster*, 3 B. & Adol. 507. And the performance of any service or duty which the parties may agree to treat as part payment will operate as such (*Bodger v. Arch*, 10 Ex. 341; 24 L. J. Ex. 22), as the delivery and acceptance of goods as part satisfaction. *Hart v. Nash*, 2 C., M. & R. 337. *Hooper v. Stephens*, 4 Ad. & E. 71. But see *Cottam v. Partridge*, 4 Scott, N. R. 834. *See* Add. Cont. 1010, 5th ed.

Payment to a third person by direction of the creditor, is equivalent to payment to the creditor himself (*Worthington v. Grimsditch*, 7 Q. B. 484. See *Megginson v. Harper*, 2 C. & M. 322), and even if the debtor is mistaken in supposing that the person to whom he makes the payment has authority to receive it, yet it may be a good acknowledgment for the purpose of barring the statute. *Clarke v. Hooper*, 10 Bing. 480. A payment by an unauthorised person is of no avail. *Harding v. Edgecomb*, 28 L. J. Ex. 313.

A payment of interest to an administrator, who had taken out administration in a wrong diocese, was held sufficient to take the debt out of the statute. *Clarke v. Hooper* 10 Bing. 480; 4 M. & Scott, 353. So, where executors paid over to trustees a sum to be paid to legatees, and they lent the money on a note:—*Held*, that payment of interest to the legatees was sufficient. *Megginson v. Harper*, 2 C. & M. 322; 4 Tyr. 94.

Payment of interest on a debt operates as an admission of the debt, and an extension of the period of limitation. Oral evidence is admissible to show on what account the money was paid. *Bevan v. Getting*, 3 Q. B. 740. *Burn v. Boulton*, 2 C. B. 484. *Evans v. Davies*, 4 Ad. & E. 841. *Waters v. Tomkins*, 2 C., M. & R. 727. *Wainman v. Kynman, supra. Baildon v. Walton, supra.*

By payment of interest the time is extended in respect of all the securities. *Dowling v. Ford*, 11 Mee. & W. 329. *Bamfield v. Tupper*, 7 Ex. 27. *Bealey v. Greenslade*, 2 C. & J. 61.

If indorsements on a bill or note of payment of principal or interest are put in evidence as an admission of the debt, they must be signed by the debtor, or have been made in his presence, or by his direction, or by some person who was acting as his agent in the matter. 9 Geo. 4, c. 14, s. 3. *Briggs v. Wilson*, 17 Beav. 330. *Bradley v. James*, 13 C. B. 822; 22 L. J. C. P. 193.

A payment within six years of interest due above six years on a note, is sufficient to take the case out of the statute. *Bealey v. Greenslade, supra;* S. C. 2 Tyr. 121.

Whether payment of the interest acknowledges the payment of the particular debt, is

IV. Of Pleading the Statute.

(A) *Of the Plea.*[1]

(*a*) *Form of.*[2]

(B) *Of the Replication.*[3]

(*a*) *Form of.*[4]

LINEA recta semper præfertur transversali. Co. Litt. 10, b. *The right line shall always be preferred to the collateral. See* Descent, vol. iv. p. 47.

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a question for the jury. *Waters v. Tompkins*, 2 C., M. & R. 723; 1 T. & G. 137. See *Tippett v. Heane*, *ante*, 399.

Part payment will not, it seems, bar the interest, where the debt to which it is applied consists of several items. *Brigstocke v. Smith*, 2 Tyr. 445; 1 C. & M. 483.

The 19 & 20 Vic. c. 97, s. 14, does not apply to payments made before the act (*Jackson v. Woolley*, 8 E. & B. 1778; 27 L. J. Q. B. 448), and, therefore, the payment by one co-debtor takes the case out of the statute as to the others.

The payment of interest on a note given by churchwardens on the parish account from time to time by the vestry, is a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations, as against the makers; *à fortiori* where one of them has audited the parish accounts, in which payments of interest on the note are entered. *Crew v. Petit*, 3 Nev. & M. 456; S. C. nom. *Rew v. Pettett*, 1 Ad. & E. 196.

Payment of interest upon a promissory note by the makers to the personal representatives of the payee, within six years of the commencement of the action: — *Held*, a sufficient acknowledgment to take the case out of the Statute of Limitations, although the letters of administration under which the party claimed, to whom the payments were made, were not obtained in the diocese in which the note was *bona notabilia*. *Clarke v. Hooper*, 4 M. & Scott, 353; 10 Bing. 480.

Payment of interest by a married woman, in respect of a note given by her before marriage, is not operative as against her husband, if made without his privity. *Neve v. Hollands*, 21 L. J. Q. B. 289. *Pittam v. Foster*, 1 B. & C. 250.

Where interest was paid from time to time by the overseers of a parish, upon a note made by the churchwardens and overseers, the court held that it was a question for the jury whether the overseers had not been constituted by the defendants their agents for this purpose, *Jones v. Evans*, 5 Ex. 104; 19 L. J. Ex. 200. *Rew v. Pettett*, 1 Ad. & E. 200.

Payment of interest by one of several executors must be made with the concurrence of the others, or under circumstances in which such concurrence may be implied, in order to preserve the remedy against the assets in their hands. *Scholey v. Walton*, 12 Mee. & W. 513. *Tullock v. Dunn*, R. & M. 416. See *Harding v. Edgcumbe*, 28 L. J. Ex. 313. *Whitley v. Lowe*, 4 Jur. N. S. 815.

[1] The necessity of pleading the Statute of Limitations applies to cases where the remedy only is taken away, and in which the defence is by way confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defence is by denial of that right. *De Beauvoir v. Owen*, 5 Ex. 166.

If an acknowledgment under 9 Geo. 4 be conditional, it must be specially declared on. *Haydon v. Williams*, 7 Bing. 163; 4 M. & P. 811.

The plea must not use the word "supposed" debt. *Margett v. Bays*, 4 Ad. & E. 489.

[2] *Plea of Statute of Limitations.*

[15 & 16 Vic. c. 76, sched. B. 39.]

That the alleged cause of action did not accrue within six years [*state the period of limitation applicable to the case*] before this suit.

[3] In actions on simple contract debts the replication may take issue on the plea, and under this the plaintiff may show that the cause of action was renewed within six years.

In actions upon specialty, where the Statute of Limitations is pleaded, if the plaintiff mean to rely upon an acknowledgment under the 3 & 4 Wm. 4, c. 42, s. 5 (*see ante*, p. 398), there must be a special replication setting it up. The acknowledgment cannot be given in evidence under a joinder of issue, or a replication that the cause of action accrued within twenty years before this suit. *Kempe v. Gibbon*, 9 Q. B. 609. The mode of making the acknowledgment, whether by writing or by part payment, or by part satisfaction, must also be specifically stated in the replication. *Forsyth v. Bristowe*, 8 Ex. 347.

It is no answer to a plea of the statute that the cause of action was fraudulently concealed from the plaintiff until within six years of the suit. *Clark v. Hoighman*, 2 B. & C. 149. *Hunter v. Gibbons*, 1 H. & N. 459; 26 L. J. Ex. 1. *Imperial Gas Co. v. London Gas Co.* 10 Ex. 39.

[4] *Replication that Defendant was Abroad when cause of Action accrued.*

That when the alleged cause of action accrued the defendant was in [France], beyond the seas, within the meaning of the statute in that case made and provided; and the plaintiff commenced this suit within six years after the last return of the defendant from beyond the seas, after the accruing of the alleged cause of action.

For form of replication of infancy, see *Chandler v. Vilett*, 2 Wms. Saund. 118; insanity, *Tarbuck v. Bispham*, 2 Mee. & W. 2. On specialty that the defendant acknowledged the debt. *Forsyth v. Bristowe*, 3 Ex. 348; B. & L. Pl. 376.

LIQUIDATED Damages.[1]

When Sum agreed upon, in event of Breach of Contract, considered to be.[2]

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[1] As to claims to estates of intestates, *see* 23 & 24 Vic. c. 38, s. 13.

[2] Where the parties to a contract mutually agree, that in the event of any breach of its provisions the one shall pay to the other a specified sum of money, it becomes a question whether such sum is to be considered in the nature of a penalty, merely to cover the damages which may be actually incurred by a violation of the contract; or as the full amount really to be paid in that event as liquidated or settled damages, without reference to the extent of the injury sustained. Chit. Cont. 758; Add. Contract, 1158; Sedgwick; Mayne on Damages.

It is a general rule, that where articles contain obligations for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the amount stipulated may be treated as liquidated damages (*Astley v. Welldon*, 2 B. & P. 346: *per Heath*, *J. Kemble v. Farren*, 9 Bing. 141; 3 M. & P. 425. *Davies v. Penton*, 6 B. & C. 216), for the courts will hold that the words "liquidated damages" are not to be taken according to their obvious meaning in any case where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and where, notwithstanding the language used, it is plain from the whole instrument the real intention was different. *Price v. Green*, 16 Mee. & W. 346: *per Cur.* See *Horner v. Flintoff*, 9 id. 678. *Beckham v. Drake*, 8 id. 846. *Boyes v. Ancell*, 7 Scott, 364. *Galsworthy v. Strutt*, 1 Ex. 659. But if the agreement provide that a certain sum shall be paid in the event of the performance or non-performance of a particular specified act, with regard to which, in case of default, damages, in their nature uncertain, may arise, and there be no words evincing an intention that the sum reserved shall be recovered as a penalty only, such sum may be enforced as liquidated damages. Thus, if a sum named in respect of one covenant only be expressly declared to be reserved as liquidated damages, and not as a penalty, the court will hold it to be the former. *Price v. Green*, 16 Mee. & W. 346. *Rawlinson v. Clark*, 14 id. 187.

The words, "It is hereby agreed by and between the parties, that either of them neglecting to perform the agreement according to its terms and effects, should pay to the other 200*l.*, to be recovered in any of the queen's courts," creates a penalty, and not a right to liquidated damages. *Astley v. Welldon*, 2 B. & P. 346. So, if a party agree not to do a specified act "under a penalty of 100*l.*," such sum cannot be considered in the nature of liquidated damages. *Smith v. Dickenson*, 3 B. & P. 630. *Orr v. Churchill*, 1 H. Black. 227. But where the nature of the transaction affords no other medium of ascertaining the damages sustained, the sum stipulated to be paid on non-performance will be viewed as liquidated damages. *Lowe v. Peers*, 4 Burr. 2225. *Crisdee v. Bolton*, 3 C. & P. 240.

Where, from the nature of the case, the extent of the damage cannot be readily ascertained, and it appears to have been the intention of the parties to ascertain it by the sum agreed upon, it will be regarded as liquidated damages; as, an agreement to pay 5*l.* per acre for every acre of meadow land which the lessee should plough up. *Birch v. Stephenson*, 3 Taunt. 469. *Lowe v. Peers*, 4 Burr. 2228. *Rolfe v. Paterson*, 2 Bro. 436. So where two persons agreed to perform certain work in a limited time, or to pay a stipulated weekly sum. *Fletcher v. Dyche*, 2 T. R. 32. Or where it is expressly contracted that the sum shall be considered as liquidated damages. *Reilly v. Jones*, 8 Moore, 244; 1 Bing. 302. *Barton v. Glover*, Holt, 43. But see *Randall v. Everest*, 1 M. & M. 41.

Where the agreement was, that in consideration that the plaintiff, who was a surgeon, would engage the defendant as his assistant, the defendant promised not to practise at any time at M., or within seven miles thereof, under a penalty of 500*l.*, it was held that under this agreement the 500*l.*, although called a penalty, was recoverable as liquidated damages. *Sainter v. Ferguson*, 18 L. J. C. P. 217. *Crisdee v. Bolton*, 3 C. & P. 240. But see *Davies v. Penton*, 6 B. & C. 216. *Smith v. Dickenson*, 3 B. & P. 630. So, in cases between landlord and tenant, where a sum is reserved annually for any specific act of mismanagement of the land, it seems that it may be regarded as liquidated damages, although it be termed a penalty. *Rolfe v. Peterson*, 2 Bro. P. C. 436. See *Jones v. Green*, 3 Y. & J. 304. Even where the contract contains several conditions, yet if it be stipulated that on non-performance of any one of them a sum of money shall be paid as liquidated damages, and not by way of penalty, and the conditions are such that the damage arising from the violation of any one of them cannot be exactly estimated beforehand, such sum will be held to be recoverable as liquidated damages, on breach of any of the said conditions. *Galsworthy v. Strutt*, 1 Ex. 659. See *Leighton v. Wales*, 3 Mee. & W. 545. And even in the case of a contract of indemnity, the parties may agree beforehand in estimating the amount to be recovered thereunder by way of liquidated damages. See *Irving v. Manning*, 6 C. B. 422.

LIVERY of Seisin.[1]

LOAN. *See* Bailment, vol. ii. p. 108; Bankers, id. p. 120; Debt, vol. iv. p. 558; Interest, *ante*, p. 222; *post*, Money Lent, p. 489.

LOAN Society.[2] *See* 21 Vic. c. 19.

LOCAL and Personal Act. *See post*, Statutes.

LODGINGS.[3] *See* also Landlord and Tenant, *ante*, p. 296, 300, n. [1]; Larceny by Lodgers, *ante*, p. 334.

I. Contract of Hiring, p. 403.

II. Warranty that Fit for Habitation, p. 403.

III. Easement of Lodger in Outer Door, Bells, &c. *See* Landlord and Tenant, *ante*, p. 296.

Where the stipulation is for liquidated damages, the plaintiff is entitled to a verdict for the full sum agreed to be paid. *Lowe v. Peers*, 4 Burr. 2229; Holt, 43. And if the jury find a verdict for a smaller one, the court will grant a new trial. *Farrant v. Olmins*, 3 B. & A. 692.

[1] Livery of seisin is of two kinds, livery in deed and livery in law. Livery in deed is the actual delivery of the possession where the feoffor comes himself upon the land, and taking the ring of the door of the principal mansion, or a twig, delivers the same to the feoffee in the name of seisin; or it may be by words only, without the delivery of anything: as if the feoffor be upon the land, or within the door of the house, and says to the feoffee, "I am content that you should enjoy this land according to the deed;" this is a good delivery to pass the freehold, for the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor on the land are sufficient indication to the persons present of the change of possession. If a man merely delivers a deed of feoffment on the land, this will not amount to livery of seisin, for it has another operation to take effect as a deed; but if the feoffor delivers the deed upon the land in the name of seisin of the lands contained in the deed, this will be a good delivery. As livery of seisin is the delivery of the actual possession, it follows that no person can give livery in deed who has not himself at the moment the actual possession: therefore, where a person takes a feoffment of lands which are let on lease, he must obtain the assent of the lessee to the livery; and in cases of this kind, the practice formerly was for the lessee to give up the possession for a moment to the feoffor, in order to enable him to give livery. Livery in law is where the feoffee is not actually on the land or in the house, but being within sight of it, says to the feoffee, "I give you yonder house or land, and go and enter into the same and take possession of it accordingly." Livery in law does not, however, transfer the freehold till an actual entry is made by the feoffee, because the possession is not delivered to him, but only a license or power given by the feoffor to take possession. A memorandum that livery of seisin was given is usually indorsed on all ancient feoffments; but courts of law and equity will presume livery of seisin to have been given, though not indorsed on the deed, where the possession is gone according to the feoffment for a length of time. A court of equity will supply the want of livery of seisin, where a feoffment appears to have been made for a good or a valuable consideration.

Livery of seisin is now abolished. *See* 7 & 8 Vic. c. 76; 8 & 9 id. 106.

By statute 3 & 4 Wm. 4, c. 27, s. 11, "no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. And by 8 & 9 Vic. c. 106, s. 2, it is enacted, that "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to be in grant as well as in livery."

Estates in fee may now be granted by deed without livery of seisin, and cannot be granted by livery of seisin without deed. *See* stats. *supra.*

[2] A society "for establishing a fund for making loans to the industrious classes, and taking payment of the same by instalments, with interest thereon," is, upon registration as such, entitled to the benefit of certain immunities and privileges conferred by the 3 & 4 Vic. c. 110.

It has been held that, on a complaint under 3 & 4 Vic. c. 110, s. 16, for not paying a promissory note given to a loan society, the justices can only make an order for payment of the sum found to be due, and have no power to postpone the time of payment. *Parker v. Boughey*, 31 L. J. M. C. 272. A covenant to pay one shilling for each pound of instalments unpaid on the day it is due, does not apply to a fraction of a pound. 11 W. R. 22; 7 L. T. 276.

[3] If a house, originally entire, be divided into several apartments, with an outer door

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V. Termination of Hiring, p. 403.

I. Contract of Hiring.[1]

II. Warranty that Fit for Habitation.[2]

III. Easement of Lodger in Outer Door, Bells, &c. *See* Landlord and Tenant, *ante*, p. 296.

IV. Responsibility of Landlord for Safety of Goods of his Lodgers.[3]

V. Termination of Hiring.[4]

to each apartment, and there be no internal communication with each other, the several apartments are considered in law as distinct mansions or houses. *Tracy v. Talbot*, 6 Mod. 214.

[1] A verbal agreement to let lodgings from a future day is within the Statute of Frauds: where, therefore, it was abandoned when there had been no part performance, although the lessor, before the time had arrived for taking possession, at the request of the lessee, removed the advertisement of lodgings from his window, it was held that no action was maintainable. *Inman v. Stamp*, 1 Stark. 12.

The rule that a general letting and payment of rent is, in the absence of an express agreement, to be considered as evidence of a taking from year to year, would appear not to be applicable to the case of lodgings. *Right v. Darby*, 1 T. R. 159. See *per Lord Mansfield*. See *Wilson v. Abbott*, 3 B. & C. 88; 4 D. & R. 693. And an agreement to take apartments at the rate of so much a-year would seem not to create a tenancy from year to year. *Atherstone v. Bostock*, 2 Scott, N. R. 637. *See infra*, n. [4].

[2] There is an implied warranty on the part of the lessor of lodgings, or a ready-furnished house, that it is reasonably fit for habitation and occupation. Where the beds of a ready-furnished house, let to a tenant at a rent of eight guineas per week, were so infested with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house, and resisting the landlord's claim for rent. *Smith v. Marrable*, 11 Mee. and W. 5. *Sutton v. Temple*, 12 id. 60. See *Underwood v. Burrow*, 9 C. & P. 26, as to lodger's right to use of knocker, water-closet, &c. A lodger is not always entitled to the exclusive possession of his rooms. A landlord and servants may have a right to enter. 3 C. B. 784.

[3] A lodging-house keeper who remains in the general possession of the house, is bound to exercise all ordinary and reasonable care for the protection of the persons and property of his tenants and lodgers; to see that the outer door is fastened at night, and that strangers, or suspected or doubtful characters, are not permitted, unknown to the lodgers, to congregate in the house at unseasonable hours of the night. He is bound to exercise ordinary care and vigilance in the selection of his servants within the house. He is not, however, responsible for the safe-keeping of the property of his lodgers, unless it has been delivered into his hands to be safely kept. *Holder v. Soulby*, 8 C. B. (N. S.) 254. And he is not responsible if the goods of a guest are stolen by his servants (id.), or by a thief who gained access to the property by the carelessness of his servant in leaving open the front door while gone on a message for the lodger. *Dansey v. Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 217.

[4] It appears that in the absence of custom, or of a contract to that effect, it is not necessary to give a month's or a week's notice in order to determine an ordinary monthly or weekly tenancy. *Towne v. Campbell*, 3 C. B. 921. *Huffel v. Armitstead*, 7 C. & P. 56. See *Doe d. Parry v. Hazell*, 1 Esp. R. 94. *Doe d. Campbell v. Scott*, 4 M. & P. 20; 6 Bing. 362. *Wilson v. Abbott*, 3 B. & C. 89. But the tenant cannot, it seems, at least after the first week or month, be turned out by his landlord immediately on the expiration of one of the periods of hiring, without some previous notice or demand of possession. *Jones v. Mills*, 31 L. J. C. P. 66. If there is by contract or custom a necessity of giving notice, then the notice will be regulated by it; and in general there is a custom or an understanding between the parties to give a quarter, month, or week's notice, according as the hiring is from quarter to quarter, or monthly, or weekly. If lodgings be hired for one month specifically, or other definite period, no notice is requisite to determine the tenancy at the end of the month.

Where a tenant agreed to pay for the occupation of furnished apartments "from March the 4th to September the 4th, the sum of 52*l.* 10*s.*," also "to occupy the rooms from the 4th of September to the 4th of December on the same terms, namely, 26*l.* 5*s.* for the three months, or to take them unfurnished at the rate of 84*l.* per annum," it was held, that this was a lease for six months, and for a further period of three months, and not a lease from year to year. *Atherstone v. Bostock*, *supra*.

If the landlord of lodgings enter into and use the rooms whilst his tenant is in possession, he is deprived of his right to rent; but if the tenant have abandoned the possession during his tenancy, the landlord lighting fires in the rooms, or even using the fires, will not deprive him of such right. *Griffith v. Hodges*, 1 C. & P. 419. *Harding v. Crethorn*, 1 Esp. 57. *Redpath v.*

LONDON.[1] *See* Foreign Attachment, vol. iv. p. 488; Lights, *ante*, p. 389; *post*, Thames Conservancy. *See* 22 & 23 Vic. c. 133; 8 Jur. N. S. 1203; 31 L. J. C. P. 149. As to coal and wine duties, *see* 24 & 25 Vic. c. 42.

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I. Of the Lord Mayor and Aldermen.[2]

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III. „ Freemen and Citizens.[4]

Roberts, 3 id. 225. But where lessee quitted in the middle of his term apartments which he had taken for a year, and the lessor let them to another tenant, it was held, that he could not recover rent against the lessee for a subsequent portion of the year during which the apartments had been unoccupied. *Walls v. Atcheson*, 3 Bing. 462; 2 C. & P. 268.

If a landlord of furnished lodgings, by his misconduct, justifies a tenant in an abrupt departure during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation. *Kirkman v. Jervis*, 7 Dowl. P. C. 678.

A tenant from week to week continuing in possession after the expiration of a notice to quit, and demand made, is not liable to an action on the stat. 4 Geo. 2, c. 28, for double value. *Lloyd v. Rosbee*, 2 Camp. 453.

The tenant is bound, if he has had the possession as well as the use of the furniture, to deliver it up at the expiration of the term in good order and condition, deteriorated only by ordinary tear and wear, and the reasonable use of it. *Stanley v. Agnew*, 12 Mee. & W. 827.

[1] The metropolis is exempted from the Municipal Corporation Acts.

[2] On the charter-day for the election of mayor, the business of the election ought to have precedence of all other matters. *Rex v. Parkins*, 1 B. & A. 668.

The lord mayor is conservator of the river Thames. *Lord Fitzwalter's case*, 1 Mod. 106. *Rex v. Carpenter*, 2 Show. 47. An alderman had his privilege allowed him in opposition to a custom to elect him as constable. *Butler v. Wigge*, 1 Saund. 63. *Rex v. Routledge*, Dougl. 538.

The custom for the court of the mayor to nominate or reject an alderman is good. *Rex v. Johnson*, 5 Ad. & E. 489.

[3] The court of aldermen have a power of imposing a fine on a sheriff chosen by them who refuses to undertake the office (*City of London v. Vanacre*, 5 Mod. 440. *Clerk's case*, 11 id. 287; Holt, 430); and a custom that the sheriff subsequently chosen shall have half the fine is valid (*Rich v. Player*, 2 Show. 263). In an escape out of either of the compters of the City of London, the action must be in the name of both the sheriffs. *Anon.* 6 Mod. 96.

If one of the sheriffs bring an action the fact may be suggested on the roll, and the process of *venire* directed to the two sheriffs. *Rich v. Player*, 6 Mod. 96.

When an action is founded on a bye-law, it is usual in a *habeas corpus* to return the bye-law (*Watson v. Clarke*, Comb. 139); but not when it is grounded on a custom. *Fazakerly v. Baldoe*, 6 Mod. 177.

[4] Freemen of the city of London are not citizens unless residents. *Corporation of Lynn v. Corporation of London*, 4 T. R. 144. Trading during apprenticeship forfeits the right of the freedom in London. *Nesson v. Finch*, 1 Ld. Raym. 383. A freeman is not deprived of his right of voting for common councilmen by not having paid the orphans' rate, if it is not demanded of him. *Warden v. Rous*, 7 Mod. 323. A freeman may be fined for not taking up his livery, and the fine recovered by action of debt. *Grafton's case*, 1 id. 10. If a freeman make a voluntary grant of all his goods, it will not oust his wife of her customary part. *City v. City*, 2 Lev. 130. But a woman may bar herself by an agreement before marriage with a freeman of her right to customary share; the stipulation must, however, be express. *Blunden v. Barker*, 10 Mod. 455. If an orphan be taken away, the court may commit the eloigner to prison till he discover where the eloignee is to be found. *Williamson v. Bolton*, T. Raym. 116. And the court of aldermen may impose a reasonable fine on a person for marrying a city orphan without their consent. *Harwood's case*, 1 Mod. 77.

By special custom, if a freeman of London died in London, or elsewhere, intestate, and though his estate did not lie in the city, or elsewhere, his children were entitled to their share of his personal estate by

IV. With respect to Apprentices.[1]

V. Customs relative to Churches, Houses, Inns, &c.[2]

VI. Relative to Trade.[3]

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custom. Priv. Lond. 288. And if a freeman died leaving a widow and child, or children, his personal estate (after his debts were paid, and the customary allowances for his funeral and for the widow's chamber were deducted thereout) was, by the custom of the city, to be divided into three equal parts, and disposed of in the following manner; to wit, one-third part thereof to the widow, another part to the children, and the other part (being taken out of the custom) is now, by the stat. 1 Jac. 2, c. 17, made subject to the Statute of Distribution. Black. Com.

The custom observed in London, the province of York, "and certain other places," concerning the distribution of the personal estate of intestates, has been abolished by 19 & 20 Vic. c. 94, save only with respect to the distribution of the personal estate of persons who may have died on or before the 31st December, 1856; this statute enacting, that the distribution of the personal estate of all persons dying on or after the 1st of January, 1857, shall take place as if such customs had never existed; and as if the rules for the distribution of the personal estate of intestates generally prevalent in the province of Canterbury had prevailed throughout England and Wales, any law or statute to the contrary notwithstanding.

[1] A custom that every freeman may take an apprentice is valid. *Windhurst v. Gibbs*, T. Raym. 4. An infant may bind himself apprentice, and be subject to covenants, &c. by custom, as if he were of full age. *Horn v. Chandler*, 1 Mod. 271; T. Raym. 4. By custom, an executor may place the testator's apprentice with another master. *Rex v. Peck*, Salk. 66.

[2] Every citizen upon an ancient foundation may erect a building without restriction as to height (*Anon.* Com. 273. But *see* Lights, *ante*, p. 391); but the builder of a house in London on an entirely new foundation cannot erect half his blank or sidewall on his neighbour's vacant ground. *Barlow v. Norman*, 2 Bl. Rep. 959. A custom for a tenant at will, of above forty shillings, to have a half-year's notice to quit, is good. *Taylor v. Seed*, Comb. 384.

By the custom of London, the parishioners repair both the church and chancel (*Ball v. Cross*, Holt, 138); and an innkeeper may *sell* or retain a horse for the amount of its keep. *Gilbert v. Berkley*, id. 366.

[3] A custom that free porters only shall carry corn is valid (*Fitzacherly v. Wiltshire*, 11 Mod. 353); or, that none but freemen shall do porterage work. *Cudden v. Eastwick*, 6 Mod. 123. So is a custom excluding foreigners from being employed in any manual occupation. *Bosworth v. Budgin*, 7 Mod. 459. A bye-law that no drayman or brewer's servant shall be in any of the streets of London after certain hours (*Bosworth v. Sterne*, Ca. Temp. Hard. 405), so to restrain the number of carts. *Player v. Jones*, T. Raym. 324; 1 Vent. 21. Wharfingers in London are not entitled to wharfage for goods unloaded and put into lighters out of barges fastened to the wharf. *Stephen v. Costor*, 3 Burr. 1409; 1 Bl. Rep. 413. *See* Grant on Corp. 329.

[4] The mayor and commonalty may limit penalties by bye-laws to be forfeited to themselves, but they cannot be *sued* for in the mayor's court. *Wood v. Mayor of London, &c.* Salk. 397. See *Mayor of London v. Markwick*, 11 Mod. 164.

The courts at Westminster are bound to take judicial notice of the mayor's court. *See* Bridgm. 301. It has no jurisdiction in penal cases. *Rex v. Willis*, Cro. Jac. 538.

A *procedendo* may be granted to the mayor's court in London, after the return of a *habeas corpus* has been filed, though the usual practice is to award the *procedendo* without filing the writ. *Fazakerley v. Baldoc*, 6 Mod. 177.

To prove the discontinuance of a suit in the sheriff's court in London, the entry in the minute-book is evidence. *Arundell v. White*, 14 East, 216.

The customs of London cannot be judicially taken notice of, but must be certified by the recorder; hence, if a cause be removed out of the city courts by *habeas corpus*, the custom must be returned, or no *procedendo* can be obtained. *Asgill v. Hunt*, 10 Mod. 440; 1 id. 202. *Coke v. Wingfield*, 8 id. 176: but *see* 1 Leon. 284, *contra*. A rule to make such a return is absolute in the first instance. 4 L. T. (N. S.) 476. Nor will the court enter into the validity of a bye-law, unless it be duly stated in the return. *Cudden v. Provost*, 6 Mod. 123. But if the custom has been once certified by the recorder, the courts will take judicial notice of its existence. *Blacquire v. Hawkins*, Dougl. 378. The city courts always take notice of the customs of the city. Dougl. 381, n.

By custom, a married woman may sue and be sued in the city courts as a *feme sole* trader. It is unsettled whether the trade of a victualler be within the custom. *Moreton v. Porkman*, 1 Mod. 26.

Notwithstanding the fine be imposed at Westminster, under charter Hen. 6, and Car. 1, the city of London is entitled to the fine for misdemeanor committed within the

LORD-Mayor's Court. *See* Foreign Attachment, vol. iv. p. 488; London, *ante*, p. 404.

LORD'S DAY. *See post*, Sunday.

LOTTERY.[1] *See* also Gaming, vol. iv. p. 600.

LUGGAGE. *See* Carrier, vol. iii. p. 31; Innkeeper, *ante*, p. 158.

LUNACY. *See* 25 & 26 Vic. c. 86; id. c. 111.

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I. Who are deemed Lunatics or Idiots, and of the Legal Incapacity in general resulting therefrom.[2]

city. *Rex v. Lord Mayor of London*, 1 C., M. & R. 1.

The jurisdiction and procedure in the lord-mayor's court is regulated by 20 & 21 Vic. c. 157. *See* vol. iv. p. 489. In the sheriff's court, by 15 & 16 Vic. c. 67.

[1] By 9 & 10 Wm. 3, c. 17, all lotteries are declared public nuisances; and by 42 Geo. 2, c. 119, "if any person shall keep any office or place for lotteries, called little-goes, or any other lottery not authorised by parliament, or shall knowingly suffer it to be exercised or played at in his house, he shall forfeit 500*l*." See *R. v. Crawshaw*, 8 Cox, C. C. 375; 30 L. J. M. C. 58. All state lotteries were discontinued after the 4 Geo. 4, c. 60, which was the last public lottery sanctioned by parliament. Art-unions for the distribution of works of art by lottery are, to a limited extent, sanctioned by the legislature. *See* Art-Unions, vol. i. p. 545.

A sweepstakes for a horse-race is a lottery within the acts. *Allport v. Nutt*, 1 C. B. 974. *Gatty v. Field*, 9 Q. B. 431; 15 L. J. Q. B. 408.

[2] Insanity, its causes, its effects, and different gradations, having all been repeatedly examined by forensic, medical, and philosophical writers, different scientific terms and expressions have been applied to certain kinds of mental aberration; but the law does not appear to recognise any great variety of classification. The comprehensive term of *non compos mentis*, or, as it is expressed in English, "of unsound mind," is the most significant and expressive. Within this general designation are included all persons deprived of reason and understanding, from any cause whatever, whether natural or accidental, whether of a permanent

or temporary nature; all idiots and lunatics; parties labouring under frenzies, or losing transiently their intellect, or deprived of their reason from drunkenness, or any other cause. The words idiot or lunatic have received a distinct legal interpretation. An "idiot" or "natural fool," is a person that is devoid of understanding from his nativity. A man is not stated to be an "idiot," if he has any glimmering of reason, so as to be able to describe himself, his age, or relate anything with reference to a specific fact. Idiotcy has been termed a natural insanity, as the other species of insanity is said to be accidental or adventitious. Adventitious insanity is, where a person, having once had a competent possession of his reasoning faculties, loses them by some subsequent cause operating on his mental or physical organisation. This species of insanity may be divided into two classes: that which is periodical, or when there are lucid intervals; and that which is permanent, and without intermission. Adventitious insanity was at common law called lunacy, and it is generally, at the present day, designated by that term. But the words "unsound mind," and "unsound memory," having been adopted in the reign of Edw. I., the one by the Statute of Westminster 2, and the other by the Statute of Fines, they have been since indiscriminately used to signify not only lunacy, which is a periodical madness, but also a permanent adventitious insanity, as distinguished from idiotcy. There is considerable difference, in point of law, as to the effect between idiotcy and the other species of mental derangement. An idiot is presumed to be incapable of ever attaining a competent degree of understanding to govern either himself or his estate, and therefore the king may grant the custody of his person and the profits of the estate during the life of the unfortunate victim of mental imbecility, without the party being compelled to render an account, except furnishing the insane with necessaries. But this power of the Crown, since the Revolution, has never been exercised, and the king has always granted the surplus profits of the estate of an idiot to some of his family. A lunatic is presumed, in law, as capable of being restored to that understanding which he has lost, and therefore the custody of his person and estate is granted to the committee only during the queen's pleasure, and the committee, after deducting a suitable maintenance for the lunatic and his family, are bound to account, in Chancery, for the surplus profits of the estate, and must pay them over, either to the lunatic, if he recover his understanding, or to his legal representatives after his death. Persons born deaf, dumb, and blind, are also, generally speaking, reckoned by the law as idiots, as being destitute of those faculties which constitute the avenues to the attainment of a right understanding of a subject. Lord Coke likewise includes a party deprived of reason from intoxication as one who is, in the legal sense, *non compos mentis;* but he adds that, being deprived of reason by his own vicious act, he has no right to exemption from the consequence of his improper conduct. And the ancient authorities do not scruple to assert that, although drunkenness is a kind of insanity for the time, yet, as it is of the party's own procuring, it cannot be made available as a defence, or derogate from the party's contracts; and that this doctrine holds as well with respect to criminal punishment as to dispositions of the party's goods, or anything concerning them. It was, however, admitted, that equity would relieve in such a case, especially if the intoxication were caused by the fraud or contrivance of the other party; and the individual sought to be charged was so excessively inebriated that he was utterly deprived of reason or understanding. But, whatever may have been the ancient law, it is now clearly established, that excessive intoxication, by which the party is bereft of reasoning faculties, will invalidate a contract, even at law. *See* Bull. N. P. 172; 18 Ves. 16; 2 Camp. 133. But mere weakness of understanding, where there is no fraud or surprise, does not form a ground of incompetency, although it is evident, as observed by *Lord Eldon* (*see* 19 Ves. 286), that a party so circumstanced may be exposed to ruin every instant. Nor does the rule of the common law, with respect to wills, appear to have been applied to deeds and other contracts; for, to establish a testamentary disposition, it is not sufficient to show that the testator had sufficient intellect to answer plain and familiar questions, but he ought to have had a disposing memory, and a clear understanding as to his objects. "This," says *Lord Coke*, "is such a memory as the law considers safe and perfect. But to take advantage in the making of any contract whatever, even of the most ordinary description, of a mind naturally weak, to obtain an unequal bargain, is highly culpable; and if combined with circumstances of fraud, apparent either from the extraordinary nature of the instrument, from the exercise of undue influence, or from the want of adequate motive or consideration, is a ground for setting aside an agreement, especially in courts of equity."

Lords of manors, though labouring under mental aberration, may make grants of copyhold lands consistently with the court custom (*see* Co. Cop. 134; Collinson on Lunacy, 453); or they may be made by the steward of the manor, but not by the committee of the lunatic. Considerable doubts have been entertained whether the widower of a *non compos* deceased shall be tenant by the courtesy of his wife's lands. *Lord Coke* seems to think that he could act; but this is controverted by Mr. Serjeant Hawkins, and by Buller, J. So in Bac. Abr. vol. iii. p. 34, it is stated that the widower shall be tenant by the courtesy. Mr. Cruise, in his *Digest on Real Property*, does not notice the point; but the difficulty may perhaps be removed by remembering that, though

II. Of their Responsibility for Criminal Acts.[1]

III. ,, Disability to Contract.[2]

the queen is entitled to the idiot's lands, his title ceases on the death of the idiot, and the husband's right does not accrue till the death; hence there could not be any conflicting interest between the widower and the Crown, the title of the one terminating as the right of the other accrues. The widow of a *non compos* deceased is entitled to dower. The parochial settlement of an insane person is the same as he would be entitled to were he possessed of his reason. A member of parliament, by being *non compos*, vacates his seat, unless it can be shown that his speedy recovery is anticipated. A *non compos* is not to be prejudiced by his own laches, or by the negligence of those through whom he derives his interest; and by the Statute of Limitations, 21 Jac. 1, c. 16, a *non compos* is expressly allowed to bring an action within as many years after his recovery as others are limited to after the cause of action may have accrued. A lunatic may support an action for the breach of any contract made with him, or for any personal injury.

[1] In criminal cases, idiots and lunatics are not chargeable for their own acts if committed when under those incapacities; no, not even for treason itself. 3 Inst. 6. "It is very difficult," says *Lord Hale*, "to define the indivisible line that divides perfect and partial insanity; but it must be duly weighed and considered both by the judge and jury, lest on the one side there be a sort of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes." If a man who takes another's life appears to have known at the time that he was acting contrary to law, his being under an insane delusion that he was thereby redressing some supposed grievance, or producing some public benefit, will not exempt him from the guilt of murder, neither will he be exempted by being under an insane delusion as to facts; provided the supposed facts, if real, would not have justified the act: but, on the other hand, he will be exempted by such delusion as last-mentioned where the facts, if real, would have justified the act. *Reg. v. M'Naughton*, 10 Clark & Fin. 200. To exempt him from punishment, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an act against God and nature. See *R. v. Offord*, 5 C. & P. 168. If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then he will be responsible for his actions. 1 Russ. 13. *Reg. v. Higginson*, 1 C. & Kir. 129. *Reg. v. M'Naughton*, *supra*. See *Reg. v. Oxford*, 9 C. & P. 525. See *R. v. Lord Ferrers*, 19 St. Tr. 333. *R. v. Arnold*, 16 id. 764. *R. v. Bellingham*, Coll. 636. *R. v. Parker*, id. 477. *R. v. Hadfield*, id. 580. See *Furiosus solo furore punitur*, vol. iv. p. 571; and *Morrison v. Maclean*, 24 Ex. Rep. 625.

By 39 & 40 Geo. 3, c. 94, "if a person charged with any offence be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impannelled to try the sanity; and if they find him insane, may order him to be kept in custody till the pleasure of the Crown be known. And if a person indicted for any offence appear insane, the court may, on his arraignment, order a jury to be impannelled to try the sanity; and if they find him insane, may order the finding to be recorded, and the insane person to be kept in like manner. And if upon the trial for treason, murder, or felony, insanity at the time committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative, the court may order him to be kept in like manner, till the Crown's pleasure be known." The above act applies to misdemeanors. 3 & 4 Vic. c. 54, s. 3. *R. v. Goode*, 7 Ad. & E. 589. *R. v. Little*, R. & R. C. C. 430. *R. v. Pritchard*, 7 C. & P. 303.

A grand jury have by law no authority to ignore a bill on the ground of insanity; it is their duty to find the bill, and then the court, either on arraignment or trial, may order the detention of the prisoner during the pleasure of the Crown. *R. v. Hodges*, 8 C. & P. 195.

[2] A lunatic is liable for the price of necessaries, *i.e.* of goods or things suited to his state and degree, actually ordered and enjoyed by and *bonâ fide* supplied to him. *Baxter v. Earl of Portsmouth*, 5 B. & C. 170. *Nelson v. Duncombe*, 9 Beav. 211. See *Read v. Legard*, 6 Ex. 636.

Lunacy is a defence to an action on a contract if the slightest imposition can be shown (*Yates v. Boen*, 2 Stra. 1104. *Baxter v. Portsmouth*, 2 C. & P. 178); but not otherwise. *Brown v. Joddrell*, 1 M. & M. 105. *Levy v. Baker*, id. 106 a. The plaintiff's knowledge of the insanity is an essential element in the inquiry. *Moss v. Tribe*, 3 F. & F. 297. *Lovatt v. Tribe*, id. 9.

The value of goods suitable to a lunatic's station who appears sane may be recovered, although a committee found he was a lunatic before that time. *Baxter v. Earl of Portsmouth*, *supra*.

When a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which

IV. Of the finding a Person Lunatic by Inquisition or Issue.

(A) *By Inquisition.*

(*a*) *Of the Commission* de Lunatico Inquirendo, *and Proceedings thereon.*[1]

is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him. *Beavan v. M'Donnell*, 9 Ex. 309; 10 id. 184. See *Dane v. Kirkwall*, 8 C. & P. 679. *Brown v. Joddrell*, 3 id. 30. *Niell v. Morley*, 9 Ves. 478. *Alcock v. Alcock*, 3 Mac. & G. 268. *Tarbuck v. Bispham*, 2 Mee. & W. 2. *Frost v. Beavan*, 22 L. J. Ch. 638. *Moss v. Tribe*, *ante*, p. 408. *In Molton v. Camroux*, 4 Ex. 17, a special verdict raised the question, Whether the mere fact of unsoundness of mind not apparent at the time of a contract for granting an annuity was sufficient to vacate it, albeit executed by the grantee by payment of the consideration-money, and intended *bonâ fide* to be executed by the grantor by payment of the annuity? The Court of Exchequer Chamber, in delivering judgment, made the following remarks:—"The old doctrine was, that a man could not set up his own lunacy, though such as that he did not know what he was about in contracting, and the same doctrine was applied to drunkenness. It is true that there are some exceptions in the old authorities, and the doctrine is not laid down uniformly with perfect distinctness; but, in general, it was as above stated. Modern cases have qualified it, and enabled a man or his representatives to show that he was so lunatic or drunk as not to know what he was about when he made a promise or sealed an instrument. This special verdict hardly shows any such state of mind, but even if it did, the modern cases show, that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position."

In *assumpsit* for use and occupation of a house, the defendant being a lunatic, and at the time provided with a sufficient residence:—*Held*, that if the plaintiff knew that the defendant was at the time insane, and took advantage of it to induce her to enter into the contract, he could not recover. *Dane v. Lady Kirkwall*, 8 C. & P. 679. The wife of a lunatic, who has no committee, has a sufficient implied authority to sue in the name of the lunatic for debts due to him. *Rock v. Slade*, 7 Dowl. P. C. 22.

Where an action is brought to recover money paid under a contract on the ground of the plaintiff's lunacy, and the issue is, whether at the time of the particular transaction the fact of the plaintiff's insanity was known to the defendant, evidence will be admissible of the plaintiff's conduct upon various occasions, both before and after the date of the particular transaction, with a view of showing that the plaintiff's malady was of such a kind as would make itself apparent to the defendant at the time when the parties were dealing together. *Beavan v. M'Donnell*, 10 Ex. 184.

All acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period. *Hall v. Warren*, 9 Ves. 610. If, therefore, during a lucid interval the lunatic execute a deed, it will be valid. Shelf. Lun. 340. *Howard v. Digby*, 2 Clark & Fin. 661. See *per Lord Brougham*. *Dymer v. Green*, 5 Jur. N. S. 742, Prob. C. *Ferguson v. Barrett*, 1 F. & F. 613.

By the law of Scotland a man of weak intellect may, by an instrument of interdiction, place himself in such a situation as to be incapable of doing any act affecting his estate without the consent of the interdictors named. The Court of Session may also appoint an *interim curator bonis*, without notice to parties affected, or cognition, or inquest before a jury: where the latter had been appointed subsequent to the execution of such an instrument, and the interdictors had instituted proceedings to recal such appointment, which nevertheless the Court of Session sustained; the House of Lords, after ascertaining the practice, affirmed the judgment below, but without costs. *Dickson v. Graham*, 4 Bligh, 492. On the lunacy of a partner a court of equity will direct the property to be sold, with liberty to all parties to bid. 31 L. J. Ch. 265.

[1] The proceedings upon an inquisition in lunacy are regulated by the 16 & 17 Vic. c. 70, and 25 & 26 Vic. c. 86, and the rules made pursuant to and for the purpose of carrying out the provisions of these statutes. By the former of these acts masters in lunacy are appointed, who should "have, perform, and execute, all the powers, duties, and authorities" which were at the time of the passing of the act 5 & 6 Vic. c. 84, had, performed, and executed by commissioners named in commissions in the nature of writs *de lunatico inquirendo* (ss. 6, 7), and also to perform duties previously performed by the masters in Chancery. (Sect. 8.) By the same act the Registrar in Lunacy was appointed (sect. 10), and two medical and one legal visitor. (Sect. 16.)

By sect. 39 of 16 & 17 Vic. c. 70, "in lieu of the commission now issued specially in each case of alleged lunacy, a general commission to the like effect, with such variations as may be necessary or expedient, may from time to time be issued in dupli-

(*b*) *New Trial.*[1]
(*c*) *Traverse of Inquisition.*[2]

cate under the Great Seal, directed to the masters by name jointly and severally, who shall, by virtue thereof, proceed in each case of alleged lunacy, concerning which the Lord Chancellor, intrusted as aforesaid, shall order them to inquire, in like manner, and with all the like powers and authorities, subject to the provisions hereinafter contained, as if a commission had issued specially in such case, and every inquisition found and returned thereon shall be as valid and effectual, to all intents and purposes, as if the same had been found and returned on a separate commission. The lunatic may, upon his requisition to that effect, have a jury upon the inquiry." Sect. 41, 25 & 26 Vic. c. 86, s. 81. If the order does not require a jury, the inquiry may be taken before the master without a jury; or the master may, if he think it expedient, upon certifying to that effect, issue his precept to the sheriff, requiring a jury to be summoned. 16 & 17 Vic. c. 70, s. 43. There must be a jury if the lunatic is not within the jurisdiction. (Sect. 45.)

The inquiry to be made under every order for inquiry or commission of lunacy or issue, shall be confined to the question whether or not the person who is the subject of the inquiry is, at the time of such inquiry, of unsound mind, and incapable of managing himself or his affairs, and no evidence as to anything done or said by such person, or as to his demeanor or state of mind at any time, being more than two years before the time of the inquiry, shall be receivable in proof of insanity on any such inquiry, or on the trial of any traverse of an inquisition, unless the judge or master shall otherwise direct. 25 & 26 Vic. c. 86, s. 3. The Lord Chancellor may, under special circumstances, direct that there be also an inquiry from what time the alleged lunatic has been of unsound mind and incapable of managing himself or his affairs, or that there be also an inquiry whether or not the alleged lunatic was of unsound mind and incapable of managing himself and his affairs at a previous time specified, and thenceforth down to the time of the inquiry. 16 & 17 Vic. c. 70, s. 47.

Where the masters certify that the alleged lunatic is of unsound mind, and incapable of managing himself or his affairs, and has been so from a time past, or on the contrary certify that the alleged lunatic is of sound mind and capable of managing himself and his affairs, the certificate shall be, and shall be deemed to be, of the same force and effect, to all intents and purposes, and be returned, filed, and proceeded on, in the same manner in all respects, as an inquisition taken upon the oath of a jury. 16 & 17 Vic. c. 70, s. 44.

If upon the return of the inquisition the party be found a lunatic, and such finding is not traversed, or the commission superseded, committees of his person and estates are immediately appointed by the Chancellor. His lordship (unless the estate is extremely small) usually refers it to a master in Chancery to approve of a proper person to act as committee. Relations are in general appointed in preference to strangers, unless some specific objection be urged. The wife of the lunatic, jointly with a relation, has been appointed a committee of the person of the lunatic; the committee of the person is frequently appointed also committee of the estate. The committee is merely considered as a bailiff appointed by the Crown, and under its control. He is to take care of the property of the lunatic, and liable to account. He may be subjected to punishment, and be removed for misconduct. Hence it is that no grant of a lunatic's estate can be made otherwise than during pleasure. The Chancellor's jurisdiction over the committee is not determined by the death of the lunatic. The court, in making an allowance to a lunatic, considers only his situation; it always looks to the probability of his recovery, and seldom regards the interest of his next of kin. With this view only it is that in cases where the estate is considerable, and the persons who will probably be entitled to it in future, are otherwise provided for, the court, looking at what it is likely the lunatic himself would do if he were in a capacity to act, will make some provision out of the estate for those persons. The Chancellor may accordingly order maintenance for the children of the lunatic, or a sum for their advancement or payment of their debts. The committee of a lunatic's estate is never allowed anything for his care and trouble, but under circumstances the court will increase the allowance of maintenance, which will operate as a remuneration. If the committee become bankrupt or insolvent he will be removed. Parties have been committed for reflecting in a pamphlet upon the conduct of the petitioners and others acting in the management or affairs of a lunatic under orders of the court. The committee of a lunatic's estate is not authorised to purchase real estates with accumulations; if they do, it does not alter the nature of the property, as the land, when so purchased, will be considered as personal estate.

[1] If the Lord Chancellor is dissatisfied with the verdict returned upon a traverse, he may order one or more new trial or trials thereon; but no person can be admitted to traverse oftener than once. 16 & 17 Vic. c. 70, s. 101.

[2] By 16 & 17 Vic. c. 70, s. 148, "any person desiring to traverse may, within the three months next after the day of the return of the inquisition, present a petition for that purpose to the Lord Chancellor, who is hereby required to hear and determine the petition, and shall, in his order upon it for a traverse, limit a time, not exceeding six months from the date of the

(*d*) *Supersedeas of Inquisition.*[1]

(B) *By Issue directed to be Tried in one of the Superior Courts.*[2]

(C) *Summary Order where Property of Lunatic of small Amount.*[3]

V. Of Lunatic Asylums.[4]

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order, within which the person desiring to traverse, and all other proper parties, are to proceed to trial of the traverse, and who may, by the same or any other order, direct that the person desiring to traverse, not being the person the object of the inquisition, shall, within the three weeks next after the date of the order, give sufficient security to, and to the satisfaction of, the masters, for all proper parties proceeding to trial within the time to be limited as aforesaid;" otherwise they will be barred, except the Lord Chancellor give special leave. (Sect. 149.)

[1] Where any person has been found of unsound mind by inquisition, but the question of unsoundness of mind is disputed, and liberty to traverse has been applied for, and whether granted or not, and it appears to the Lord Chancellor to be for the lunatic's benefit, and also to be expedient that the inquisition should be superseded on terms and conditions, and subject to an arrangement respecting the lunatic's estate, he may, upon the consent of the lunatic, and of the persons entitled or claiming to traverse, and of such other persons, if any, whose consent he may deem necessary, order the inquisition to be superseded, on such terms and conditions to be fulfilled by the lunatic, or such other person, and subject to such arrangement respecting the lunatic's estate, as he may under the circumstances of the case think proper, and may, by the same or any other order, direct the lunatic, or any other persons, being consenting parties to the arrangement, to execute, make, and do all such conveyances, transfers, and things, as may seem proper for carrying the arrangement into effect. *See* 16 & 17 Vic. c. 70, s. 152.

The Lord Chancellor may supersede the commission upon terms and conditions, if that course shall seem expedient, upon consent of the lunatic and such other persons, if any, whose consent he may deem necessary. 25 & 26 Vic. c. 86, s. 10.

[2] The Lord Chancellor may direct the inquisition before a jury to be tried in one of the superior courts of common law at Westminster. 25 & 26 Vic. c. 86, s. 4.

"On the trial of the issue the alleged insane person shall, if he is within the jurisdiction, be examined before the taking of the evidence is commenced, and at the close of the proceedings before the jury consult as to their verdict, unless the presiding judge shall otherwise direct; and such examination of the alleged insane person shall take place, either in open court or in private, as such judge shall direct." (Sect. 6.)

"No person shall be entitled to a traverse of any inquisition made under any such order as aforesaid, upon the oath of a jury but it shall be lawful for the Lord Chancellor intrusted as aforesaid, if he shall think fit, upon a petition being presented to him within three months next after the trial of any such issue, to order that a new trial shall be had of such issue, or a new inquiry made as to the insanity of such person, subject to such directions and upon such conditions as to the Lord Chancellor intrusted as aforesaid may seem proper." (Sect. 7.)

[3] Where the property of a lunatic is of small amount it may be applied for his benefit in a summary and inexpensive manner.

By 25 & 26 Vic. c. 86, s. 12, where by the report of one of the masters in lunacy, or of the commissioners in lunacy, or by affidavit or otherwise, it is established to the satisfaction of the Lord Chancellor that any person is of unsound mind, and incapable of managing his affairs, and that his property does not exceed 1000*l.* in value, or that the income thereof does not exceed 50*l.* per annum, the Lord Chancellor may, without directing any inquiry under a commission of lunacy, make such order as he may consider expedient for the purpose of rendering the property of such person, or the income thereof, available for his maintenance or benefit, or for carrying on his trade or business. *See* sects. 13–15.

[4] It is unlawful for any person to receive two or more lunatics into any house, unless such house shall be an asylum or a hospital duly registered, or a house for the time being duly licensed under some act of parliament. 8 & 9 Vic. c. 100, s. 44. *See* also 16 & 17 id. c. 96, and 18 & 19 id. c. 105; 25 & 26 id. c. 111.

The licenses to receive insane patients are granted for any period not exceeding thirteen calendar months in Middlesex, London, Westminster, Southwark, and all places within the range of seven miles from any part of London, Westminster, or Southwark, by a board composed partly of medical men and barristers, and called the "Commissioners in Lunacy" (8 & 9 Vic. c. 100, s. 3), at a quarterly or special meeting of the Board; and in other places are granted by the justices of the county, in general or quarter sessions. (Id. ss. 14, 17.) 25 & 26 Vic. c. 111, s. 14.

County lunatic asylums are established under, and regulated by, the following acts:—48 Geo. 3, c. 96; 16 & 17 Vic. c. 97; The Lunatic Asylums Act, 1853, 18 & 19 Vic. c. 105; 19 & 20 id. c. 87; and 25 & 26 id. c. 111.

(A) *Persons may be Confined in, upon the Certificate of Two Medical Practitioners.*[1]

(B) *Of the Visitation of.*[2]

M.

MACHINERY, Malicious Injury to. 24 & 25 Vic. c. 97, ss. 14, 15; *post*, Malicious Injuries, p. 413; Negligence, p. 517.

MADHOUSES. *See* Lunatic Asylums, *ante*, p. 411.

MAIM.

I. Wounding or Shooting at with Intent to.[3]

II. Maiming Cattle. *See* Malicious Injuries, *post*, p. 413.

[1] In general, no person can be legally received in a hospital or licensed house without a written order from the person sending him, and a medical certificate of two physicians, surgeons, or apothecaries, in the form prescribed by the acts. 16 & 17 Vic. c. 96, ss. 4, 7. But in the case of a pauper lunatic the order is to be made under the hand of a justice of the peace, or the officiating clergyman and one of the overseers or the relieving officer of the parish to which he belongs; and the medical certificate is to be signed by one physician, surgeon, or apothecary. (Sect. 7.)

If the forms of proceeding prescribed by the act are not complied with, the imprisonment will be unlawful. *Reg. v. Pinder*, 24 L. J. Q. B. 148. *Reg. v. Munster*, 20 L. J. M. C. 48. *Norris v. Seed*, 3 Ex. 782. *Fletcher v. Fletcher*, 28 L. J. Q. B. 134. In an action by the lunatic, inspection may be obtained of the books of the asylum. 1 F. & F. 456; 33 L. T. 137.

A medical man is not justified merely on the statements of relatives to seize and confine a party supposed to be insane, unless satisfied from such statements that it is necessary to prevent immediate injury. In an action by the party for assault and imprisonment:—*Held*, that the question was, whether there was reasonable and probable cause for the relatives to consider him insane. If access cannot be obtained, the proper course is to apply to the court having jurisdiction in such matters to have the party taken up, that he may be examined. *Anderdon v. Burrows*, 4 C. & P. 210. At common law a medical man or other person may justify measures necessary to restrain a dangerous lunatic. *Scott v. Wakem*, 3 F. & F. 328.

[2] Provision is made by the statutes for the frequent visitation and inspection of registered hospitals and licensed houses by the commissioners, and (in the cases of houses in the country) by visitors appointed by the magistrates at quarter sessions (25 & 26 Vic. c. 111, ss. 61, 62); and it is directed that the visits should be made at uncertain and unexpected intervals, and in certain cases even by night. 8 & 9 Vic. c. 100, s. 71. Any person detained in a licensed house or hospital without sufficient cause established to the satisfaction of the commissioners, may be set at liberty by them. (Sects. 76–81.) The power to order a discharge does not, however, extend to the case of a person found lunatic under a commission, or confined by the order of the Secretary of State for the Home Department, or under the order of any court of criminal jurisdiction. (Id.)

Every lunatic must be personally seen and visited by one of the visitors, four times at least in every year, and the visits must be so regulated as that the interval between successive visits shall not exceed four months; but lunatics resident in licensed houses, asylums, or registered hospitals, need not necessarily be visited by the visitors more than once in the year, unless the Lord Chancellor otherwise direct. 25 & 26 Vic. c. 86, s. 20.

[3] By 24 & 25 Vic. c. 100, s. 18, "whosoever shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension and detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." And by sect. 20, "whosoever shall unlawfully wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall

MAINTENANCE. *See* Alimony, vol. i. p. 297; Champerty, vol. iii. p. 72; *post*, Marriage, p. 443.

MALA Grammatica non vitiat Chartam. Wing. 18. *Bad grammar does not vitiate a deed.*[1]

MALITIA supplet ætatem. Dyer, 104, b. *Malice supplies the want of mature years.* *See* Infant, *ante*, p. 144.

MALICIOUS INJURIES.

I. By Fire to Buildings and Goods therein, p. 414.

II. Injuries by Explosive Substances to Buildings and Goods therein, p. 414.

III. „ to Buildings by Rioters, &c. p. 414.

IV. „ „ Tenants, p. 415.

V. „ Manufactures, Machinery, &c. p. 415.

VI. „ Corn, Trees, and Vegetable Productions, p. 416.

VII. „ Fences. *See* vol. iv. p. 453.

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IX. „ Sea and River Banks, and to Works on Rivers, Canals, &c. p. 417.

X. „ Ponds. *See* Fishery, vol. iv. p. 473.

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XII. „ Railway Carriages and Telegraphs, p. 417.

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be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

To constitute a wound, the continuity of the skin must be broken. *R. v. Wood*, 1 Moo. C. C. 278. *Reg. v. M'Loughlin*, 8 C. & P. 635. *R. v. Becket*, 1 M. & Rob. 526. *R. v. Smith*, 8 C. & P. 173. *Reg. v. Warman*, 1 Den. C. C. 183. The nature of the instrument by which it was inflicted is immaterial. *R. v. Sheard*, 2 Moo. C. C. 13; 7 C. & P. 846. *R. v. Withers*, 1 Moo. C. C. 294. *R. v. Payne*, 4 C. & P. 558. A kick with a shoe is within the statute. *R. v. Briggs*, 1 Moo. C. C. 318.

The repealed statute did not contain the words, "by any means whatsoever;" and it was held necessary that some instrument should have been used. See *R. v. Stevens*, 1 Moo. C. C. 409. *R. v. Harris*, 7 C. & P. 446. *R. v. Murrow*, 1 Moo. C. C. 456.

The Intent must be proved as laid. *R. v. Duffin*, R. & R. 365. *R. v. Boyce*, 1 Moo. C. C. 29. *R. v. Gillow*, id. 85. *Reg. v. Bowen*, Car. & M. 149. *R. v. Cox*, R. & R. 362. *Reg. v. Hewlett*, 1 F. & F. 91. See *R. v. Holt*, 7 C. & P. 518. *Reg. v. Ryan*, 2 M. & Rob. 213. *R. v. Coke*, 6 St. Tr. 212. To maim is to injure any part of a man's body, which may render him in fighting less able to defend himself or annoy his enemy. 1 Hawk. c. 44, s. 1. See *Reg. v. Sullivan*, Car. & M. 209. To disfigure, to do some external injury which may detract from his appearance, and to disable, is to do something which creates a permanent disability, and not merely a temporary injury. See *R. v. Boyce*, *supra*. It is not necessary that a grievous bodily harm should be either permanent or dangerous, if it be such as seriously to interfere with either health or comfort that is enough. *R. v. Cox*, R. & R. 362. See *Reg. v. Ashman*, 1 F. & F. 88. Where the intent laid is to prevent a lawful apprehension, it must be shown that the arrest would have been lawful. Arch. *Cr. Law*, 574, 15th ed.

If a person intending to shoot another put his finger on the trigger of a loaded firearm, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms within the statute (*Reg. v. St. George*, 9 C. & P. 483. *Reg. v. Lewis*, id. 523), but it is an assault. *Reg. v. Baker*, 1 C. & Kir. 254. *Reg. v. James*, id. 530.

[1] Neither false English nor bad Latin will make void a deed when the meaning of the party is apparent (Co. Litt. 223, b; 2 Bl. Com. 379. *Osborn's case*, 10 Rep. 133. See *Reg. v. Inhabitants of Wooldale*, 6 Q. B. 565); but where a proviso in a lease was altogether ungrammatical and insensible, the court declared that they did not consider themselves bound to find out a meaning for it. *Doe d. Wyndham v. Carew*, 2 Q. B. 317. *Berdoe v. Spittle*, 16 L. J. Ex. 258. Broom's *Max.* 535.

XIII. Injuries to Works of Art, &c. p. 418.

XIV. „ Cattle and other Animals, p. 418.

XV. „ Ships, p. 418.

XVI. Sending Letter Threatening to Burn or Destroy, p. 419.

XVII. Injuries not before Provided for, p. 419.

XVIII. Making Gunpowder to commit Offences, and Searching for the same, p. 419.

I. By Fire to Buildings and Goods therein.[1]

II. Injuries by Explosive Substances to Buildings and Goods therein.[2]

III. „ to Buildings by Rioters, &c.[3]

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[1] The following offences are felonies punishable by penal servitude or imprisonment; namely, unlawfully and maliciously to set fire to any church, chapel, meeting-house, or other place of divine worship (24 & 25 Vic. c. 97, s. 1); or to any dwelling-house, any person being therein (sect. 2); or to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof, whether the same shall be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person (sect. 3); or to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbour; or to any canal or other navigation (sect. 4); or to any building other than such as are in this act before-mentioned belonging to the queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution (sect. 5); or to any building other than such as are in this act before mentioned (sect. 6); or to any matter or thing being in, against, or under, any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony (sect. 7); or unlawfully and maliciously, by any overt act, to attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, under such circumstances that, if the same were thereby set fire to, the offender would be guilty of felony. (Sect. 8.)

The above sections are a re-enactment and consolidation of the statutes relating to arson, the cases upon which will be found under Arson, vol. i. p. 539.*

[2] It is felony unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, to throw down or damage the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person shall be endangered (24 & 25 Vic. c. 97, s. 9); or to place or throw into, upon, under, against, or near, any building, any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working-tools, fixtures, goods, or chattels, whether or not any damage be caused. (Sect. 10.)

[3] By 24 & 25 Vic. c. 97, s. 11, "if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish or pull down or destroy, or begin to demolish, pull down, or destroy any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, or any buildings other than such as are in this section before mentioned belonging to the queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection

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* Vol. I. was published before the passing of the Consolidation Act.

IV. Injuries to Buildings by Tenants.[1]

V. „ Manufactures, Machinery, &c.[2]

used in conducting the business of any mine or any bridge, waggon way, or truck for conveying minerals from any mine," shall be guilty of felony.

And by sect. 12, "if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine-staith, bridge, waggon-way, or truck, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor." And if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, the jury may find him guilty thereof, and he may be punished accordingly.

The assembly must be unlawful (*R. v. Langford*, Car. & M. 602. See *R. v. Phillips & others*, 2 Moo. C. C. 252), and riotously assembled. *R. v. Birt*, 5 C. & P. 154. See *R. v. Howell*, 9 id. 437. *R. v. Simpson*, Car. & M. 669. And there must either be a destruction of the property, or a beginning of that which, if continued, would end in its destruction, and which shows an intent to demolish. *R. v. Ashton*, 1 Lewin, C. C. 296. *R. v. Thomas*, 4 C. & P. 237. *R. v. Howell, supra. R. v. Adams*, Car. & M. 299. *R. v. Phillips*, 2 Moo. C. C. 252. *R. v. Langford, supra.* The demolition may be by burning. *R. v. Howell, supra. R. v. Harris*, Car. & M. 661. *R. v. Christian*, 12 L. J. M. C. 26; Car. & M. 388. *R. v. Whiston*, 6 Jur. 1039. Where part is demolished, it must be part of the freehold to be within the section: thus, the destruction of movable shutters was held not within a similar enactment. *R. v. Howell, supra.* And the jury must be satisfied that the intent of the prisoners was to accomplish the act of demolition. *R. v. Price*, 5 C. & P. 510. *R. v. Batt*, 6 id. 329. *R. v. Harris, supra.* See *R. v. Thomas, supra.*

[1] By 24 & 25 Vic. c. 97, s. 13, "whosoever being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years, or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish the same, or any part thereof, or shall unlawfully and maliciously pull down and sever from the freehold any fixture, being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor."

[2] By 24 & 25 Vic. c. 97, s. 14, "whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or render useless, any loom-frame, machine, engine-rack, tackle, tool, or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and if a male under sixteen, with or without whipping." See *R. v. Tacey*, Russ. & Ry. 452. *R. v. Smith*, 6 Cox, 198. *R. v. Clegg*, 3 id. 295. *R. v. Woodhead*, 1 M. & Rob. 549.

By 24 & 25 Vic. c. 97, s. 15, "whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or render useless, any machine or engine, whether fixed or movable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or movable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work, knitted piece, stocking-hose, or lace), shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and if a male under sixteen, with or without whipping." See *R. v. Chubb*, Deac. *Crim. Law*, 1687. *R. v. Hutchinson*, id.

If a thrashing-machine be taken to pieces and separated by the owner, the destruction of any part of it is within the statute. *R. v. Mackarel*, 4 C. & P. 448. So, though a part of it be wanting (*R. v. Bartlett*, Deac. *Crim. Law*, 1517); but not if part be destroyed by the owner, so that it has ceased to be a machine. *R. v. West*, id. 1518. The destruction of a water-wheel, by which a thrashing-machine was worked, was held to be within the statute. *R. v. Fidler*, 4 C. & P. 449.

VI. Injuries to Corn, Trees, and Vegetable Productions.[1]

VII. „ Fences. 24 & 25 Vic. c. 97, s. 25. *See* Fences, vol. iv. p. 453.

VIII. „ Mines.[2]

[1] The following offences are felony: viz. unlawfully and maliciously to set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing (24 & 25 Vic. c. 97, s. 16), or to any stack of corn, grain, pulse, tares, hay, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark (id. s. 17); or by any overt act to attempt to set fire to any such matter or thing in either of the two last preceding sections mentioned, under such circumstances that, if the same were thereby set fire to, the offender would be, under either of such sections, guilty of felony (id. s. 18); or unlawfully and maliciously to cut or otherwise destroy any hop-binds growing on poles in any plantation of hops (id. s. 19); or to cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the amount of 1*l.*) (id. s. 20); or growing elsewhere, in case the injury shall exceed 5*l.* (Id. s. 21.) And if the injury be to the amount of 1*s.* at the least, wheresoever the tree, &c. may be growing, the offender may, on conviction before a justice of the peace, be committed to prison for a term not exceeding three months, or forfeit, over and above the amount of the injury done, a sum of money not to exceed 5*l.*; and a longer imprisonment may be imposed upon a second or third conviction. (Id. s. 22.) The malicious destruction, or damaging with intent to destroy, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, greenhouse, or conservatory, is punishable on conviction before a justice of the peace with imprisonment not exceeding six months, or forfeiture of a penalty not exceeding 20*l.* beyond the amount of injury, on a first conviction, and on a second, the imprisonment may be for three years. (Id. s. 23.) The malicious destruction of, or damaging with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or inclosed, not being a garden, orchard, or nursery-ground, is punishable on conviction before a justice of the peace with imprisonment, not to exceed one month, or forfeiture of a penalty not to exceed 20*s.* above the amount of injury done. On a second conviction he may be imprisoned for six months." (Id. s. 24.)

The "amount of injury done," means the actual injury done to the trees, &c. by the defendant's act; it is not sufficient to bring the case within the statute that, although the amount of such actual injury is less than 5*l.* the amount of consequential damage (as by its being necessary, in consequence of the defendant's act, to shut up and replace a hedge) would exceed 5*l.* *Reg. v. Whiteman*, Dears. C. C. 353.

The words "plant or vegetable production" do not apply to young trees. *R. v. Hodges*, M. & M. 341.

[2] The following offences are felony: viz. unlawfully and maliciously to set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel (24 & 25 Vic. c. 97, s. 26), or by any overt act to attempt to set fire to any mine, under such circumstances that, if the mine were thereby set fire to, the offender would be guilty of felony (id. s. 27), or unlawfully and maliciously to cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or with the like intent unlawfully and maliciously to pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine: Provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working. (Id. s. 28.) It is felony unlawfully and maliciously to pull down or destroy, or damage with intent to destroy or render useless, any steam-engine, or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connexion with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way or truck, for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way or truck, be completed or in an unfinished state; or unlawfully and maliciously to stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof; or unlawfully and maliciously wholly or partially to cut through, sever, break, or unfasten, or damage with

IX. Injuries to Sea and River Banks, and to Works on Rivers and Canals, &c.[1]

X. „ Ponds. 24 & 25 Vic. c. 97, s. 32. *See* Fishery, vol. iv. p. 473.

XI. „ Bridges, Viaducts, and Toll-Bars.[2]

XII. „ Railway Carriages and Telegraphs.[3]

intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway, or other way, or other work whatsoever, in any wise belonging or appertaining to or connected with or employed in any mine or the working or business thereof. (Id. s. 29.) The mine may be laid as the property of a person in possession of it and working it, though only as agent for others. *Reg. v. Jones*, 1 C. & Kir. 181; 7 Moo. C. C. 293. If workmen stop up an air-way by order of their master, in a portion of his mine, it is not felony in the workmen, even though the master knew he had no right to the air-way; but if the workmen knew that the stopping of the air-way is a malicious act of the master it is felony in the workmen. *R. v. James*, 8 C. & P. 131.

A steam-engine used in working a mine had been stopped and locked up for the night; the defendant got into the engine-house and set it going; there being no machinery attached, the engine went with great velocity and received damage:—*Held*, to be within the statute. *Reg. v. Norris*, 9 C. & P. 241. A scaffold erected at some distance above the bottom of a mine, and used for working a vein of coal on a level with the scaffold, was held to be an erection used in conducting the business of the mine within the statute. *Reg. v. Whittingham*, 9 id. 234.

[1] It is felony unlawfully and maliciously to break down or cut down, or otherwise to damage or destroy, any sea-bank or sea-wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be or shall be in danger of being overflowed or damaged, or unlawfully and maliciously to throw, break, or cut down, level, undermine, or otherwise destroy any quay, wharf, jetty, lock, sluice, flood-gate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal (24 & 25 Vic. c. 97, s. 30); or to cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or unlawfully and maliciously to open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof. (Id. s. 31.)

[2] It is felony unlawfully and maliciously to pull or throw down, or in any wise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal, shall pass, or to do any injury with intent, and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof dangerous, or impassable. (24 & 25 Vic. c. 97, s. 33.) It is a misdemeanor unlawfully and maliciously to throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate or toll-bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate or toll-bar, so set up or erected to prevent passengers passing by without paying any toll, directed to be paid by any act of parliament relating thereto, or any house, building, or weighing engine, erected for the better collection, ascertainment, or security of any such toll. (Id. s. 34.)

[3] It is felony unlawfully and maliciously to put, place, cast, or throw upon or across any railway, any wood, stone, or other matter or thing, or to take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or to turn, move, or divert any points or other machinery belonging to any railway, or to make or show, hide or remove, any signal or light upon or near to any railway, or to cause to be done any other matter or thing with intent in any of the cases aforesaid to obstruct, upset, overthrow, injure or destroy, any engine, tender, carriage or truck using such railway. (24 & 25 Vic. c. 97, s. 35.) And whosoever by any unlawful act or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. (Id. s. 36.) And whosoever shall unlawfully cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of

XIII. Injuries to Works of Art.[1]

XIV. „ Cattle and other Animals.[2]

XV. „ Ships.[3]

any communication by any such telegraph, shall be guilty of a misdemeanor. The justice, if he think it is not expedient that the offence should be prosecuted by indictment, has power to convict summarily of this offence. (Id. s. 37.) An overt act to commit this offence is punishable by imprisonment not exceeding three months, or fine not exceeding 10*l*.

Where the engine or carriage is in fact obstructed, or the safety of the persons conveyed therein is in fact endangered by the defendant's act, but there is no evidence of any of the intents mentioned in this section, the defendant should be indicted for a misdemeanor under sect. 36. See *Reg. v. Bradford*, 1 Bell, C. C. 268. It seems that the intent to injure or destroy a train, provided against by the 35th section, is an intent to injure or destroy otherwise than by burning, which is specially mentioned in sect. 4. See *Reg. v. Sanderson*, 1 F. & F. 37.

[1] By 24 & 25 Vic. c. 97, s. 39, "whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust, or vase, or any other article or thing kept for the purposes of art or literature, or as an object of curiosity in any museum, gallery, cabinet, library, or other repository, which museum, &c. is either at all times or from time to time open for the admission of the public, or of any considerable number of persons, to view the same, either by the permission of the proprietor thereof or by the payment of money before entering the same; or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or to any university or college, or hall of any university, or to any inn of court, or in any street, square, churchyard, burial-ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, and with or without hard labour, and if a male under the age of sixteen, with or without whipping: Provided that nothing herein contained shall be deemed to affect the rights of any person to recover by action at law damages for the injury so committed."

[2] By 24 & 25 Vic. c. 97, s. 40, "whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony. By sect. 2, it is punishable by imprisonment or fine, upon conviction before a magistrate, unlawfully and maliciously to kill, maim, or wound any dog, bird, beast, or other animal not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose.

To constitute a maiming of the animal the injury must be permanent (*Reg. v. Jeans*, 1 C. & Kir. 539); but a wounding may be temporary. *R. v. Haywood*, 2 East, P. C. 1076; R. & R. 16. See *R. v. Owens*, 1 Moo. C. C. 205. Setting on a dog at a sheep, which bit the latter, was held not to be a wounding. *R. v. Hughes*, 2 C. & P. 420.

Where the prisoner set fire to a cowhouse, and a cow in it was burnt to death, it was held to be a killing within the statute. *R. v. Haughton*, 5 C. & P. 559.

Where the prisoner gave sulphuric acid to a horse, evidence of other acts of administration was admitted to prove the intent. *R. v. Mogg*, 4 id. 364.

[3] It is felony unlawfully and maliciously to set fire, cast away, or in anywise destroy any ship or vessel whether the same be complete or in an unfinished state (24 & 25 Vic. c. 97, s. 42); or to set fire to or cast away or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel or on the freight thereof, or upon any goods on board the same (id. s. 43); or by any overt act to attempt to set fire, to cast away, or destroy any ship or vessel, under such circumstances that, if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony (id. s. 44); or to place or throw in, into, upon, against, or near any ship or vessel, any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, whether or not any explosion take place, and whether or not any injury be effected (id. s. 45); or to damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or render the same useless (id. s. 46); or to mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or to do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided. (Id. s. 47.) So it is felony maliciously to cut away, cast adrift, remove, alter, deface, sink, or destroy, or do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other

XVI. Sending Letter Threatening to Burn or Destroy.[1]

XVII. Injuries not before Provided for.[2]

XVIII. Making Gunpowder to commit Offences, and Searching for the same.[3]

MALICIOUS PROSECUTION and ARREST.[4]

See also Arrest, vol. i. p. 519; id. p. 525; Constable, vol. iii. p. 182; False Imprisonment, vol. iv. p. 428; Justices of the Peace, *ante*, p. 285.

I. By whom the Action for may be Brought, p. 420.

II. In what Court Action may be Brought, p. 420.

III. Under what Circumstances the Action lies, p. 420.

manner unlawfully and maliciously to injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen and the purposes of navigation (id. s. 48); or to destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel. (Id. s. 49.)

If the ship be only run aground, and is afterwards got off in a condition so as to be repaired, it would not, it seems, be an offence within these sections. See *R. v. De Lando*, 2 East, P. C. 1098. If the intent be to prejudice the underwriters, the policy must be proved. See *R. v. Gibson*, R. & R. 138. A pleasure-boat, eighteen feet long, is, it seems, within the statute. See *R. v. Bowyer*, 4 C. & P. 559.

[1] By 24 & 25 Vic. c. 97, s. 50, "whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony."

[2] By the 24 & 25 Vic. c. 29, s. 51, "whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding 5*l.*, shall be guilty of a misdemeanor, punishable by imprisonment not exceeding two years; if committed between nine o'clock in the evening and six o'clock in the next morning, with penal servitude not exceeding five or imprisonment not exceeding two years." And by s. 52, "whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding two months, or shall forfeit and pay such sum of money, not exceeding 5*l.*, as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l.*: which last-mentioned sum of money shall, in the case of private property, be paid to the party aggrieved, and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in the same manner as every penalty imposed by a justice of the peace under this act; and if such sum of money, together with costs if ordered, shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two months, unless such sums and costs be sooner paid: Provided that nothing herein contained shall extend to a case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this act had not passed." And by s. 53, the provisions in the last preceding section shall extend to any person who shall wilfully and maliciously commit any injury to any tree, sapling, shrub, or underwood, for which no punishment is hereinbefore provided.

[3] By the 24 & 25 Vic. c. 97, ss. 54, 55, it is a misdemeanor to make, or knowingly have in possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent thereby, or by means thereof, to commit, or for the purpose of enabling any person to commit, any of the felonies in this act mentioned, and search-warrants for the same may be granted.

[4] In a case of damage by a wrongful act, such as the law esteems an injury, malice is not a necessary ingredient to the maintenance of an action. *Rogers v. Rajendro*, 13 Moore, P. C. C. 209; 1 Hill on Torts, 231–461; Add. id. 433.

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VIII. „ Damages, p. 423.

I. By whom the Action may be Brought.[1]
II. In what Court Action may be Brought.[2]
III. Under what Circumstances the Action lies.[3]

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[1] The action may be brought by joint plaintiffs in respect of a joint damage, as for expenses jointly incurred in defending an action against them. *Barratt v. Collins*, 10 Moore, 446. *Pechell v. Watson*, 8 Mee. & W. 691.

An action for a malicious prosecution will not lie at the suit of a subordinate officer against his commanding officer for maliciously, and without reasonable or probable cause, bringing him to a court-martial, as it is an act done in the course of discipline, and under the powers legally incident to his situation in the public service. *Johnstone v. Sutton*, 1 T. R. 548; 1 Bro. P. C. 76. *Floyd v. Barker*, 12 Rep. 23.

[2] The county court has no jurisdiction in an action for malicious prosecution. 9 & 10 Vic. c. 95, s. 58. *Chivers v. Savage*, 5 E. & B. 697; 25 L. J. Q. B. 85. *Jones v. Currey*, 20 id. 438. *Hunt v. North Staffordshire Railway Co.* 2 H. & N. 451. *Brandt v. Craddock*, 27 L. J. Ex. 314.

[3] An action is maintainable against any person who maliciously, and without probable cause, prosecutes another, and exposes him to injury, either in his person, property, or reputation; as, by laying an information before a magistrate (*Wyatt v. White*, 5 H. & N. 371; 29 L. J. Ex. 193), compelling the procuring of sureties to keep the peace (29 L. J. C. P. 170); or to procure conviction of an offence (29 id. 16) in an English or foreign court (*Castrigue v. Behrens*, 30 L. J. Q. B. 163); or maliciously detaining a judgment-debtor after tender of claim. *Croyer v. Pilling*, 4 B. & C. 26. So, if the defendant has maliciously, and without reasonable and probable cause, procured the issuing of a search-warrant, and the plaintiff has been damnified by the execution of it. *Cooper v. Booth*, 3 Esp. 144. *Phillips v. Naylor*, 4 H. & N. 565; 27 L. J. Ex. 222. So if a defendant, from feelings of ill-will and with a view to annoy and injure the plaintiff, prays an extent to secure a debt due from the plaintiff to the Crown, under the pretence that the debt is in danger of being lost to the Crown, when he knows it not to be in peril, he will be responsible in damages in an action for a malicious prosecution. *Craig v. Hasell*, 4 Q. B. 492. So an action for a malicious prosecution will lie against persons who petition for an adjudication of bankruptcy without reasonable or probable cause, and knowingly and wilfully, or recklessly, swear to depositions false in fact (*Farley v. Danks*, 4 E. & B. 499. *Brown v. Chapman*, 1 W. Black. 427). The proceedings must be superseded or set aside before the commencement of the action. *Whitworth v. Hall*, 2 B. & Adol. 698. *Hay v. Weakley*, 5 C. & P. 361. *Cotton v. James*, 1 B. & Adol. 134. If a party apply for a summons, and the plaintiff, having made default in appearing, the magistrate issue his warrant, under which the plaintiff is arrested, the defendant will not, it appears, be responsible for the arrest, which is to be attributed to the plaintiff's own neglect. *Phillips v. Naylor*, 4 H. & N. 615; 27 L. J. Ex. 224.

A man cannot be sued for the exercise of his legal right, as where he issues execution upon a judgment, though it be averred that he acted maliciously and without reasonable or probable cause (*Roret v. Lewis*, 5 D. & L. 373. *Magnay v. Burt*, 5 Q. B. 394); but if more than is due be knowingly and maliciously claimed, and execution issued, and the debtor or his goods taken in execution for such excessive amount, an action may be maintained, provided the debtor has been damnified by the execution being in excess. *Churchill v. Siggers*, 3 E. & B. 938. *Jennings v. Florence*, 2 C. B. 467; 26 L. J. C. P. 277. *Gilding v. Eyre*, 10 C. B. (N. S.) 592. *Wentworth v. Bullen*, 9 B. & C. 849. And, in general, however unfounded a civil action may be, or however malicious the motives of the plaintiff, no action will lie in respect of its being brought (*Beauchamp v. Croft*, Keilw. 26). But under special circumstances such an action may, it seems, be maintained; but it is not enough to say that A. sued him *falso et malitiose*, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious. *Savile v. Roberts*, 1 Ld. Raym. 374; 1 Salk. 13. And an action will lie for maliciously, and without reasonable and probable cause, procuring or bringing an action against A. in the name of a third person, provided A. has suffered damage thereby (*Flight v. Leman*, 4 Q. B. 883). As, where the nominal plaintiff was a pauper, and the defendant lost his costs. *Cotterell v. Jones*, 11 C. B. 728; 21 L. J. C. P. 3. *Atwood v. Monger*, Styles, 378. *Waterer v. Freeman*, Hob, 266. *Pechell v. Watson*, *supra*.

In order to be actionable the prosecution must, in general, have ended favourably for the plaintiff, for if he were convicted, and

IV. The Prosecution must have been Malicious, and without probable Cause.[1]

the conviction has not been quashed, it will be an answer to the action (*Mellor v. Baddeley*, 2 C. & M. 678); but this is not so where the proceedings are *ex-parte*, and the plaintiff has no opportunity of preventing an unfavourable termination, as where the defendant maliciously exhibits articles of the peace against him. *Steward v. Gromett*, 7 C. B. (N. S.) 191; 29 L. J. C. P. 170.

And in an action for maliciously arresting the plaintiff on a *ca. sa.* for a larger sum than was really due, it is not necessary that he should have obtained his discharge by an order of the court before action, because the illegality of the arrest does not depend upon the result of any legal proceedings, but only on the amount for which execution might issue. *Gilding v. Eyre*, 10 C. B. (N. S.) 592; 31 L. J. C. P. 174.

If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges for which he was acquitted. *Reed v. Taylor*, 4 Taunt. 617. The question, whether there was or was not probable cause for some parts of the charge, would affect the amount of the damages recoverable, but not the plaintiff's right to a verdict. *Delisser v. Towne*, 1 Q. B. 343. *Ellis v. Abrahams*, 8 id. 713.

[1] The essence of the cause of action consists in the prosecution by the defendant of legal proceedings of a civil or criminal nature against the plaintiff, maliciously and without any reasonable or probable cause, whereby the plaintiff is injured, as by being arrested or imprisoned, or put to expense. Bull. & L. 303, 2d ed. *Churchill v. Siggers*, 3 E. & B. 397. *Willans v. Taylor*, 6 Bing. 186; 2 B. & Adol. 845. By the term malice, is meant any indirect motive of wrong, any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice (*Stevens v. Midland Railway Co.* 10 Ex. 356; 23 L. J. Ex. 328); as, where the motive was to injure the accused (*Willans v. Taylor*, 2 B. & Adol. 845. *Farmer v. Darling*, 4 Burr. 1972); or to obtain payment of a debt (*Brooks v. Warwick*, 2 Stark. 393. *M'Donald v. Rooke*, 2 Bing. N. C. 219); or to prevent the plaintiff making a statement. *Heslop v. Chapman*, 23 L. J. Q. B. 49. So, if from his declarations or conduct it appears that the defendant did not, while he voluntarily persisted in the charge, believe in its truth (*Hadduck v. Heslop*, 12 Q. B. 267. *Broad v. Ham*, 5 Bing. N. C. 722; 8 Scott, 50. *Huntley v. Simson*, 2 H. & N. 600; 27 L. J. Ex. 134. *Williams v. Bank*, 1 F. & F. 557); or, that he bore ill-will against the plaintiff. *Michell v. Williams*, 11 Mee. & W. 217. Malice is not negatived by the circumstance of the defendant being bound over to prosecute, for the proceedings may still have originated in malice (*Dubois v. Keats*, 11 Ad. & E. 332); or having obtained counsel's opinion advising the proceedings (*Hewlett v. Cruchley*, 5 Taunt. 283), though if the facts be fully and fairly laid before him, and his opinion *bonâ fide* acted upon, it may be evidence to prove probable cause. *Ravenga v. Mackintosh*, 2 B. & C. 693.

If the defendant has gone before a magistrate, and upon a wilfully untrue statement the magistrate has granted a warrant against the plaintiff, the defendant will be responsible. *Elsee v. Smith*, 1 D. & R. 105. *Cohen v. Morgan*, 6 id. 8. *Clarke v. Postan*, 6 C. & P. 423. If the accusation be founded on the accuser's own knowledge, proof will be required to that extent to warrant the charge; if it rests on suspicion only, evidence of circumstances sufficient to induce suspicion on the mind of a rational person will be enough (*Davis v. Noake*, 6 M. & S. 32: *per Bayley, J. Hailes v. Marks, infra. Jones v. Howell*, 29 L. J. Ex. 19. *Hermann v. Seneschall*, 6 L. T. (N. S.) 646; 32 L. J. C. P. 43. But if the plaintiff has simply given a true narrative before the magistrate, and the magistrate, upon the statement or deposition *bonâ fide* given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in doing so forms an erroneous judgment, and conceives that to be a felony which is not a felony, but only matter for a civil action, the complaining party who has thus set the magistrate in motion and caused the warrant to be issued is not responsible for the erroneous judgment of the magistrate, and the acts consequent thereupon. *Leigh v. Webb*, 3 Esp. 165. See *Huntley v. Simson*, 2 H. & N. 600; 27 L. J. Ex. 137. A person may render himself responsible by taking up a prosecution commenced by another, and adopting it or carrying it on. See *Weston v. Beeman*, 27 L. J. Ex. 57. *Mellor v. Boddeley*, 2 C. & M. 678.

The absence of reasonable and probable cause is a question of law for the judge to determine (*Hailes v. Marks*, 30 L. J. 389); but the facts and inferences of fact upon which the question arises are for the jury. *Panton v. Williams*, 2 Q. B. 169. *Douglas v. Corbett*, 6 E. & B. 511. *Taylor v. Willans*, 2 B. & Adol. 856. *Read v. Coker*, 8 Scott, 48. *Cox v. Reid*, 13 Q. B. 558. *Arnould v. Hamel*, 9 Ex. 404; 23 L. J. Ex. 137. *Jones v. Howell*, 29 L. J. Ex. 19.

The existence of malice is a question of fact for the jury, and they are at liberty to infer such malice from the absence of reasonable and probable cause for the steps the defendant took in instituting or persisting in the charge or prosecution (*Mitchell v. Jenkins*, 5 B. & Adol. 588; but see *Moore v. Gardner*, 16 Mee. & W. 595. *Weston v.*

V. Of the Declaration.[1]
VI. „ Pleas.[2]
VII. „ Evidence.[3]

Beeman, supra). But the converse does not hold; it cannot be inferred from the most direct and positive evidence of malice that there was not reasonable or probable cause, and both must concur to constitute a cause of action: for a prosecution instituted with malicious motives is not a ground of action, unless also instituted without reasonable and probable cause. See *Musgrove v. Newell*, 1 Mee. & W. 582. A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt, and in neither case is he liable to an action. With whatever feelings of malice the defendant may have acted in instituting the prosecution, still, if there was reasonable and probable cause for it in the opinion of the judge, the defendant is entitled to a verdict. *Turner v. Ambler*, 10 Q. B. 257: *per Patteson, J.* The *bonâ fide* belief of the defendant in the charge preferred by him against the plaintiff, and of the plaintiff's guilt, is essential to the establishment of reasonable and probable cause, and it is for the jury to determine what was the plaintiff's belief in the matter, and whether, if he believed the plaintiff to have done what he imputed to him, he had reasonable grounds for that belief; for if he formed his conclusion rashly and inconsiderately, he is not justified in acting on his belief. *Douglas v. Corbett*, 6 E. & B. 514. *Stevens v. Midland Railway Co.* 10 Ex. 356; 23 L. J. Ex. 322. *Hinton v. Heather*, 16 Mee. & W. 131. *Huntley v. Simson*, 2 H. & N. 600; 27 L. J. Ex. 134. *Read v. Coker*, 22 L. J. C. P. 200.

[1] *The following is a Form of Declaration where the Plaintiff was charged with Felony:—*

For that the defendant falsely and maliciously, and without reasonable or probable cause, appeared before a justice of the peace, and charged the plaintiff with having feloniously stolen certain goods, and upon such charge procured the said justice to grant his warrant for apprehending the plaintiff, and bringing him before the said justice to be dealt with according to law, and under and by virtue of the said warrant caused the plaintiff to be arrested and to be imprisoned for a long time, and afterwards to be brought in custody before the said justice; and the said justice having heard the said charge, dismissed the same, and discharged the plaintiff out of custody, whereby the said prosecution was determined; and by reason of the premises the plaintiff has been injured in his reputation, and suffered pain of body and mind, and was prevented from attending to his business, and incurred expense in defending himself from the said charge, and in obtaining his release from the said imprisonment.

[2] The plea of not guilty puts in issue the fact of the arrest or prosecution by or through the instrumentality of the defendant, the question of malice and of the existence of reasonable and probable cause for the prosecution (*Cotton v. Brown*, 3 Ad. & E. 312); but not the fact of the discontinuance or termination of the proceedings, which, if alleged, must be specially traversed in order to be put in issue. *Watkins v. Lee*, 5 Mee. & W. 270. *Atkinson v. Raleigh*, 3 Q. B. 85. *Hadrick v. Heslop*, 12 id. 275. A plea of justification must state, that the facts relied upon as constituting reasonable and probable cause were known to the defendant at the time the charge was made, and formed the inducement for his putting the law in motion. *Delegal v. Highley*, 5 Bing. N. C. 950; 5 Scott, 169.

[3] The plaintiff must show that the prosecution was instituted by the defendant (*Barber v. Lipster*, 29 L. J. C. P. 161. *Fitzjohn v. Mackinder*, id. 167); as by evidence that he employed an attorney or agent to conduct the proceedings, gave directions respecting them, paid expenses, and personally interfered in getting up the case and preparing evidence. And he must give general evidence, showing that there was no reasonable ground for the prosecution. *Incledon v. Barry*, 1 Camp. 204 n.

In order to prove what took place before the magistrate the depositions must be produced (*Parsons v. Brown*, 3 C. & Kir. 296); or it must be proved that the evidence was not reduced into writing, and then oral evidence of what was said will be admissible. *Jeans v. Wheedon*, 2 M. & Rob. 486. *Clark v. Postan*, 6 C. & P. 423. If the depositions cannot be found, secondary evidence of their contents may be given (*Freeman v. Arkell*, 2 B. & C. 494); and if the plaintiff has been tried and acquitted, the acquittal may be proved by a certified copy of the record. 14 & 15 Vic. c. 99, s. 13.

Scandalous charges and accusations made by the defendant against the plaintiff, in connexion with the prosecution, are evidence of malice. *Chambers v. Robinson*, 1 Stra. 691.

If a count in *trespass* alleges malice, proof of it need not be given. *Harrison v. Taylor*, 27 L. J. Ex. 315.

If the plaintiff makes out a *primâ facie* case of malice, and want of reasonable and probable cause, the defendant must bring forward circumstances to show that he acted *bonâ fide*, and had reasonable ground for believing that the facts within his knowledge constituted the offence which he charged. *Weston v. Beeman*, 27 L. J. Ex. 57. *Delegal v. Highley*, *supra*. *Turner v. Ambler*, 10 Q. B. 260. *Wyatt v. White*, 29 L. J. Ex. 193. With a view to ne-

VIII. Of the Damages.[1]

MANDAMUS.

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(A) *Against Whom and to Enforce what Duties the Writ will be Granted*, p. 425.
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(13) „ *Lords of the Treasury*, p. 435.
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(C) „ *Form of the Writ*, p. 436.
(*a*) *Service of Writ*, p. 437.
(D) *Quashing or Superseding of Writ*, p. 437.
(E) *Of the Return to the Writ*, p. 437.
(F) „ *Demurring to the Return*, p. 439.
(G) „ *Traversing or Pleading to the Return*, p. 439.
(H) *Inspection of Documents*, p. 439.
(I) *Special Case*, p. 439.
(K) *Error*, p. 439.

gative malice, the knowledge of the defendant that the plaintiff had previously been convicted is receivable in evidence. *Thomas v. Russell*, 9 Ex. 764.

[1] "There are three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient as the basis of an action. 1. The damage to a man's fame, as if the matter of which he is accused be scandalous. 2. Where a man is put in danger to lose his life, limb, or liberty. 3. The damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused." *Per Holt, C. J.: Saville v. Roberts*, 1 Ld. Raym. 378. *Rowlands v. Samuel*, 11 Q. B. 41. To support such a claim the declaration must allege that the defendant was put to expense. *Foxall v. Barnett*, 2 E. & B. 298; 23 L. J. Q. B. 7.

(L) *Consequence of Return being False or Untrue*, p. 440.

(M) *Costs of Mandamus*, p. 440.

(N) *No Action lies for anything done in obedience to the Writ*, p. 441.

I. Under the Common-Law Procedure Act, 1854.

(A) *In what cases it may be Claimed.*[1]

(B) *Of the Declaration, Pleadings, and Proceedings.*[2]

(C) „ *Writ of Mandamus, and how it is Enforced.*[3]

(D) „ *Form of Judgment.*[4]

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[1] By the Common-Law Procedure Act, 1854 (17 & 18 Vic. c. 125, s. 68), "the plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which now may be enforced in such action, or separately, a writ of mandamus, commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is interested."

This provision does not affect the jurisdiction of the Court of Queen's Bench with respect to the prerogative writ of mandamus. (Sect. 75.)

Sect. 68 does not extend to the enforcing of a duty arising out of a personal contract. It must be considered as confined to those cases in which, before the act passed, a mandamus would have lain. *Benson v. Paull*, 25 L. J. Q. B. 274; 6 E. & B. 373.

The mandamus may be claimed in general to enforce the performance of a duty in which the plaintiff is personally interested, where such duty does not arise out of a mere personal contract. *Norris v. Irish Land Co.* 8 E. B. 512; 27 L. J. Q. B. 115.

Where a debt is of such a nature that a mandamus will be granted to enforce its payment, it is not necessary that the amount of the debt should have been previously ascertained, but such amount may be ascertained by the verdict of the jury in the action in which the writ of mandamus is claimed. *Ward v. Lowndes*, 28 L. J. Q. B. 265; 5 Jur. N. S. 1124. See *Burland v. the Local Board of Health*, 32 L.J.Q.B. 32. *Bush v. Beavon*, 8 Jur.N.S. 1015. A plea that such cause of action did not accrue within six years is bad. *Qu.? See Bush v. Bevon, supra.*

[2] By 17 & 18 Vic. c. 125, s. 69, "the declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains, or may sustain, damage by the non-performance of such duty, and that performance thereof has been demanded of him, and refused or neglected." And by sect. 70, "the pleadings and other proceedings in any action in which a writ of mandamus is claimed, shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party as in an ordinary action for the recovery of damages."

[3] By sect. 71, "in case judgment shall be given to the plaintiff that a writ of mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced."

"The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment. (Sect. 72.) No return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms. (Id.) The court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the act being done the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or a judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution. (Sect. 74.)

[4] *Form of Judgment for Plaintiff after Verdict that a Mandamus do Issue, under sect. 71 of the Common-Law Procedure Act*, 1854. (17 & 18 Vic. c. 125, sched. 32.)

[*The same as in the ordinary form of an entry of a judgment to the end of the postea, and then thus:*—] Therefore it is considered that a writ of mandamus do issue, commanding the defendant to [*here state the duty to be performed, or the thing to be done, as claimed by the declaration*]. And it is also considered that the plaintiff do recover of the defendant the said monies by the justices [*or* by the judge *or* baron] aforesaid, in form aforesaid, above assessed, and also £ for his costs of suit in this behalf.

In the margin of the judgment, opposite the first words, "Therefore it is considered," &c., *write*, Judgment signed the day of 18 *inserting the day of signing final judgment.*

(E) *Of the Costs.*[1]

(F) *Form of Writ of Inquiry to ascertain the Expense of doing an Act for which a Mandamus has Issued.*[2]

II. Of the Prerogative Writ of Mandamus.[3]

(A) *Against Whom, and to enforce what Duties the Writ will be granted.*

(*a*) *In General.*[4]

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[1] By 23 & 24 Vic. c. 126, s. 32, "in all cases in which a writ of mandamus issued under the provisions of the Common-Law Procedure Act, 1854, such writ shall, unless otherwise ordered by the court or judge, in addition to the matters directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving the writ, and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law recoverable."

[2] *Writ of Inquiry to ascertain the Expense incurred by the doing of any act, and for the doing of which a Mandamus was issued.* (17 & 18 Vic. c. 125, sched. 33.)

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas upon an application by A. B., the plaintiff, in an action against C. D. in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] at Westminster, our said court did, on the day of A.D. [*date of the order*], direct that [*state the terms of the order commanding the act to be done at the defendant's expense*], and the said A. B. [*or* and E. F., *if another person than the plaintiff has been appointed by the court to do the act*], has done the said act so directed to be done; and in order to enable our said court to ascertain the amount of the expense of the doing the same, we command you, that by the oaths of twelve good and lawful men of your bailiwick, you diligently inquire what is the amount of the expenses incurred by the said A. B. [*or* by E. F. *as the case may be*], in the doing of the said act, and that you send to us [*or in the Common Pleas*, to our justices, *or in the Exchequer*, to the barons of our Exchequer] at Westminster, on the day of now next ensuing, the inquisition, which you shall thereupon take under your seal, and the seal of those by whose oath you shall take that inquisition, together with this writ.

Witness [*name of Chief Justice, or, in the Exchequer, of Chief Baron*] at Westminster, the day of in the year of our Lord

[3] *See* Tapping on Mandamus; Impey, id.; Grant on Corporations.

[4] Nothing contained in the Common-Law Procedure Act, 1854, takes away the jurisdiction of the Court of Queen's Bench, nor is any writ of mandamus issued out of that court invalid by reason of the right of the prosecutor to proceed by action for mandamus under that act. 17 & 18 Vic. c. 125, s. 75.

In general, a mandamus can only be successfully applied for where there is no other specific legal remedy (*Reg. v. Hull & Selby Railway Co.* 6 Q. B. 70. *R. v. Bishop of Chester*, 1 T. R. 404. *R. v. St. Katherine's Docks*, 4 B. & Adol. 360), and it is not claimable merely to anticipate a probable defect of duty. *Blackborough v. Davis*, 1 P. Wms. 48. The obligation must be imperative, such as leaves the party no discretion. *R. v. Hughes*, 3 Ad. & E. 429. *R. v. Mayor of London*, 3 B. & Adol. 254. *R. v. Eye*, 1 B. & C. 85. *R. v. Bishop of Gloucester*, 2 B. & Adol. 158); but if the discretion has been exercised with manifest injustice the court may interfere. *R. v. Justices of Lancaskire*, 7 B. & C. 692. *Ex parte Becke*, 3 B. & Adol. 704. *R. v. West-Riding Justices*, 5 id. 671. The act to be done must be a public duty; but the value to the public is not nicely weighed. *R. v. Eastern Counties Railway Co.* 10 Ad. & E. 557. *R. v. Bank of England*, 2 B. & A. 622. *R. v. Baker*, 3 Burr. 1265. The court will not extend the remedy by mandamus to cases not within it, merely because the parties waive the objection. *R. v. Lords of Treasury*, 16 Q. B. 357. And it will not grant a mandamus in a case where it would be fruitless or useless (*R. v. Bridgman*, 15 L. J. Q. B. 208. *R. v. Northwick Savings' Bank*, 9 Ad. & E. 729. *R. v. Heathcote*, 10 Mod. 55. *R. v. Bishop of London*, 1 Wils. 11), or where performing the act commanded would subject the party to an action (*R. v. Heathcote*, 10 Mod. 51. *R. v. Dyer*, 2 Ad. & E. 606. *See* 6 & 7 Vic. c. 67, s. 3); or where it is impossible to perform the act (*R. v. London & N. W. Railway Co.* 6 Rail. Ca. 634); or where it is unnecessary (*R. v. Pitt*, 10 Ad. & E. 272. *Anon.* Lofft, 148. *R. v. Llandilo Roads*, 2 T. R. 232); neither will it be granted where no definite purpose would be served, but the party claiming the writ seeks merely to gratify curiosity (*R. v. Justices of Staffordshire*, 6 Ad. & E. 90); or if the mandamus would be too uncertain to obey (*R. v. Bishop of Ely*, 1 Wils. 266; 1 W. Black. 59); or the application is merely vexatious (*R. v. St. John's College*, Comb. 238); or would be indecorous in its nature. *R. v. Coleridge*, 1 Chit. R. 597.

On the ground that an action might be brought, a mandamus to compel a railway company to pay to another company a statutory compensation for tolls was refused. *Reg. v. Hull & Selby Rail. Co.* 6 Q. B. 70; 3 Rail.

Ca. 705 ; 8 Jur. 491. But where an agreement with a landowner to make compensation for damage done by their works was not under seal, the court granted a mandamus against the railway company to compel payment, on the ground that no action would lie. *Reg. v. Bristol & Exeter Railway Co.* 3 Rail. Ca. 777. And the directors of a company may be compelled to pay a judgment-debt by mandamus, where there is no other remedy. *Rex v. St. Katherine's Dock Co.* 1 Nev. & M. 121; 4 B. & Adol. 360. There must be a previous application (*Rex v. Justices of Nottingham*, 5 Nev. & M. 160 ; 3 Ad. & E. 500), and a positive refusal by the proper parties. *Rex v. Wilts & Berks Canal Co.* 5 Nev. & M. 344; 3 Ad. & E. 477. *Rex v. Brecknock Canal Co.* 4 Nev. & M. 871 ; 3 Ad. & E. 217. Thus, if it is sought to enforce the performance of works which a public company is enjoined by statute to execute, the work must be specifically pointed out, and the company required to do it before the mandamus is applied for. *Reg. v. Bristol & Exeter Railway Co.* 4 Q. B. 162; 12 L. J. Q. B. 106; 3 Gale & D. 384. *Reg. v. St. Luke's*, 31 L. J. Q. B. 50.

It is discretional in the court to grant or refuse a mandamus, and it is never granted unless adequate reasons are assigned. *Rex v. Bishop of Chester*, 1 T. R. 396. *Rex v. Mayor & Aldermen of London*, 2 id. 177. *Jones v. Bishop of Ely*, 2 id. 290. *Rex v. Commissioners of Excise*, id. 38. *Rex v. Bristol Dock Co.* 2 Selw. N. P. 1062.

Where there is another specific legal remedy the court will refuse to interfere by mandamus (*Rex v. Windham*, Cowp. 377. *R. v. Bank of England*, 2 Dougl. 524. *R. v. Bristol Docks*, 12 East, 429. *R. v. Ponsford*, 3 Dowl. P. C. (N. S.) 116. *Rex v. Bishop of Chester*, 1 T. R. 396); as where the party has a right to redress in equity (*Rex v. the Marquis of Stafford*, 3 T. R. 646) ; but not that an indictment will also lie. *Rex v. Severn*, 2 B. & A. 646.

A mandamus will not be granted to enforce a mere equitable right or a trust. *Rex v. the Marquis of Stafford*, *supra*. Thus a mortgagee of tolls and toll-houses, having only an equitable right to enforce payment of the principal and interest, is therefore not entitled to a mandamus for that purpose. (*Reg. v. Balby, &c. Turnpike Road*, 22 L. J. Q. B. 164 ; 1 Bail. C. C. 134) ; nor where there is another specific remedy, as by writ or information in nature of a *quo warranto* (*Rex v. the Mayor of Colchester*, 2 T. R. 259. *Rex v. Whitstable*, 7 East, 353 ; 3 Smith, 369) ; or a *quare impedit* (*Rex v. the Bishop of Chester*, 1 T. R. 396) ; or to do that which is likely to be done (*Anon.* Lofft, 148) ; or to execute one part of a power granted by act of parliament (*Rex v. Birmingham Canal Nav.* 2 Bl. Rep. 738) ; or to restore a party to an office from which he has been irregularly suspended, if it appear there were sufficient grounds for suspension (*Rex v. the Mayor of London*, 2 T. R. 177) ; or to restore to office where it is confessed that the removal was just, though no notice was given (*Rex v. the Axbridge Corporation*, Cowp. 523) : nor will they grant a mandamus in opposition to a long-continued usage, where the words of a charter are in any degree doubtful. *Rex v. the Corporation of Chester*, 1 M. & S. 101) ; nor to a ministerial officer, to compel him to do his duty, the remedy being by indictment. *Rex v. Bristow*, 6 T. R. 168. *Rex v. Surrey* (*Treasurer*), 1 Chit. Rep. 650. *Rex v. Johnson*, 4 M. & S. 515. *Reg. v. North Riding*, 6 L. T. (N. S.) 351. But the general rule that indictment and not mandamus is the proper mode of enforcing obedience by a ministerial officer to an order of sessions, does not prevail where the court sees that the ministerial officer is put forward merely as a nominal party, and that other persons are those who are to be compelled to perform the duty. *Reg. v. Wood Ditton*, 18 L. J. M. C. 218.

The Court of Queen's Bench has no jurisdiction to grant a mandamus to magistrates to make an order of maintenance on a particular parish (*Rex v. Middlesex*, 4 B. & A. 298) ; or to admit to any office that is not of a public nature (*Anon.* Comb. 41) ; or to swear in a party who has had judgment on an information for an usurpation (*Rex v. Hearle*, 1 Stra. 625 ; 11 Mod. 390) ; or where the office is already the subject of a suit in equity (*Rex v. Wheeler*, Ca. Temp. Hard. 99) ; or in favour of an officer who is only suspended ; or for a town-clerk elected *durante bene placito* (*Rex v. Approved Men of Guildford*, 1 Lev. 162 ; 1 Keb. 868) ; or to the Gunmakers' Company, to restore a member to the office of approver of guns (*Vaughan v. Gunmakers' Co.* 6 Mod. 82) ; or to restore a person to the place of clerk of a company in a corporation (*Rex v. White*, id. 18 ; 3 Salk. 230) : nor will the court grant a mandamus to summon specific jurors upon a court-leet (*Rex v. Banks*, 1 W. Black. 452) ; or to admit a person to an office contrary to a local custom (*Rex v. the Mayor of London*, 1 T. R. 423. *Rex v. Marshall*, 2 id. 2. S. P. *Rex v. Mayor of Chester*, 1 M. & S. 101) ; or to compel a canal company, pursuant to the provisions of an act of parliament, to proceed to an assessment of the value of land taken by them for the purpose of the canal (*Rex v. Stainforth Canal*, id. 32) ; or to compel an inferior jurisdiction to grant a new trial in a cause before it, in which alleged injustice had been done to one of the parties. *Ex-parte Morgan*, 2 Chit. Rep. 250. *Rex v. Marquis of Conyngham*, 1 D. & R. 529. *Arden v. Connell*, 5 B. & A. 885.

Where a condition is to be performed it must be fulfilled before a mandamus lies. *Reg. v. Deptford Pier Co.* 1 Per. & D. 128.

Where a suit is pending in Chancery the court will not grant a mandamus. *Reg. v. Pitt*, 2 id. 385. But it is no answer to a mandamus that a prior return shows an officer incompetent. *Rex v. Mayor of London*, 1 Nev. & M. 285.

A mandamus does not lie to enforce an officer's half-pay at the instance of his executors. *Ex-parte Rickets*, 4 Ad. & E. 999 ; 6 Nev. & M. 523.

Where a statue does not allow a removal of proceedings by *certiorari*, the court will not indirectly bring them under review by a mandamus. *Rex v. Justices of Yorkshire*, 3 Nev. & M. 802; 1 Ad. & E. 563. Two circumstances must concur to authorise the issuing of a mandamus—a specific legal right, and the absence of an effectual remedy. If it be doubtful whether there be a remedy, the court will issue a mandamus. *Rex v. Nottingham Waterworks*, 1 Nev. & P. 480. A mandamus will not be granted to enforce the general law of the land, if an action will lie, although in some cases it will be granted even where an indictment may be preferred. *Ex-parte Robins*, 7 Dowl. P. C. 566. So, one writ of mandamus cannot issue at the instance of two persons for the enforcement of separate claims, although they have been successors in the same office in respect of which the claim arises. *Ex-parte Scott*, 8 Dowl. P. C. 328.

A mandamus lies to compel a railway company to complete the purchases of land (*Reg. v. Eastern Counties Railway Co.* 2 Per. & D. 648), and the completion of the line according to the project. Id. 46.

A mandamus was refused requiring the local authority of a district to enforce an order of justices under 18 & 19 Vic. c. 121, for the abatement of a nuisance. *Ex-parte Bassett*, 7 E. & B. 280.

The court will not interfere by mandamus with the judicial committee of the Privy Council. *Ex-parte Smith*, 5 Nev. & M. 145; 4 id. 582.

A mandamus does not lie to commissioners of customs to restore wrecked goods. *Rex v. Commissioners of Customs*, 1 Nev. & P. 536; 5 Ad. & E. 380.

A mandamus lies with respect to the appointment of assessors under a local drainage act. *Rex v. Whitaker*, 9 B. & C. 648.

A mandamus will be granted to arbitrators under a canal act to appoint an umpire (*Rex v. Goodrich*, 3 Smith, 388), or the trustees of a meeting-house to admit a dissenting teacher duly elected. *Rex v. Baker*, 3 Burr. 1265; 1 Bl. Rep. 300, 352); or to admit and restore the minister of an endowed dissenting meeting-house (*Rex v. Jotham*, 3 T. R. 575); or to a registrar to certify a dissenting meeting-house. *Rex v. Justices of Derbyshire*, 3 Burr. 1791; 1 Bl. Rep. 606.

Though a mandamus to churchwardens, &c. to make a church rate will not be granted, that being a matter of ecclesiastical cognisance, yet it will be granted to compel them to assemble and determine whether a rate should be made. *Rex v. St. Margaret*, 4 M. & S. 250. *Rex. v. Wilson*, 5 D. & R. 602. *Rex v. St. Peter's, Thetford*, 5 T. R. 364. *Rex v. Hawarth*, 12 East, 556.

A mandamus lies to deliver up the keys of a church. *Anon.* 2 Chit. 255.

A mandamus lies to the ecclesiastical officers to swear in a churchwarden (*Rex v. Henchman*, Ca. Temp. Hard. 130; 5 Mod. 325; Comb. 417; 6 Mod. 89), duly elected. *Anon.* 2 Chit. Rep. 254.

A mandamus does not lie to the Scriveners' Company to admit a notary, unless the party be duly qualified. *Rex v. Scriveners' Co.* 10 B. & C. 511.

The validity of a resolution of a vestry to close the poll for the election of churchwardens at a particular hour is a fit question to be tried upon a mandamus. *Rex v. Bishop of Winchester*, 7 East, 573.

A mandamus will not lie to compel a constable to pay money levied by him under a distress and sale, and who, under an idea of its having been erroneous, had restored the money to the purchaser and the goods to the owner. *Morley v. Stacker*, 6 Mod. 83.

A mandamus may be had by a candidate for the office of clerk to the commissioners of the land-tax. *Rex v. the Commissioners of the Land-Tax for St. Martin*, 1 T. R. 146.

A mandamus may be granted to abate a nuisance. *Rex v. St. John's College, Cambridge*, 4 Mod. 237.

A mandamus will not lie to an insurance company to transfer shares standing in the name of a bankrupt into the names of the assignees. *Rex v. London Assurance Co.* 1 D. & R. 310; 5 B. & A. 899. *Rex v. Bank of England*, 399. Nor to a treasurer of a county to reimburse constables who have expended money in conveying rogues, vagabonds, and disorderly persons. *Rex v. Earle*, 2 Burr. 1197. Nor will the court grant a mandamus to a ministerial officer, such as the treasurer of a county, to obey an order of the court of quarter sessions. *Rex v. Bristow*, 6 T. R. 168. *Rex v. Surrey*, 1 Chit. Rep. 650; and see *Rex v. Johnson*, 4 M. & S. 515.

A mandamus will lie to compel the delivery of the key of a chest, containing the deeds of a private charity for the poor of a parish, to the person entitled to its custody under the trust-deed. *Reg. v. Ottery St. Mary*, 4 Q. B. 157; 12 L. J. Q. B. 118.

The court will not grant a mandamus to compel the repair of a turnpike-road. *Rex v. Oxford, &c. Trustees*, 12 Ad. & E. 427; 4 Per. & D. 154.

A mandamus for the payment of booty by the East India Company to the commander-in-chief of the forces was refused. *Ex-parte Napier*, 18 Q. B. 692; 21 L. J. Q. B. 332.

It is no ground of granting a mandamus, where it is not by law applicable, that the parties waive the objection. *Reg. v. Treasury, Lords of*, 16 Q. B. 357; 20 L. J. Q. B. 305.

If persons appointed by statute to elect deputies are empowered to decide upon the validity of objections to candidates, a mandamus will not lie if they have exercised their jurisdiction by deciding they were not qualified. *Reg. v. Goodrich*, 19 L. J. Q. B. 413. *Reg. v. Leicester*, 15 Q. B. 671.

The court will not, in general, grant a mandamus upon a second application after a previous refusal of the writ. *Ex-parte Thompson*, 6 Q. B. 721; 14 L. J. Q. B. 176; *Reg. v. Pickles*, 3 Ad. & E. (N. C.) 59. *Qu. See* also 8 Ad. & E. 413; 4 B. & C. 891; 9 Dowl. P. C. 287; 2 Burr. 782. Leave is sometimes given to renew the motion.

(*b*) *In Particular.*

(1) *As to Corporate Officers.*[1]

[1] *As to Corporate Officers.* — A mandamus lies to swear in a party to the office of mayor (*Johnston v. Taylor*, T. Raym. 431. *See* 1 Geo. 1, c. 4); or to restore a man as a burgess of a corporation (*Rex v. Wilton*, 5 Mod. 256); or sword-bearer (*Roe's case*, Comb. 145); or recorder (*Rex v. Wells, Corporation of*, 4 Burr. 1999); or a common councilman (*Bret & Johnston's case*, Comb. 214), or a clerk to a company of masons (*Stamp's case*, id. 348); or to proceed to an election of a mayor (*Rex v. Corporation of Oxford*, Ca. Temp. Hard. 177); or to elect an officer upon the 11 Geo. 1, c. 4, although there has been an election *de facto* (*Rex v. Newsham*, Say. 212. *Borough of Bossiny*, 2 Stra. 1003. *Case of Aberystwith*, id. 1157. *Rex v. Heathcote*, 10 Mod. 59. *Case of Corporation of Scarborough*, 2 Stra. 1180); or to swear in a town-clerk (*Rex v. Slatford*, Comb. 419; 5 Mod. 318); or where there has been an election merely colourable but clearly void. *Rex v. Cambridge*, 4 Burr. 2008.

Upon an affidavit that one of two candidates for an office had a majority only by means of illegal votes, the court granted a mandamus to the corporation to admit and swear in the other, who appeared on the affidavits to have the greater number of legal votes. *Rex v. Bedford Level*, 2 Smith, 535; 6 East, 356.

Where a person has been elected mayor of a corporation who is disqualified, the court, upon receiving competent information of this fact, will grant a mandamus to the electors to proceed to a new election upon the 11 Geo. 1, c. 4. *Rex v. Corporation of Bedford*, 454. So a writ has been granted to compel a mayor and capital burgesses of a corporation to fill up two vacancies occasioned by the death of two capital burgesses, though there was a *quo warranto* information depending against the mayor. *Rex v. Grampond*, 6 T. R. 301. So it will lie to admit an inhabitant of a borough by prescription to be a free burgess, if it appear that he had an inchoate right to be a free burgess, and that such office is a corporate office by prescription (*Rex v. Mayor of West Looe*, 2 D. & R. 178; 3 B. & C. 677); or to admit a jurat (*Rex v. Mayor of Rye*, 2 Ld. Kenyon, 468.

The 11 Geo. 1, c. 4, is not confined to annual officers. *Rex v. Mayor of Thetford*, 8 East, 270.

Payment of a fine imposed by the bye-laws of a corporation refusing to accept a corporate office does not exempt the party elected from serving the office, and he may be compelled to do so by mandamus. *Rex v. Bower*, 2 D. & R. 842; 1 B. & C. 585.

A mandamus lies to deliver up corporation books. *Rex v. Ingram*, 1 W. Black. 50. So for the burgesses, &c. to inspect the corporation books. *Rex v. Chester*, 1 Chit. Rep. 477.

A mandamus lies to put the corporate seal to a certificate of the election of a recorder. *Rex v. Mayor of York*, 4 T. R. 699.

A mandamus lies to compel an election where the local act is only directory as to the time of election. *Rex v. Mayor of Norwich*, 1 B. & Adol. 310.

Where tellers at an election by poll cannot agree as to numbers, a mandamus lies to complete the election. *Rex v. St. Luke's, Middlesex*, 2 Nev. & M. 464. So, after ouster of a corporate officer, a mandamus lies for a new election (*Rex v. M'Kay*, 4 B. & C. 658); or to ascertain the validity of the mode of election. *Rex v. St. James's, Churchwardens, &c.* 5 Ad. & E. 391.

To obtain a mandamus to enrol a corporate officer, there must be an inchoate right to be a corporator. *Rex v. West Looe, Mayor, &c.* 3 B. & C. 677; 3 D. & R. 414.

A mandamus lies to insert burgesses named on the roll. *Reg. v. Eye, Mayor of*, 8 Ad. & E. 670; 2 Per. & D. 348. But where a town-councillor's name was omitted on the burgess-roll of the corporation, and the office was filled by another: — *Held*, that the remedy was *quo warranto*, not mandamus. *Rex v. Oxford, Mayor of, &c.* 1 Nev. & P. 474. And where the office of council is full no mandamus lies. *Rex v. Derby, Councillors of*, 7 Ad. & E. 419; 2 Nev. & P. 589. And one of several freemen claiming against a corporation the same right cannot have a mandamus. *Reg. v. Frost*, 1 Per. & D. 75.

A dispute arose between the freemen of the new corporation of Beverley and the old corporation, with respect to the right of cutting down trees on certain pastures formerly granted to the old burgesses of the old corporation of Beverley, and an injunction to restrain the cutting down of the trees having been obtained by the corporation, a mandamus was granted at the instance of the freemen to permit them to inspect the deeds, &c. concerning the pastures in question, and which were in the possession of the new corporation, with a view to dissolve the injunction. *Reg. v. Mayor of Beverley*, 8 Dowl. P. C. 140. But a mandamus does not lie to a corporation to compel them to meet and consider the propriety of removing certain persons on account of non-residence. *Rex v. Mayor of Totnes*, 5 D. & R. 481. So, where a charter is granted to a corporation to hold a court for the trial of causes, the disuse of that court for two hundred years, and the want of funds to hold it, are no answer to a rule for a mandamus commanding them to hold it. *Rex v. Mayor of Wells*, 4 Dowl. P. C. 562.

So where an election of a person as a mayor for a year immediately succeeding that during which he has served the office, and which by 9 Anne, c. 20, s. 8, is consequently void, the court will grant a mandamus to proceed to another election pursuant to 7 Wm. 4, &

(2) *As to Ecclesiastical Courts and Persons.*[1]

(3) „ *Justices of the Peace.*[2]

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1 Vic. c. 78, s. 26. *Reg. v. Pembroke Corporation*, 8 id. 302.

The court has no power by mandamus to compel the mayor and assessors to insert names of parties on the burgess lists, where expunged upon objection that the payment of the shilling required by 2 Wm. 4, c. 45, s. 56, had not been made. *Rex v. Hythe, Mayor of, &c.*, 1 Nev. & P. 239; S. C. 5 Ad. & E. 832.

The court refused, on a motion for a mandamus, to determine a corporation question of consequence, but directed the writ to issue that the question might be decided on the return. *Rex v. Everett*, Ca. Temp. Hard. 261.

If notice be given in writing, ten days before the application, for a mandamus to proceed in the election of a corporate officer of a borough, pursuant to the 6 & 7 Vic. c. 89, s. 5, the rule for the mandamus may be made absolute in the first instance. *See* vol. iii. p. 278.

A mandamus lies to restore the ensigns of mayoralty to a succeeding mayor. *Rex v. Owen*, 5 Mod. 314.

[1] *To Ecclesiastical Courts and Persons.*— A mandamus lies to instal a person into a prebend (*Rex v. Bishop of Salisbury*, And. 20); or to restore the registrar of a bishop's court (*Anon.* Comb. 264); or a chaplain, where there is no visitor (*Rex v. Bishop of Chester*, 2 Stra. 797); or to restore a curate to his chapel (*Rex v. Barker*, 1 Bl. Rep. 300. *Rex v. Blooer*, 2 Burr. 1043); but not to compel a dean to license a second curate (*Anon.* 2 Chit. Rep. 253); or a bishop to license a curate of an augmented curacy (*Rex v. Bishop of Chester*, 1 T. R. 396); or to grant a license to a clergyman to preach as lecturer of a parish (*Rex v. Bishop of London*, 1 Wils. 11; 2 Stra. 1192); or to a bishop to license a lecturer without the consent of the rector, where such lecturer is supported by voluntary contributions (id. 1 T. R. 331); or to a rector to certify to the bishop the election of a lecturer (*Rex v. Field*, 4 id. 125); or, where no immemorial custom appeared, to appoint a lecturer in a parish church (*Rex v. Bishop of Exeter*, 2 East, 462): but a mandamus to the archbishop and bishop lies to license a lectureship, or show cause, &c., if it appear that the candidate has a right. *Rex v. Bishop of London*, 13 East, 418; id. 427, n. *Rex v. the Archbishop of Canterbury*, 15 East, 117.

A refusal by the archbishop must appear before the court will entertain a motion for a mandamus to the bishop to license a lectureship, which he has refused to do on the alleged ground of unfitness. *Rex v. Bishop of London*, 13 East, 419.

A mandamus may be obtained for refusing to admit a residentiary canon of a church, who appears duly to have been elected (*Webber's case*, Lofft, 254, 266. *Bishop of Chichester v. Harward*, 1 T. R. 652); but it does not lie to a visitor who has deprived a prebend for incontinency (*Rex v. Bishop of Chester*, 1 Wils. 206); nor to a visitor to exercise his visitorial power over the temporalities of a cathedral church, concerning the intermediate profit during the vacancy of a stall (*Rex v. Bishop of Dunelmensen*, 1 Burr. 567; 2 Ld. Kenyon, 296); nor to a visitor to restore a canon whom he had expelled; or to reverse his own sentence (*Rex v. Bishop of Chester*, 1 W. Black. 22. See *Reg. v. Dean & Chapter of Chester*, 15 Q. B. 513; 19 L. J. Q. B. 485. *Reg. v. Dean, &c. of Rochester*, 17 Q. B. 1. But if the visitor of a college refuses to exercise his visitorial power by hearing an appeal, the Court of Queen's Bench will grant a mandamus to set him in motion, but cannot afterwards review his decision. *Ex-parte Buller*, 1 Jur. N. S. 709.

The court refused a mandamus requiring a bishop to issue a commission of inquiry, under the 3 & 4 Vic. c. 86, into the conduct of a clerk in holy orders, pursuant to the requisition of a stranger to the parish (*Reg. v. Chichester, Bishop of*, 29 L. J. Q. B. 23; 6 Jur. N. S. 120); and the court were divided on the question whether the archbishop could be thus compelled to confirm the election and invest and consecrate a bishop elected by the dean and chapter. *Reg. v. Archbishop of Canterbury*, 11 Q. B. 483; 17 L. J. Q. B. 252.

A mandamus will not lie to the vicar, &c. to elect an organist to the parish church, for it is optional with the parishioners whether the organ shall be played. *Reg. v. St. Stephens*, 14 L. J. Q. B. 34; 2 D. & L. 571.

Where "inhabitants" are to vote in the election of a chaplain, a mandamus will not lie to try the meaning of that word. *Rex v. Sandford*, 1 Nev. & P. 328. So, a mandamus will not lie to compel a bishop to assign reasons why he disapproves of a registrar. *Rex v. Bishop of Gloucester*, 2 B. & Adol. 158.

A mandamus lies for inspection of a bishop's registry of presentations. *Rex v. Bishop of Ely*, 8 B. & C. 112; 2 M. & R. 127.

A mandamus does not lie to investigate the appointment of sexton. *Rex v. Stoke Damerell*, 1 Nev. & P. 56.

The court cannot grant a mandamus to a rector to bury a corpse in a vault, or in any particular part of the churchyard, he having a right to exercise a discretion on the subject. *Ex-parte Blackmore*, 1 B. & Adol. 122. *See* Burial, vol. iii. p. 9.

[2] *To Justices of the Peace.*—A mandamus lies to justices to proceed against a Quaker for a church-rate. *Rex v. Freeman*, 2 Ld. Keny. 19. So, to the justices of the peace to swear overseers to their accounts (*Rex v.*

Justices of Middlesex, 1 Wils. 125. *Rex v. Carter*, 4 T. R. 246. *Rex v. Pascoe*, 2 M. & S. 343); or to summon a person for not paying poor-rates. *Anon.* 2 Chit. 257; 8 D. & R. 220. And magistrates may be compelled by mandamus to issue a distress-warrant for levying a poor-rate. *Reg. v. Cheek*, 11 Jur. 86, n. *Reg. v. Middlesex*, 12 L. J. M. C. 36; 7 Jur. 252; 2 Dowl. N. S. 385. *Reg. v. North Riding*, 6 C. P. 351. And it is no objection to a rule for a mandamus to justices to issue their warrant of distress for the levy of poor-rates that it includes two separate and distinct rates. *Reg. v. Ellis*, 2 Dowl. N. S. 361; 12 L. J. M. C. 20. They may be so required to rehear an appeal against an order of removal. *Rex v. Justices of Leicestershire*, 1 M. & S. 442. But they refused a mandamus to compel a magistrate to enforce a conviction for the plaintiff, where he had returned that the defendant was convicted of the penalty before him, but that the said conviction was invalid in law. *Rex v. Robinson*, 3 Smith, 274. Nor will the court grant a mandamus to magistrates to order them to issue warrants of distress to levy a poor-rate on persons who have refused to pay, unless these persons have been previously summoned by the justices (*Rex v. Benn*, 6 T. R. 198); nor grant a mandamus to justices to rate a parish within their jurisdiction, in aid of another parish having exclusive jurisdiction (*Rex v. Holbeche*, 4 T. R. 778); nor to make a new election of a county treasurer on the ground that one of the justices, who had voted at the election, had not taken the qualification-oath required by the stat. 18 Geo. 2, c. 20 (*Rex v. Justices of Herefordshire*, 1 Chit. Rep. 700); nor to justices to make an order of maintenance on a particular parish (*Rex v. Justices of Middlesex*, 4 B. & A. 298. *Rex v. Corporation of Eye*, id. 271. *Rex v. Mayor of Truro*, 3 id. 590); nor to justices, where they consider they have no jurisdiction. *Rex v. Justices of Kent*, 14 East, 399. And the court will not grant a mandamus commanding justices to do an act which may render them liable to an action. *Rex v. Justices of Buckinghamshire*, 2 D. & R. 689; S. C. 3 Nev. & M. 68): therefore they refused such a writ to compel a magistrate to enforce a conviction, when it was doubtful whether such a conviction was good for want of setting out the evidence on which it was proceeded on. *Rex v. Broderip*, 7 D. & R. 861; S. C. 5 B. & C. 239. And if the justices have exercised their jurisdiction, and decided the matter of law or fact in issue, the court will not review their decision on the application for a mandamus, or allow the writ, however erroneous the decision of the justices may be. *Reg. v. Bolton* (*Recorder*), 18 L. J. M. C. 139.

A mandamus will not be granted to compel the quarter sessions to give their reasons for their judgment, or make special entries on their records (*Rex v. Justices of Devon*, 1 Chit. Rep. 34); nor to direct them to enter continuances (*Rex v. Justices of* ——, id. 164. *Rex v. Jukes*, 8 T. R. 625); or to review their decision on an appeal (*Rex v. Justices of Worcestershire*, 1 Chit. Rep. 649. *Rex v. Caernarvon Justices*, 4 B. & A. 86); or to dismiss an appeal at the sessions (*Rex v. Justices of Wilts*, 2 Chit. Rep. 257); nor will they interfere to regulate the practices of a court of quarter sessions, unless it appears to be manifestly wrong or unjust (*Rex v. Justices of Essex*, id. 385); nor to inspect the books of the quarter sessions. *Rex v. Sheriff of Chester*, 1 id. 477. *Herbert v. Ashburner*, 1 Wils. 297.

A mandamus will not be granted to justices of the peace to license a public-house (*Rex v. Justices of Nottingham*, Sayer, 217. *Giles' case*, 2 Stra. 881. *Rex v. Farringdon Without*, 4 D. & R. 735. See *Rex v. Surrey*, 5 D. & R. 308); nor does it lie to justices at sessions commanding them to state a special case (*Peal's case*, 6 Mod. 249); or upon a supposed failure of duty in the justices of the peace to remove a man from a parish after he had offered security to indemnify that parish. *Reg. v. Cory*, 3 Salk. 230.

A mandamus to the justices of sessions to allow an item of charge in the coroner's account refused. *Rex v. Kent*, 11 East, 229.

If justices decline to enter upon a matter in which they have jurisdiction, they will be compelled by mandamus. *Reg. v. Bridgeman*, 15 L. J. M. C. 44; 10 Jur. 159. But even in such a case the court may, it seems, in the exercise of its discretion, refuse the writ (*Reg. v. Ingham*, 3 New Sess. Ca. 689. *Ex-parte Baldwin*, 13 Jur. 563. *Ex-parte Davy*, 2 Dowl. N. S. 24), especially if the question of jurisdiction be doubtful. *Reg. v. Rawlinson*, 8 Jur. 108.

If the preliminary point be matter of fact, the court will not review the decision of the justices; if it be matter of law, and the court can see that the justices came to a wrong conclusion, the mandamus will go to compel them to exercise their jurisdiction. *Reg. v. Kesteven*, 3 Q. B. 800; 1 New Sess. Ca. 151. *Reg. v. Flintshire Justices*, 16 L. J. M. C. 55; 1 B. C. Rep. 33; 2 New Sess. Ca. 572. *Reg. v. Sussex Justices*, 1 id. 438. *Reg. v. Surrey Justices*, 3 D. & L. 573; 15 L. J. M. C. 46. *Reg. v. Oxfordshire Justices*, 4 Q. B. 177; 3 Gale & D. 348. As where the sessions have refused to hear an appeal, upon an erroneous opinion that the notice of appeal was insufficient. *Rex v. Cornwall Justices*, 5 Ad. & E. 134; 2 Har. & W. 134.

If the justice has declined jurisdiction, on the erroneous ground that a previous notice ought to have been given where none was necessary, he will be compelled by mandamus (*Reg. v. Bingham*, 4 Q. B. 877); but not if he has exercised his jurisdiction, though erroneously. *Reg. v. Blanshard*, 13 Q. B. 877; 18 L. J. M. C. 110.

No mandamus lies unless the justices have jurisdiction. *Rex v. Bateman*, 4 B. & Adol. 553. So where magistrates, from a doubt of their jurisdiction, decline giving possession of the premises to a landlord, pursuant to 11 Geo. 2, c. 19, s. 6, the court

(4) *Concerning Manors.*[1]

will not compel them by mandamus to do so. *Ex-parte Fulder*, 8 Dowl. P. C. 535. And the court will not grant a rule *nisi* for a mandamus to compel justices to issue their warrant to levy expenses of cutting a hedge pursuant to 5 & 6 Wm. 4, c. 50, s. 65, unless it appear that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand. *Ex-parte Whitmarsh*, 8 Dowl. P. C. 431.

By the 50 Geo. 3, c. 69, s. 1, it is enacted, "that churchwardens and overseers shall, within fourteen days after other overseers shall be nominated to succeed them, deliver on oath before two justices an account in writing of all sums received, &c. by them during their year of office, and such justices are authorised and empowered, if they shall so think fit, to examine into the matter of such accounts, and to disallow unfounded and reduce exorbitant items:— *Held*, that these words rendered it imperative on the justices to examine (and if necessary, disallow or reduce) the accounts, when objections were made to any part of them by any rated inhabitant at the special sessions. And where the justices had signed and allowed such accounts, after verification of them by the churchwardens and overseers, without examining into them, although certain rated inhabitants objected to certain items, the court granted a mandamus to them to examine and allow the accounts. *Reg. v. Justices of Cambridgeshire*, 8 Dowl. P. C. 89. And where an appeal against a poor-rate is entered, and the applicant does not appear to support his appeal, the sessions still have power to hear the appeal, and make an order for the respondent's costs upon the appellants; and a mandamus granted. *Rex v. Essex*, 1 id. 539.

Where a rule *nisi* for a mandamus to justices to hear an appeal is discharged, with costs to be paid to the justices by the appellants, the parish which appeared to support the refusal of the justices is not entitled to its costs, although served with the rule *nisi*, and although the justices did not appear by counsel. *Rex v. Staffordshire*, 1 Dowl. P. C. 507.

If certain magistrates attending at special sessions do not take part in a decision of the sessions, they ought not to be brought before the Court of Queen's Bench on an application for a mandamus in respect of that decision. *Reg. v. Justices of Wilts*, 8 Dowl. P. C. 717.

If the jurisdiction be doubtful the mandamus will be refused. *Rex v. Twyford*, 5 Ad. & E. 430. *Rex v. Justices of Buckinghamshire*, 3 Nev. & M. 68.

A mandamus lies to the sessions to state a case (*Rex v. Justices of Pembroke*, 2 B. & Adol. 391. *Ex-parte Inhabitants of Jarvin*, 9 Dowl. P. C. 120); or to hear an appeal. *Rex v. Tucker*, 3 B. & C. 544; 5 D. & R. 434. But a mandamus does not lie to justices to receive evidence which ought not to affect their decision (*Rex v. Minshull*, 1 Nev. & M. 277); or to alter a verdict at the sessions (*Rex v Justices of Suffolk*, 5 Nev. & M. 139); or to enforce a penalty if the conviction be doubtful (*Rex v. Broderip*, 5 B. & C. 239); or to compel justices to direct the clerk of the peace to put a bond in suit. *Ex-parte Inhabitants of Callon Dale*, 4 Nev. & M. 312. *In re Lodge*, 2 Ad. & E. 123.

Where a mandamus is directed to justices, they ought not to make a return instead of obeying the writ, merely to gain the protection of 6 & 7 Vic. c. 67, s. 3. *Reg. v. Earl Dartmouth*, 5 Q. B. 878.

The court has a discretion as to granting a mandamus to justices to issue a warrant of distress or commitment against a person summarily convicted by them. *Ex-parte Thomas*, 9 Q. B. 976; 16 L. J. M. C. 57.

The court will presume, that if the justices have entered on their duty they will perform it in a satisfactory manner. *Reg. v. Radnorshire Justices*, 2 Dowl. N. S. 673; 7 Jur. 375.

Where a recognisance has been removed for the purpose of being estreated, the court will not grant a mandamus to the justices to correct a clerical error vitiating the recognisance. *Reg. v. Stack*, 12 L. J. M. C. 58.

Any application for a writ of mandamus to justices to enter continuances and hear an appeal, should be made not later than in the term following the sessions at which the refusal was made, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court. Reg. Gen. Q. B. E. T., 21 Vic.; 1 El. Bl. & El. 255. See *Reg. v. Recorder of Richmond*, id. 253.

[1] *Concerning Manors.*—A mandamus will be granted to the steward of a manor to allow inspection of the court-rolls to two tenants litigating a right of common (*Rogers v. Jones*, 5 D. & R. 484). But a mandamus will not lie to the lord and steward of a manor to inspect rolls, for the purpose of supporting an indictment against the lord of the manor for not repairing a road within the manor. *Rex v. Cadogan*, 1 D. & R. 559; 5 B. & A. 902.

A mandamus lies to the steward of the manor and to the homage to hold a court and present certain conveyances to purchasers of burgage tenements (*Rex v. Midhurst*, 1 Wils. 283), whether such conveyances be legal or not. *Rex v. Montacute*, 1 Wm. Black. 60. So, to hold a court-leet. *Rex v. Colebrooke*, 2 Ld. Keny. 163.

Where it is clear that, by the provisions of the 3 & 4 Wm. 4, c. 27, a claimant's title to a copyhold is barred by lapse of time, the court will not compel the lord by mandamus to admit him. *Rex v. Lord of Manor of Agarsdley*, 5 Dowl. P. C. 19. But a mandamus lies to the steward of a manor to inspect the rolls, although the issue was not joined at the time of granting the rule

nisi. *Rogers v. Jones*, 5 D. & R. 484. A rule for a mandamus to the steward of a manor to accept a surrender of copyhold premises to certain uses should make the lord of the manor a party to the rule. *Reg. v. Lord of Manor of Whitford*, 7 Dowl. P. C. 709. The court refused a mandamus to compel the steward to take a surrender in general terms, as, "all those tenements which A. had surrendered on a particular day," although the tenements were particularly stated in such former surrender; and *semble*, a custom for the steward to prepare all surrenders in the manor is good. *Reg. v. Lord of Manor of Bishopstoke*, 8 id. 608. But a mandamus will lie to inspect the rolls by a party interested; but it is not sufficient if the demand be only made by an agent. *Ex-parte Hutt*, 7 id. 690. The 3 & 4 Wm. 4, c. 74, s. 53 (the Act for the Abolition of Fines and Recoveries), only applies to equitable estates of tenants in tail of lands held by copy of court-roll; the court therefore refused a mandamus to the lord of a manor, commanding him to enter on the court-rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not enrol the deed by which they were granted. *Reg. v. Lord of Manor of Ingleton*, 8 id. 693. In applying for a mandamus to the steward of a manor to enrol a deed of disposition, pursuant to 3 & 4 Wm. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself if the contents are stated in the affidavit. *Crosby v. Fortescue*, 5 Dowl. P. C. 273.

No mandamus lies to the lord to grant a license to copyholder to demise, &c. *Reg. v. Hale*, 9 Ad. & E. 339; 1 Per. & D. 293. *See* also vol. iii. p. 245, n. [4].

A mandamus to the mayor to give the key of the town-hall to the lord of the manor to hold his leet there was refused, although the leet had been usually held in that place. *Rex v. Wigan*, 1 Wils. 76; and see *Rex v. Ilchester*, 2 D. & R. 724; 2 id. 324; 2 B. & C. 764. *Rex v. Grantham*, 2 W. Black. 716.

[1] *Concerning Offices in general.*—It seems that whenever a party is improperly suspended or removed from an office, whether its duties are public or private, if he has a certain term therein, and there are profits annexed to it, a mandamus lies to restore him, provided he has no other specific remedy. *Rex v. the Mayor of London*, 2 T. R. 177. *Anon.* Lofft, 551. Therefore, where a party has been in possession, he may try his right by an action for the profits, and a mandamus will not be granted. *Rex v. Jotham*, 3 T. R. 575.

A peremptory mandamus may be awarded in the first instance for electing an officer (*Rex v. Borough of Heyden*, Say. 208). And where it appears there has been delay in proceeding on the first mandamus, a second may be awarded. *Rex v. Corporation of Haslemere*, id. 106. *Semb. contra. Rex v. Corporation of Scarborough*, id. 105. It lies to admit or restore a party to the stewardship of a court-leet, or a court-baron (*Stamp's case*, T. Raym. 12; 1 Sid. 40); and it will lie to restore an attorney to an inferior court, for the office of attorney is necessary to the administration of justice, and is of public concern. *White's case*, 6 Mod. 18. *Hurst's case*, 1 Lev. 75. *Leigh's case*, 3 Mod. 333. It lies to admit a deputy into an office, where the office may be executed by deputy. *Rex v. Clapham*, 1 Vent. 110.

A principal may have a mandamus to admit a deputy. *Rex v. Ward*, 2 Stra. 893; Barnard, 252, 294; Fitzg. 123. The office of parish-clerk is a temporal office, and the clerk, though appointed by the minister, if unlawfully displaced, may have a mandamus to be reinstated. *Rex v. Warren*, Cowp. 370. *Rex v. St. Anne's, Soho*, 3 Burr. 1878; Lofft, 434. *The Parish of St. Dunstan's*, Comb. 105, 106.

If a parish clerk has been deprived of his office, the mandamus to restore him must be directed to the incumbent, and not to the churchwardens. *Ex parte Cirkett*, 3 Dowl. P. C. 327.

The office of vestry clerk is of a private nature, and is not permanent; therefore a mandamus does not lie to admit to it. *Rex v. Churchwardens of Croydon*, 5 T. R. 713.

The office of clerk to the guardians of a union, appointed under 4 & 5 Wm. 4, c. 76, is a public office created by statute, and where such office is full, a *quo warranto*, and not a mandamus, is the proper remedy to try the validity of the election. *Reg. v. St. Martin-in-the-Fields*, 20 L. J. Q. B. 423; 15 Jur. 800.

Where a surveyor of the highways has improperly allowed the time for producing and passing his accounts to elapse, the court will compel him to produce them by mandamus. *Rex v. Lewis*, 1 Dowl. P. C. 530.

A mandamus lies to compel the county treasurer to inquire whether the clerk of the sessions is entitled to certain fees (*Reg. v. Baker*, 2 Nev. & P. 375), and to compel the county treasurer to deliver his book to the clerk of the peace. *Rex v. Payn*, 1 id. 524.

A mandamus will lie to the treasurer of a borough fund for payment of costs ordered to a prosecutor. *Reg. v. Hayward*, 17 L. J. Q. B. 223; S. C. nom. *Reg. v. Oswestry*, 12 Q. B. 239; 12 Jur. 744. *Reg. v. Clark*, 5 Q. B. 887; but see *contra*, *Rex v. Jeyes*, 3 Ad. & E. 417. *Rex v. Johnson*, 4 M. & S. 515. *Rex v. Bristow*, 6 T. R. 168. *Rex v. Treasurer of Surrey*, 1 Chit. 651.

Where a criminal information had issued against a town-clerk for misconduct in his office in the election of councillors of the borough, the court refused a mandamus to

(6) *Concerning Churchwardens and Overseers.*[1]
(7) „ *Poor-Rates.*[2]

compel him to produce the voting papers in his custody, which had been used at the election. *Rex v. Micholetts*, 5 Ad. & E. 376.

A mandamus lies to admit the clerk of the trustees of a turnpike-road. *Rex v. Trustees of Cheshunt Turnpike-Roads*, 5 B. & Adol. 439. So to a select vestry (*Rex v. St. Martin-in-the-Fields*, 3 B. & Adol. 907); and in case of partiality or unfairness, for a fresh election. *Reg. v. St. Pancras Vestry*, 4 Per. & D. 66, n.

[1] *Concerning Overseers.*—A mandamus may be awarded to justices of the peace to appoint overseers of the poor (*Rex v. Nichols*, Sayer, 230); or, to make a new appointment when the appointment has been made on a Sunday. *Anon.* Lofft, 618. So it lies to appoint overseers of the poor in a hamlet where there were never any before. *Rex v. Justices of Westmoreland*, 1 Wils. 138.

Where a parish consists of several townships, some of which maintain their own poor, and have immemorially had overseers separately appointed, the court will grant a mandamus for the separate appointment of overseers for the remaining townships. *Rex v. Horton*, 1 T. R. 374. *Rex v. Newell*, 4 id. 266.

If an unqualified party is appointed churchwarden by the rector, a mandamus may issue directed to him to appoint an eligible person. *In re Barlow*, 30 L. J. Q. B. 271; 5 L. T. (N. S.) 289.

The writ was refused where it was not shown that the votes of persons improperly rejected would have turned the election of churchwardens. *Ex-parte Mawby*, or *Joyce*, 3 E. & B. 718; 23 L. J. M. C. 153; 18 Jur. 906.

A mandamus lies for the appointment of district overseers. *Rex v. Justices of Salop*, 3 B. & Adol. 910.

The rule is absolute in the first instance for swearing in a churchwarden where there is no rival candidate. *Rex v. Lichfield and Coventry*, 5 Nev. & M. 42. *Ex-parte Lowe*, 4 Dowl. P. C. 15.

A mandamus lies to compel churchwardens and overseers to make a rate (*Rex v. Churchwardens of St. Saviour's, &c.* 1 Nev. & P. 496), and to hear a complaint against a rate. *Rex v. Justices of Kent*, 9 B. & C. 283. The right to inspect overseers' accounts under the 1 Geo. 3, is not a mere private right, but must be on public grounds. *Rex v. Clear*, 4 B. & C. 899; 6 D. & R. 393.

The writ lies to compel churchwardens to raise annually a sum to repay money borrowed, to be paid some years afterwards. *Rex v. St. Michael's, Pembroke*, 1 Nev. & P. 69. The 43 Geo. 3, c. 110, does not repeal the 22 Geo. 3, c. 83, as to money borrowed under that statute. *Rex v. Brighton Overseers, &c.* 1 Nev. & P. 774.

A mandamus will lie against old overseers to compel them to deliver their public books and papers to their successors. *Page v. Clapham*, 1 Wils. 305. *Rex v. Bletshaw*, 1 Bott, 300; but see *Rex v. Street*, 8 Mod. 98.

A mandamus lies at the instance of a rated parishioner to inspect the accounts of the guardians of the poor (*Rex v. Great Farringdon*, 9 B. & C. 541); but does not lie to admit the clerk of guardians of the poor. *Reg. v. Guardians of Dolgelly*, 3 Nev. & P. 542; 8 Ad. & E. 561.

The court will not grant a mandamus to parish officers to receive a pauper in obedience to an order of removal: the proper course is by indictment (*Ex-parte Downton*, 8 E. & B. 856). But the directors of the poor of a parish were compelled by mandamus to receive a foundling of tender years, although the application was made at the instance of a stranger, who took care of the child from humane motives. *Ex-parte Foundling Hospital*, 5 Dowl. P. C. 722. Where a local statute confers a power of investigating accounts upon auditors, to be annually elected, and to be summoned by the vestry clerk, at certain stated intervals, to audit the accounts, the court will not grant a mandamus to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year. *Rex v. St. Giles*, 1 id. 540. So, where the settlement arose by service under an indenture of apprenticeship, assigned by indorsement, a mandamus for its production, in order to be stamped, refused. *Rex v. Westowe*, 1 Nev. & P. 222.

[2] *Concerning Poor-Rates.*—A mandamus lies to parish officers, &c. to make a poor-rate. *Rex v. Slatford*, Comb. 419. It will be awarded in the first instance to justices of the peace to allow and sign a poor-rate (*Rex v. Fisher*, Sayer, 160. *Breedon v. Gill*, 5 Mod. 275; Comb. 414. *Rex v. the Mayor of Worcester*, Hard. 128); but not to make an equal rate (*Rex v. Churchwardens of Freshford*, 1 Andr. 25); nor to insert a particular person in a poor-rate (*Rex v. Churchwardens of Weobly*, 2 Stra. 1259. *See* 1 W. Black. 607); nor to make a rate to reimburse the expense of defending an indictment (*Anon.* Stra. 63); nor to compel new churchwardens to make a rate to reimburse the old ones (*Rex v. Churchwardens of Rotherhithe*, 8 Mod. 339; 2 Salk. 232; 6 Mod. 97); unless the overseer has advanced his own money (*Rex v. Littleport Parish*, 6 Mod. 97). It lies to a corporation to pay a poor-rate. *Rex v. Margate Pier Co.* 3 B. & A. 220.

A mandamus lies to imposed increased rates, and to collect and pay away the same. *Reg. v. St. Saviour's, Wardens of, &c.* 3 Nev. & P. 126.

A mandamus lies for the inspection of

(8) *Concerning Rates and Taxes.*[1]
(9) „ *the Universities.*[2]
(10) „ *Inns of Court.*[3]
(11) *To Assess Compensation under Act of Parliament.*[4]

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rates or assessments where there is a right by statute (*Rex v. Justices of Leicester*, 4 B. & C. 891; 6 D. & R. 370); but not at common law. *Rex v. St. Mary-le-bone Vestry*, 5 Ad. & E. 268.

A mandamus may be obtained to levy a rate (*Rex v. Commissioners of St. Paul, Shadwell*, 1 M. & R. 591). if it be clear that the statute gives authority (*Rex v. Hall*, 4 Nev. & M. 546); but it will not lie to compel a distress for a doubtful rate (*Rex v. Justices of Somerset*, 4 id. 394), at all events, until after application to the sessions (*Rex v. Marehouse*, 2 Ad. & E. 632. *Rex v. Morgan*, 2 id. 618. *Rex v. Greame*, 2 id. 615); nor to compel justices to enter continuances with a view of quashing the rate (*Reg. v. Justices of Middlesex*, 1 Per. & D. 402; 7 Ad. & E. 540); but it lies to enter continuances with a view to an appeal. *Reg. v. Justices of St. Albans*, 1 Per. & D. 148.

The mandamus to justices to allow a poor-rate is absolute in the first instance. *Reg. v. Godolphin*, 1 D. & L. 830; 13 L. J. M. C. 57.

[1] *Concerning Rates and Taxes.*—A mandamus will be granted to the Commissioners of Taxes to re-assess the inhabitants upon default made by the collector (*In re Wootton*, 6 Price, 103); or of Excise, if a proper case be laid before the court (*Rex v. Commissioners of Excise*, 2 T. R. 381); or to Commissioners of Sewers. *Rex v. Commissioners of Sewers*, 2 D. & R. 700; 1 B. & C. 477.

The office of vestry clerk being of private nature a mandamus cannot be obtained to admit. 5 T. R. 714; 4 M. & S. 524.

Concerning the Universities.—A mandamus lies to the provost of a college to compel him to affix the college seal (*Rex v. Bland*, 7 Mod. 355. *Rex v. Justices of Surrey*, 2 Show. 74, n); or to compel the warden to affix the common seal to an answer in Chancery (*Rex v. Windham*, Cowp. 377); or to the keeper of a common seal of the university. *Rex v. Cambridge University*, 3 Burr. 1647; 1 W. Black. 547.

If a visitor of a college refuse to exercise his visitorial powers by receiving and hearing an appeal, the court will grant a mandamus (*Rex v. Bishop of Ely*, 5 T. R. 475. *Rex v. Bishop of Lincoln*, 2 id. 338); or to try the validity of an election to a vacant fellowship (*R. v. Whaley*, 2 Stra. 1139); but not to admit to the fellowship of a college that has a visitor (*Rex v. Alsop*, 2 Show. 170. *Appleford's case*, 1 Mod. 82. *Rex v. New College*, 2 Lev. 14. *Parkinson's case*, 3 Mod. 265; Holt, 143; Comb. 143; Carth. 92, 168; 1 Show. 75. *Phillips v. Bury*, 4 Mod. 122; 10 id. 50. *Widrington's case*, T. Raym. 31. *Rex v. St. John's College*, 4 Mod. 236): but see *Rex v. St. John's College, Oxford*, Comb. 238, 239); or to remove a fellow (*Rex v. Gower*, 3 Salk. 231. *Rex v. St. John's College*, Comb. 279; Skin. 546); or to restore a person against whom a sentence of banishment has been pronounced (*Rex v. University of Cambridge*, 6 T. R. 89); or where, in the case of a private eleemosynary lay foundation, no special visitor is appointed, &c., the right of visitation devolves upon the king (*Rex v. St. Katherine's Docks*, 6 id. 233); or to a visitor where he is clearly acting under a visitorial authority (*Rex v. Bishop of Ely*, 2 id. 290, 345); or where it is doubtful who is the visitor. Id. 1 Wils. 266; 1 W. Black. 52.

[3] A mandamus will not lie to compel the benchers of an inn of court to admit a party to be a member (*Rex v. the Benchers of Lincoln's Inn*, 4 B. & C. 855; 6 D. & R. 351); nor to compel them to call a student to the bar (*Townsend's case*, Raym. 69; Tapping, 138. *Rex v. Gray's Inn*, 1 Dougl. 353; abridged, vol. iv. p. 161); nor against the principal of Clifford's Inn to appear before one of the four inns of court (*Rex v. Allen*, 3 Nev. & M. 184); nor to compel the Society of Barnard's Inn to admit an attorney into the society. *Rex v. Barnard's Inn*, 5 Ad. & E. 17; Tapping, 138.

[4] *To Assess Compensation.*—Where a company or commissioners are authorised by statute to take lands and execute works, and are required to make compensation for the lands they prejudice, a mandamus will lie to compel them to make such compensation (see *Reg. v. Burslem Board of Health*, 29 L. J. Q. B. 21; 6 Jur. N. S. 696. *Reg. v. Woods and Forests, Commissioners*, 17 L. J. Q. B. 341; 12 Jur. 915. *See* id. 15 Q. B. 761. *Rex v. Hungerford Market*, 1 Nev. & M. 404. *Rex v. Thames and Isis Navigation Co.* 8 Ad. & E. 901, n.); or to summon a jury for the purpose of assessing such compensation. *Ex-parte Farlow*, 2 B. & Adol. 341. Where the finding is not a nullity, a mandamus will not lie to summon another jury. *Rex v. Greenwich Railway Co.* 4 Nev. & M. 458. And the owner of a house pulled down by mistake cannot seek compensation by mandamus. *Rex v. Hungerford Market Co.* 3 id. 622. *See post*, Railways.

A peremptory mandamus lies to commissioners of navigation for compensation. *Rex v. Thames and Isis Commissioners*, 5 Ad. & E. 601.

Where commissioners are under a statutory obligation to make compensation or pay salaries out of rates they are required to levy *inter alia* for these purposes, a mandamus lies to compel them to do so. See *Reg. v. Sewers of Norfolk, Commissioners*, 20 L. J. Q. B. 121. *Bogg v. Pearse*, 20 L. J. C. P. 99; 10 C. B. 534. And where a duty was

(12) *As to Inferior Courts.*[1]

(13) „ *Lords of the Treasury.*[2]

(B) *Of the Application for the Writ.*[3]

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imposed by statute upon a party to levy certain moneys from other parties, and pay over to another a portion of the sums levied, a mandamus was issued directing him "to take the necessary and legal measures and proceedings for obtaining and recovering payment." *Reg. v. Southampton Commissioners*, 1 Best & Sm. 5.

It lies to recompense a borough treasurer under 5 & 6 Wm. 4, c. 76. *Reg. v. Mayor of Swansea*, 3 Per. & D. 16.

By 5 & 6 Wm. 4, c. 76, the sheriff's court (York) was thrown open to all the attornies of the superior courts at Westminster, and A. applied under the 66th section of that act for compensation for his loss of office. The Lords of the Treasury made an order for that purpose, but the corporation refused to execute a bond to secure the payment to A.; A. having obtained a rule *nisi* for a mandamus to compel them, the court made the rule absolute. *Reg. v. Mayor of York*, 8 Dowl. P. C. 502. But where the right to compensation under the Municipal Corporation Act (5 & 6 Wm. 4, c. 76) is purely nominal, the court will not grant a mandamus. *Ex-parte Lee*, 2 Nev. & P. 63.

Where the Lords of the Treasury make an order on the town council of a borough to grant compensation to a party, and the town council neglect to comply with the order, the court of Queen's Bench will enforce it by mandamus. *Rex v. Bridgewater*, 1 id. 466.

[1] *To Inferior Courts.*—Where an inferior court declines to exercise a jurisdiction imposed on it by law, the Queen's Bench will enforce its proceeding by mandamus; but when it has acted, its judgment can only be reversed in that court on a case stated for its opinion. *Reg. v. West Riding*, 1 New Sess. Ca. 247.

A mandamus lies to an inferior court to compel it to adopt and give effect to the necessary proceedings. *Amherst's case*, T. Raym. 214. *Burgh v. Blunt*, 10 Mod. 350. *Rex v. Justices of Surrey*, 2 Show. 74. *Rex v. Justices of Glamorganshire*, 2 Mod. 403. *Thompson v. Goodfellow*, 2 Show. 173. But not to swear in and restore a steward of a court baron. *Leigh's case*, 3 Mod. 334. *Anon.* Comb. 127. *Anon.* 12 Mod. 666.

The court will not grant a mandamus to enforce the process of an inferior court, the judge of which has power to compel obedience to it. *Reg. v. Conyers*, 8 Q. B. 981; 15 L. J. Q. B. 300.

A mandamus lies to hold a court-leet. *Rex v. Lord of Milverton*, 3 Ad. & E. 284. But not to the mayor, &c., to hold a court-leet for administering the oath of allegiance. *Rex v. Mayor of Maidstone*, 6 D. & R. 334. No mandamus lies to permit the party to have inspection of the records of a court-leet, unless good reason is assigned. (Id.)

It does not lie to compel an inferior court to enter a verdict in a particular way. *Rex v. Hewes*, 3 Ad. & E. 725.

No mandamus can issue to a county-court judge, but he may be compelled to exercise his jurisdiction by a rule of one of the superior courts. 19 & 20 Vic. c. 108, s. 43; 21 & 22 Vic. c. 74, s. 4. *See* County Courts, vol. iii. p. 344.

[2] The court will not grant a mandamus calling upon the Lords Commissioners of the Treasury to pay a debt or claim, unless they have admitted that they have received money granted by parliament for that specific purpose. *Ex-parte Walmesley*, 1 El. Bl. & El. 81; 7 Jur. N. S. 1010.

A mandamus may be granted to the Lords of the Treasury to pay a pension granted by parliament. *Rex v. Lords Commissioners of the Treasury*, 5 Nev. & M. 519. But it does not lie for revoking the grant of a pension (*Rex v. Lords of the Treasury*, 6 id. 505; 4 Ad. & E. 984), as they have no power to grant a permanent pension. Id. 6 Nev. & M. 508; 4 Ad. & E. 984.

[3] "Upon application by motion for any writ of mandamus in the court of Queen's Bench, the rule may, in all cases, be absolute, in the first instance, if the court shall think fit, and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it by the court or judge, either with or without terms." 17 & 18 Vic. c. 125, s. 76. "The provisions of the Common-Law Procedure Acts (1852 and 1854) shall apply, as far as they are applicable, to the pleadings and proceedings upon a prerogative writ of mandamus issued by the court of Queen's Bench." (Id. s. 77.)

The mandamus must be applied for within a reasonable time (*R. v. Townsend*, 28 L. T. 100, Q. B. *Rex v Stainforth Canal Co.* 1 M. & S. 32. *Rex v. Justices of Lancashire*, 12 East, 366. *Reg. v. West Riding*, 1 Gale & D. 668; 6 Jur. 506. *Reg. v. Justices of Cheshire*, 15 L. J. M. C. 115; 4 D. & L. 94; 2 New Sess. Ca. 420); and must be preceded by a distinct demand of the specific thing, the performance of which is the object of the mandamus, and by a refusal of performance or conduct equivalent thereto. *Ex-parte Thompson*, 6 Q. B. 721. *R. v. Bristol Railway Co.* 4 id. 162; 17 & 18 Vic. c. 125, s. 70.

An application for a mandamus to a railway company to complete the railway may be made by a shareholder. *Reg. v. Ambergate Railway Co.* 17 Q. B. 362; 15 Jur. 991.

In rules for a mandamus to elect a mayor,

(C) *Of the Form of the Writ.*[1]

a subsisting mayor *de facto* must always be a party. *Rex v. Bankes*, 3 Burr. 1452; 1 Black. Rep. 445.

A mandamus to proceed to an election upon judgment of ouster cannot be moved for till judgment be actually signed. *Rex v. Corporation of West Looe*, 3 Burr. 1386.

On application for a mandamus to admit a person to a fellowship in right of his relation to the founder, the statutes, or sworn copies of them, must be produced. *Rex v. Archbishop of Canterbury*, 7 Mod. 220.

On a motion for a mandamus to restore one to an office, an affidavit that he once enjoyed it is unnecessary, as that fact may be stated in the return. *Rex v. the Company of Cutlers*, Ca. Temp. Hardw. 129.

Where an application is made to the court for a mandamus to direct the filling up any vacancies in a definite integral part of a corporation, the court will require strong grounds to induce them to issue the writ. *Rex v. the Mayor of Grampond*, 6 T. R. 301.

Where an application is made for a mandamus, and the questions turn upon a custom which the parties litigating desire to have tried, the court will either grant the writ or direct an issue, according as the application is supported. *Rex v. the Bishop of London*, 1 id. 331.

A rule to show cause why "one or more" writs of mandamus should not issue is an improper form of rule. *Reg. v. Mayor of Bridgenorth*, 2 Per. & D. 317.

In another case, a rule calling on the steward of a copyhold manor to show cause why a mandamus should not issue, commanding him to accept a surrender of a tenement to certain uses, was discharged on the ground that the lord of the manor was a party interested, and ought to have been called into court by the rule. *Reg. v. Whitford*, 7 Dowl. P. C. 709.

The court will not grant a rule in the alternative for a mandamus or a *quo warranto*. *Rex v. Mayor of Leeds*, 11 Ad. & E. 512.

[1] No precise form is necessary in a mandamus. *Rex v. Mayor of Nottingham*, Say. 37.

As to its Direction.— Care must be taken that the mandamus is properly directed, that is, to the persons who are to obey the writ. *Rex v. Mayor of Hereford*, 2 Salk. 701. *Rex v. Mayor of Derby*, 2 id. 436. *Rex v. Mayor of Southmolton*, id. 701. *Rex v. Mayor of Leeds*, Stra. 640. And this duty is imposed on the person who applies for the writ. *Rex v. Mayor of Ripon*, Salk. 433.

If the writ be improperly directed, the court will grant a *supersedea quia improvide emanavit*. *Rex v. Wigan*, 2 Burr. 782.

It may be directed to members of a corporation by their names of office. *Rex v. Mayor of Abingdon*, 1 Ld. Raym. 560.

It must be directed to a corporation by its proper name. *Rex v. Taylor*, 3 Salk. 230.

A direction to a corporation by its corporate name is good, notwithstanding the vacancy of the mayoralty. *Rex v. Smith*, 2 M. & S. 583.

As to Certainty.— The writ must be sufficiently certain in setting forth the duty to be performed, but it need not particularly set forth by what authority this duty exists. *Rex v. Ward*, 2 Stra. 897. *Rex v. Bettesworth*, id. 857. *Rex v. the Mayor of Devizes*, Bull. 205. *Rex v. Nottingham*, Bull. N. P. 204; Say. 36. *Peat's case*, 6 Mod. 310. *Anon.* 2 id. 316. And it must state all facts necessary to show that the prosecutor is entitled to the relief prayed. *Rex v. the Justices of Yorkshire*, 7 T. R. 48. *Rex v. Justices of Denbighshire*, 14 East, 285. *Rex v. Bishop of Oxford*, 3 Smith, 341; 6 East, 345. *Rex v. Coopers' Co.* 7 T. R. 543. Hence, a mandamus to a corporation commanding them to pay a poor-rate, omitting to state that the defendants had no effects upon which a distress could be levied, is bad. *Rex v. Margate Pier Co.* 3 B. & A. 220; 2 Chit. Rep. 256.

To admit a freeman, the writ should be *ad privilegium*, not *ad locum et officium*. *Rex v. Morris*, 1 Ld. Raym. 338. So, a mandamus to choose and swear a mayor shall be taken *reddendo singula singulis*. *Rex v. Tregony*, 8 Mod. 111. And if the approval of another body is necessary to the obligation, the mandamus must show that such has been given. *Reg. v. St. Luke's, Chelsea*, 1 Best & Smith, 903.

If bad in respect of one of the matters commanded, the writ is bad *in toto*. *Reg. v. Tithe Commissioners*, 19 L. J. Q. B. 177; 14 Jur. 290. It must not require more than is necessary. *Reg. v. London and South-Western Railway Co.* 13 Q. B. 775; 17 L. J. Q. B. 326. And a writ of mandamus which omits a necessary fact, cannot be cured by the return. *Reg. v. South-Eastern Railway Co.* 17 Jur. 901. *Mayor of London v. Reg.* 13 Q. B. 30; 17 L. J. Q. B. 330.

A mandamus commanded a person to deliver up to the clerk of a court of requests, papers relating to the office; the writ was held bad for not showing any claim by the person detaining them to hold them under any right. *Reg. v. Hopkins*, 4 Per. & D. 550; 1 Q. B. 160.

As to being Joint or Several.—If several persons have been removed, there must be a distinct writ for each person, for they cannot join. *Rex v. Mayor of Kingston-upon-Hull*, 11 Mod. 382; 1 Stra. 578. *Rex v. City of Chester*, 5 Mod. 11; 3 Salk. 230; Holt, 438. *Rex v. Andover*, 1 Salk. 229; 12 Mod. 332. *Rex v. Mayor of Chester*, Comb. 307, 308.

If one parish officer apply for a mandamus against another to concur in a rate, the writ must lie against the applicant as well as the other. *Anon.* 2 Chit. Rep. 254.

As to the Teste and Return of the Writ.— By 17 & 18 Vic. c. 125, s. 76, the writ may

(*a*) *Service of Writ.*[1]

(D) *Quashing or Superseding of Writ.*[2]

(E) *Of the Return to the Writ.*[3]

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bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or vacation; but time may be allowed by the court or a judge, either with or without terms.

The writ may be amended at any time before the return. *Rex v. Clitheroe*, 6 Mod. 133. *Rex v. Lyme Regis*, Dougl. 135. But after the return has been made and traversed the court will not permit an amendment in the mandamus. *Rex v. Mayor of Stafford*, 4 T. R. 690.

[1] Where a copy of the writ was served without showing the original, the court refused to set aside the service. *Reg. v. Birmingham, &c. Railway Co.* 1 El. & B. 293; 22 L. J. Q. B. 195.

Attachment lies against a corporation for not making a return to a peremptory mandamus, although it had only been served on the town-clerk. *Rex v. Fowey, Mayor, &c.* 5 D. & R. 614.

[2] The right to obtain a mandamus may be objected to on motion to quash the return. *Rex v. St. Katherine Dock Co.* 1 Nev. & M. 121; 4 B. & Adol. 360.

An exception may be taken to the writ after the return. *Rex v. Margate Pier Co.* 3 B. & A. 220. *Tavernier's case*, T. Raym 446. *Rex v. Mayor of Lincoln*, 5 Mod. 403; 1 Lev. 91. *Rex v. Selby*, 2 Show. 151. *Townsend's case*, T. Raym. 69. *Rex. v. Selby*, 2 Show. 154.

Where it is suggested on the face of the mandamus directed to an inferior officer of a college that such college is subject to the power of a visitor, the writ will be quashed. *Dr. Walker's case*, Ca. Temp. Hard. 212. *Rex v. Whaley*, 7 Mod. 308, 309, n.

After a mandamus has been granted, return made, and an issue thereon tried, the court will not quash the mandamus on grounds which were or might have been discussed on showing cause against the application for it. *Reg. v. Stamford*, 6 Q. B. 433.

The writ will be superseded if directed to those who have and those who have no right. *Rex v. Mayor of Norwich*, Stra. 55. *Rex v. Wildman*, 2 id. 879. The court will not supersede the writ merely on affidavits without a return. *Rex v. Whaley*, Stra. 1139.

The return to a mandamus may be quashed as to part and allowed as to the remainder, provided the two are independent of and not inconsistent with each other. *Rex v. Mayor of Cambridge*, 2 T. R. 456.

A notice of motion to quash or supersede a mandamus must always be given. *Anon.* 1 Wils. 30.

When a rule has been obtained for a mandamus to issue, and the mandamus is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a mandamus, but materially enlarging the terms, the court will quash the writ. *Rex v. Water-Eaton*, 2 Smith, 54. *Rex v. Tucker*, 5 D. & R. 434; 3 B. & C. 545.

[3] A mandamus should be delivered to the officer who is to make the return. *Rex v. Mayor of Exeter*, 12 Mod. 251. Therefore, on a mandamus being granted to elect a town clerk, the writ must be delivered to the mayor. *Rex v. Chapman*, 6 Mod. 152.

When a mandamus is directed to the mayor, bailiffs, &c. the mayor alone may make the return, and the others cannot disavow it. The mayor is punishable if he does it against the consent of the majority. *Rex v. Mayor of Abingdon*, 2 Salk. 431; Carth. 499; 2 Salk. 699; Skin. 368.

The ex-bailiff of a town cannot make the return, unless the election of his successor be void. *Reg. v. Clitheroe*, 6 Mod. 133.

A return is good though there be neither the hand of the mayor or seal of the corporation to it. *Rex v. Mayor of Exeter*, 12 Mod. 127. *Rex v. St. John's College*, Skin. 368.

The writ, as we have seen, may be made returnable forthwith, whether in term or vacation, but time may be allowed to return it by the court or judge, either with or without terms. 17 & 18 Vic. c. 125, s. 75.

The return must be very specific in showing an excuse for the non-performance of the act commanded. *Reg. v. Southampton*, 1 E. B. & E. 5; 30 L. J. Q. B. 244.

The same certainty is required in a return to a mandamus as on indictments and writs of *habeas corpus*. *Rex v. Lyme Regis*, Dougl. 158. But it will be sufficient if the return be certain on the face of it; for the court cannot intend facts inconsistent with it for the purpose of making it bad. Id. 159. *Manaton's case*, T. Raym. 365. *Rex v. Mayor of Doncaster*, Say. 39, 175. *Glide's case*, 4 Mod. 35. *Rex v. Mayor of Abingdon*, 2 Salk. 431; 12 Mod. 402; Holt, 436, 441; Salk. 432 n.

The return must not be argumentative. *Rex v. Lyme Regis*, Dougl. 158. *Manaton's case*, T. Raym. 586. *Reg. v. Mayor of Hereford*, 6 Mod. 309.

An evasion in the return will not be inferred. *Rex v. Round*, 5 Nev. & M. 427; 4 Ad. & E. 139.

A return that a churchwarden "was not duly elected" is good. *Rex v. Williams*, 8 B. & C. 681.

The court of aldermen may return that an alderman was not duly elected. *Rex v. the Mayor of London*, 2 Nev. & M. 126; 5 B. & Adol. 233.

The mayor may return that he has a discretion in the admission of an alderman. *Rex v. Lord Mayor of London*, 3 B. & Adol. 255; 1 Nev. & M. 285.

A return that another tribunal is authorised to decide the matter is not bad, and does not oust the Q. B. of its jurisdiction. *Rex v. Lord Mayor of London*, 9 B. & C. 1.

A return showing judgment has been given on a plaint is sufficient. *Reg. v. Lord of the Manor of Old Hall*, 2 Per. & D. 515.

A return merely using the words of the statute, without stating that the thing has been done, is insufficient. *Rex v. Ouse-Bank Commissioners*, 3 Ad. & E. 544.

Justices cannot return that no facts were laid before them. *Rex v. Justices of Leicester*, 4 B. & C. 891; 6 D. & R. 370.

To a mandamus to elect, it is a good return that a person had been duly elected and sworn into the office. *Rex v. Williams*, Say. Rep. 140.

The power of removing being *primâ facie* in the corporation at large, it is sufficent to state that the party was removed by the corporate body at large, without averring that the body at large had the power of removing. *Rex v. Lyme Regis*, Dougl. 149.

Non fuit electus is a good return (*Reg. v. Corporation of Cornwall*, 11 Mod. 174. *Reg. v. Twitty*, 7 Mod. 84. *Reg. v. Aldborough*, 10 id. 101). So is *non debito modo electus et perfectus ad officium* (*Rex v. Newton*, Show. 252. *Rex v. Lambert*, 12 Mod. 2, 3. *Rex v. Sheriff of York*, 2 Show. 154); or that some other person instead of the applicant has been duty elected (*Rex v. Williams*, Say. 140); or that the complainant has resigned. *Rex v. Mayor of Ripon*, 2 Salk. 433; 1 Ld. Raym. 564. But a return to a mandamus to restore, stating that the prosecutor was not duly elected, admitted, and sworn, is bad. *Reg. v. Lyme Regis*, 1 Dougl. 79. So a return to mandamus to restore an alderman removed for non-residence, was disallowed, because it did not set forth a total desertion from the place of which the party was alderman. *Rex v. Leicester*, 4 Burr. 2087. A return is good if it pursue the suggestion of the court. *Rex v. Sir W. Penrice*, 2 Stra. 1235. A return to a mandamus to justices to hear and determine a complaint before them "that it was determined" is good. *Rex v. Richardson*, 1 Wils. 21. And a return that a party was not duly elected sexton according to ancient custom, for the inhabitants, &c. to remove at pleasure, and that the party was moved pursuant to such custom, is good. *Rex v. Taunton Churchwardens*, Cowp. 413. And several matters, if consistent with each other, may be returned on the same writ. *Reg. v. Mayor of Norwich*, 2 Salk. 436. *Rex v. Mayor of Cambridge*. *Rex v. York, Mayor of*, 6 T. R. 66. *Wright v. Fawcett*, 4 Burr. 2041. In a return to a mandamus of a custom in London to hold courts for the admission of freemen, the place of holding them is sufficiently stated, if it be averred to be held within the city, and the time when held need not be stated. *Rex v. Bosworth*, 2 Stra. 1112.

Nothing is to be intended in a return to a mandamus. *Rex v. Evans*, 1 Show. 282. *Reg. v. Corp. of Durham*, 10 Mod. 146. *Rex v. Corp. of Malden*, 1 Ld. Raym. 481; Salk. 431. *Rex v. the Mayor of Abingdon*, 1 Ld. Raym. 559. *Rex v. Lane*, 11 Mod. 270; 2 Ld. Raym. 1304. *Rex v. President and Council of Man*, T. Raym. 153.

It cannot be returned to a mandamus for restoring a person to an office that he is not elegible (*Rex v. Mayor of Doncaster*, Say. 40); or *non fuit modo debito admissus*. *Hereford's case*, Sid. 209; 10 Mod. 101; cited, 5 id. 11) unless the writs suggest a *debito modo*. *Reg. v. Twitty and Maddicot*, 2 Salk. 434. *Rex v. Whiskin*, And. 1. So to a mandamus to swear a churchwarden, *non fuit electus* is not a good return. *Rex v. Harwood*, 8 Mod. 380; id. 325. *Rex v. White*, Stra. 894; *contra*, 895. *Rex v. Guy*, 6 Mod. 89. *Rex v. Rice*, 5 id. 325. *Rex v. Guise*, 2 Ld. Raym. 1008; 3 Salk. 88.

An inhibition of the bishop is not a good return to a mandamus to swear a churchwarden. *Rex v. Simpson*, 1 Stra. 609.

When the return to a mandamus to restore to academical degrees alleges a suspension or degradation of the party, and does not state that he was summoned to attend the proceedings, it is bad. *Rex v. University of Cambridge*, 1 Stra. 557; 2 Ld. Raym. 1348. So is a return to a mandamus to elect a town clerk, that the candidates had an equal number of votes. *Rex v. Chapman*, 6 Mod. 152. So where by the charter the transaction of certain business is limited to one particular day, a return to a mandamus, assigning as a reason for not completing it that the day was consumed in the necessary business of the corporation, is bad. *Rex v. the Corporation of Carmarthen*, 1 M. & S. 697.

Mandamus to the mayor of M. to convene a meeting to proceed to an election in order to fill up five vacancies in a select body; return by him, that the remaining burgesses are too few to proceed to such election, is insufficient. *Rex v. the Mayor of Monmouth*, 4 B. & A. 496.

A rule to inspect the charter in order to make a return will not be granted, but in an action for a false return it will. *Anon.* Salk. 430.

The return by leave of the court may be amended. *Rex v. Aldborough*, 10 Mod. 102. *Rex v. Mayor of Chichester*, 1 Show. 273.

The return to a mandamus to restore a dismissed officer, alleging a dismissal for acts of misconduct, should show that the prosecutor had an opportunity of answering the charges. *Reg. v. Smith*, 5 Q. B. 614; 13 L. J. Q. B. 166. *See* further, as to the sufficiency of returns, *Reg. v. Mayor of London*, 13 Q. B. 1.; 16 L. J. Q. B. 185. *Reg. v. Yorkshire, West Riding*, 10 Q. B. 763; 16 L. J. M. C. 171. *Reg. v. Bristol Dock Co.* 2 Q. B. 64; 6 Jur. 216. *Reg. v. Burslem Board of Health*, 28 L. J. Q. B. 345; 5 Jur. N. S. 1394.

There cannot be a return to a peremptory mandamus. *Reg. v. Hudson*, 9 Jur. 345. *Reg. v. Poole, Mayor of*, 1 Gale & D. 728; S. C. nom. *Reg. v. Ledgard*, 1 Q. B. 616.

(F) *Of Demurring to the Return.*[1]
(G) „ *Traversing or Pleading to the Return.*[2]
(H) *Inspection of Documents.*[3]
(I) *Special Case.*[4]
(K) *Error.*[5]

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[1] By virtue of 6 & 7 Vic. c. 67, s. 1, the prosecutor may demur to the return in the same manner as to pleadings in personal actions; the court thereupon adjudges, "either that the said return is valid in law, or that the writ of mandamus is not valid in law; and if they adjudge that the said writ is valid in law, but that the return thereto is not valid in law, then and in every such case they shall also by their said judgment award that a peremptory mandamus shall issue in that behalf, and thereupon such peremptory writ of mandamus may be sued out and issued accordingly, at any time after four days from the signing of the said judgment; and it shall be lawful for the said courts respectively, and they are hereby required, in and by their said judgment, to award costs to be paid to the party in whose favour they shall thereby decide by the other party or parties."

Leave to amend the return may be given where no delay or injustice is occasioned. *Reg. v. Painter*, 14 L. J. M. C. 182; 9 Jur. 926.

The party demurring to a return to a mandamus is entitled to be first heard, as in ordinary cases of demurrer. *Reg. v. Smith*, 5 Q. B. 614; 13 L. J. Q. B. 166.

Where the Court of Queen's Bench had given judgment upon a demurrer to a return to a mandamus, it was held that an objection to the sufficiency of the mandamus might be taken at any time before the issuing of the peremptory mandamus. *Clark v. Leicester, &c. Canal Co.* 6 Q. B. 898; 9 Jur. 215.

After the demurrer to the return, the court may let in the person really interested to make a return. *Reg. v. Painter, supra.*

[2] By 9 Anne the prosecutor may plead or traverse the return, and the other party may take issue or demur (*Rex v. Trinity Chapel*, 8 Mod. 28); but no exception can be taken to the return where the court has no power to grant the writ. *Rex v. New College, Oxford*, 2 Lev. 14, 15.

The prosecutor may obtain an order under the 1 Wm. 4, c. 21, s. 3, for leave to plead several matters to the return. *Reg. v. Ambergate Railway Co.* 16 Jur. 777.

If a mandamus to certify an election state, "by reason of which said premises A. was duly elected," the return cannot traverse that A. was not elected, as by the writ is supposed. *Rex v. the Mayor of York*, 5 T. R. 66.

Where in a writ of mandamus the facts are alleged to have happened in a particular county, and issue as to their existence is joined there, the venue must be from that county. *Rex v. Mayor of Newcastle-upon-Tyne*, 1 East, 114.

Mandamus to churchwardens to raise a rate to pay principal and interest of money borrowed on the credit of parish and church-rates, under the Church-Building Acts, 58 Geo. 3, c. 45, and 59 id. c. 134. *Return*, that since the security was given the lender, who was the prosecutor, had become bankrupt. *Plea*, that the prosecutor had lent the money as trustee for a party named out of the money vested in him as trustee, in which he had no interest except as trustee. On demurrer, assigning for cause that the nature of the trust did not appear: — *Held*, good. *Reg. v. Brancaster*, 7 Ad. & E. 458; 2 Nev. & P. 580.

A plea traversing an immaterial allegation in the return is bad. *Reg. v. Dendy*, 1 E. & B. 829; 22 L. J. Q. B. 247. *See* further, as to the sufficiency of pleas, *Reg. v. East Riding of Yorkshire*, 13 Jur. 447.

The prosecutor may reply to a return for a mandamus. *Rex v. Mayor of Lyme Regis*, Dougl. 159.

What is not answered upon the return must be looked upon as admitted to be true. *Rex v. Buckingham*, 10 Mod. 174.

Judgment *non obstante veredicto* may be given for the party making the return. *Reg. v. Darlington School*, 6 Q. B. 682.

[3] An order may be made under the 14 & 15 Vic. c. 99, s. 6, compelling parties to allow an inspection of documents in a proceeding by mandamus, if the mandamus be for the purpose of enforcing a civil right. *Reg. v. Ambergate Railway Co.* 16 Jur. 777.

[4] When a special case is stated for the opinion of the court, and the parties agree that, in the event of the court giving judgment for the plaintiff, a mandamus may issue against the defendant, this must be understood to mean, if the court think fit, that it shall do so. *Nicholl v. Allen*, 1 Best & Sm. 916.

[5] By the 6 & 7 Vic. c. 67, s. 2, error may be brought upon the judgment of the court, upon an issue joined upon the return or other pleadings, "and such and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error, upon judgments of the said courts respectively in personal actions; and if the judgment of the said court be reversed by the Court of Error, the said Court of Error shall thereupon, by their judgment, not only reverse the same, but shall also, in addition thereto, give the same judgment which the court whose judgment is so reversed ought to have given in that behalf; and if by their said judgment they

(L) *Consequence of Return being False or Untrue.*[1]

(M) *Costs of Mandamus.*[2]

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shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, as the case may be, upon production to him of an office copy of the said judgment of the Court of Error, which shall be his authority and warrant for so doing: Provided always, that bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed as hereinafter provided, shall be duly put in within four days after the allowance of the said writ of error, and the same shall afterwards be duly perfected, according to the practice of the court wherein the said original judgment was given, otherwise the plaintiff in error shall be deemed to have abandoned his writ of error, and the same shall not be further prosecuted."

[1] If the officer make an improper return he may be fined; and on a second default an attachment may be obtained. *Anon.* 12 Mod. 410. And if the return to the first writ be invalid, a peremptory mandamus will be granted. *Rex v. Mayor of Norwich*, 2 Ld. Raym. 1244; Holt, 444. *Rex v. Bailiffs of Ipswich*, id. 1240. *Rex v. Shaw*, 12 Mod. 113. *Dr. Bentley's case*, Fort. 205. *Rex v. Simpson*, 8 Mod. 325. *Rex v. Mayor of Oxon*, 2 Salk. 428, 835; 2 Ld. Raym. 1267. *Rex v. Barnes*, Skin. 669.

If a return be false an action lies against the body politic for a false return, and against a particular person for procuring it (*Lydston v. Mayor of Exeter*, 12 Mod. 126; Carth. 226. *Rex v. Chapham*, Holt, 443. *Rex v.* ——, 1 Ld. Raym. 364. *Enfield v. Hill*, 2 Lev. 238), even if the return be true in words, if it be false in substance. *Rex v. Lyme Regis*, Dougl. 158. In such an action it is not material whether the writ ought to have been granted. *Green v. Pope*, 1 Ld. Raym. 126. The action should be brought in the Queen's Bench. Id. Comb. 400.

Although the action is local, the venue may be either in the county where the return was made, or where it is of record. *Lord v. Francis*, 12 Mod. 408.

Two persons cannot bring one action for a false return. *Butler v. Rews*, id. 349. But where a number of persons join in prosecuting a mandamus to register the certificate of a Dissenters' meeting-house, they may join in an action for an untrue return. *Green v. Pope*, 1 Ld. Raym. 127. In such an action it need not be alleged that they ought to obey it, for by making a return that is admitted. *Case of the Mayor of Norwich*, 12 Mod. 322.

A return ought to be by the mayor, with the consent of the corporation, and if he does it without such consent, an information will lie against him. *Rex v. Borough of Abingdon*, id. 308.

Where no one in particular is interested to bring an action for a false return, and the affidavits are contradictory, the court will direct an information to try the facts between the parties. *Rex v. the Overseers of the Poor of the Town of Spotland*, Ca. Temp. Hard. 184.

If the first writ be not returned a peremptory rule may be obtained, and afterwards an attachment. *Mayor of Coventry's case*, Salk. 429.

[2] The costs of the application for the writ, and of the writ itself, are in the discretion of the court by virtue of the 1 Wm. 4, c. 21, s. 5, which enacts, that "in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ is granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court, and the court is hereby authorised to order and direct by whom, and to whom, the same shall be paid." *See* 17 & 18 Vic. c. 125, s. 70.

The general rule that costs go to the successful party applies to a mandamus, where the matter is between parties interested (*Reg. v. Mayor of Newberry*, 1 Q. B. 765. *Reg. v. Langridge*, 24 L. J. Q. B. 73), but not where a judicial officer is required by mandamus to do an act, for he will not be fixed with the costs unless he has been guilty of improper conduct. *Rex v. Justices of Warwick*, 2 Har. & W. 429. *Reg. v. Mayor of Lichfield*, 6 Jur. 624.

It is no ground for exempting a party unsuccessfully opposing the issuing of a mandamus that he relies upon the decision of a court to which the mandamus is directed. *Reg. v. Justices of London*, 9 Q. B. 41. *Reg. v. Justices of Surrey*, id. 37. *Reg. v. Justices of Cumberland*, 5 D. & L. 430; *contra*, *Reg. v. Sheriff of Middlesex*, 5 Q. B. 365. *Reg. v. Justices of West Riding*, 5 id 1. *Rex v. Oundle*, 1 Ad. & E. 299, n. c.

The application for the costs should not be made until it is known whether the writ is obeyed or a return made; upon motion on affidavits, showing ground for believing that the litigation is at an end, and that the defendants have had notice that the application would be made for costs, the court will make the rule absolute with costs. *Reg. v. East Anglian Railway Co.* 2 E. & B. 475. *Reg. v. Bingham*, 4 Q. B. 877. *Reg. v. Justices of Cheshire*, 5 D. & L. 426. If, on the other hand, the rule for a mandamus is discharged, it will in general be discharged with costs. *Reg. v. Mayor of Bridgenorth*, 10 Ad. & E. 66. *Reg. v. Justices of West Riding*, 14 L. J. M. C. 119.

If issues be joined upon the return, the costs of the writ and other proceedings abide the result, and go to the successful party by virtue of the statutes 9 Anne, c. 20, and 1 Wm. 4, c. 21, s. 3. *Reg. v. Fall*, 1 Q. B. 636. *Reg. v. Kelk*, id. 660. *Reg. v. Corporation of Malmesbury*, 3 id. 577.

(N) *No Action lies for anything done in obedience to the Writ.*[1]

MANOR. *See* Copyhold, vol. iii. p. 223–231; Custom, vol. iii. p. 532.

MANSLAUGHTER. *See post*, Murder and Manslaughter, p. 501.

MAN-TRAPS. *See* 7 & 8 Geo. 4, c. 18; *post*, Spring-Guns.

MANUFACTURES, Malicious Injuries to. 24 & 25 Vic. c. 97, ss. 14, 15; *ante*, Malicious Injuries, p. 413.

MARINE Stores.[2]

MARK. *See post*, Trade-Mark.

MARKETS and Fairs.

I. How Established and Held, and of the Rights of the Owner of the Soil, and of the Persons using the Market.[3]

It seems that the relator cannot be required to find security for costs. *Reg. v. Mayor of Malmesbury*, 9 Dowl. 359.

[1] "No action, suit, or any other proceeding, shall be commenced or prosecuted against any person or persons whatsoever, for or by reason of anything done in obedience to any peremptory writ of mandamus issued by any court having authority to issue writs of mandamus." 6 & 7 Vic. c. 67, s. 3.

[2] By the 17 & 18 Vic. c. 104, certain obligations are imposed upon marine-store dealers, and their performance secured by the imposition of penalties. These relate to having their names on their storehouses, &c., keeping accounts, not purchasing from persons apparently under sixteen years of age, not cutting up any cable exceeding five fathoms in length without a permit, &c. *See* 17 & 18 Vic. c. 104, ss. 480–482. These regulations are applicable to "every person dealing in, buying, and selling anchors, cables, sails, or old junk, old iron, or marine stores of any description." Further restrictions are imposed by 24 & 25 Vic. c. 51, on dealers in old metal, who are thereby required to register their places of business, and are subject to the visitations of the police.

[3] No market or fair can be holden without a grant from the Crown, or a prescription which supposes such grant. It is usual to have a writ of *ad quod damnum* executed and returned before making new grant, to ascertain whether it would be to the prejudice of an existing market or fair. *See* 2 Vent. 344. Grant on Corporations, 173.

If the franchise occasion damage either to the king or a subject in any respect, it will be revoked (*see* 2 Inst. 406; 3 Lev. 222); and a person whose ancient right is prejudiced is entitled to have a *scire facias* in the queen's name, to repeal the letters patent. *See* 2 Vent. 334; 3 Lev. 220; 3 Burr. 1818; 6 Mod. 229. The *scire facias* may be sued out either in Chancery (*see* 4 Inst. 88; 3 Lev. 223), or in the Queen's Bench. *See* 4 Inst. 72. An allegation in these words, "whereas we are given to understand, and be informed," are correct in point of form. *See* 3 Lev. 222. A finding upon the *scire facias* that the grant was to the prejudice of an existing market is sufficient, though the uses may not be found to be prejudicial. *See* 1 Stra. 43. An action on the case is also maintainable at the suit of any person whose ancient franchise is injured by a new fair or market, whether a patent has been obtained for it or not; and although it is holden on a different day, except when the owner of the old market has allowed the new one to be erected in the neighbourhood, and enjoyed for a considerable space of time, as for twenty years. *See* 2 Saund. 172; 1 Bos. & P. 400; 4 Esp. 109. But an information in the nature of *quo warranto* will not lie for the encouraging of a franchise (*see* 3 Burr. 1812), and doubts have been entertained whether it can be granted on the application of a private individual, against a person by whom a fair or market is claimed to be holden. An action on the case may be maintained for the disturbance of a fair or market, as if a stranger disturbs those who are coming to buy or sell there, by which the owner loses his toll or profit. *See* 2 Roll. Abr. 106; 2 Vent. 28. The franchise of holding a fair or market is very frequently annexed to a manor. A fair granted for a term of years is a chattel real, which passes to the executor.

Markets and fairs are frequently regulated by act of parliament, and by the 10 & 11 Vic. c. 14, certain provisions are enacted, such as are usually contained in acts for constructing or regulating markets and fairs, and which may be incorporated in subsequent acts for that purpose.

As to days when fairs and markets are not to be held, *see* 27 Hen. 6, c. 5; 13 & 14 Vic. c. 23.

When a market is granted to the damage of another, the patent may be repealed in a *scire facias*, notwithstanding a writ of *ad quod damnum* had been executed, for the return of the writ is not conclusive. *Butler's case*, 2 Vent. 344. *Rex v. Marsden*, 3 Burr. 1818.

When a place has been used as a public fair or market for above twenty years, and

II. Sale in Market-Overt.[1]

persons have resorted to it during that time for exposing articles to sale, they will not be liable to be indicted for a nuisance in obstructing the highway, if *bonâ fide* engaged in using the place as a fair or market. *The King v. Smith*, 4 Esp. 111. *Aliter* after notice of removal. *The King v. Cotterall*, 1 B. & A. 67, 70.

The owner of a market cannot sue for erecting a new market in his neighbourhood, after an uninterrupted enjoyment for twenty years. *Holcroft v. Heel*, 1 B. & P. 400.

Trespass lies for erecting a stall in a market not of common right. *Mayor of Northampton v. Ward*, 2 Stra. 1238; 1 Wils. 107. So for setting tables in a market-place, for the sale of goods therein, without leave of the owners of the soil. *Norwich v. Swan*, 2 W. Black. 1116. See *Mayor of Yarmouth*, 8 Jur. N. S. 677.

Where the king grants a market to be kept in a particular place, parties can go to no other, although the place happens to be inconvenient; but if no place be limited by the king's grant, the grantees may keep the fair or market where they please. *Dixon v. Robinson*, 3 Mod. 107; id. 127. *Curwen v. Salkeld*, 3 East, 537.

Inhabitants of one market-town may buy and sell goods in another market-town, notwithstanding the stat. of Phil. & Mary. *Davies v. Leving*, 2 Lev. 89.

Where the corporation of Walsall claimed the right of holding a market in the town, but it appeared that the lord of the manor had always appointed the clerk of the market, but had not received any tolls from the persons frequenting it, the court determined that this act of the lord was not absolutely incompatible with the claim made by the corporation, in whom the right was, by other evidence, absolutely vested. *Rex v. Cotterall*, 1 B. & A. 66.

A *misuser* or *nonuser* of the franchise in a matter essentially incident to it, and in which the public good is at stake, as an abuse in the court of piepoudre (*see* Palm. 82); or a neglect to appoint a clerk of the market; or misconduct in other matters, amounts to a forfeiture. The Statute of Westminster provides that in such cases the franchise shall be seised into the king's hands. The statute adds, that if excessive toll be taken by a bailiff or inferior officer, without the consent of the lord, he shall restore the toll taken, and be imprisoned forty days. *See* 3 Edw. 4, c. 31. If the owner of a market take outrageous toll, he does not forfeit the market, but the toll only. *See* Com. Dig. Market, 1.

A grant to hold a market may be presumed. *De Rutzen v. Lloyd*, 5 Ad. & E. 456; 6 Nev. & M. 776.

The owner of a market is bound to find sufficient room, as far as it will allow. *Prince v. Lewis*, 5 B. & C. 363; 8 D. & R. 121; 2 C. & P. 66.

A person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods. *Townend v. Woodruff*, 5 Ex. 506; 19 L. J. Ex. 315.

A market cannot be removed unless on the soil of the lord of the manor. *Rex v. Starkey*, 2 Nev. & P. 169; 7 Ad. & E. 95.

A custom that certain commodities shall be sold only in the market on market-day (*Mayor of Macclesfield v. Pedley*, 1 Nev. & M. 708; 4 B. & Adol. 397), or to exclude shopkeepers from selling fish usually sold in a market, is good. *Mosley v. Walker*, 7 B. & C. 40.

The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops, within the limits of the franchise, on market-days. *Mayor of Macclesfield v. Chapman*, 12 Mee. & W. 18; 13 L. J. Ex. 32.

As to what is a sale in a shop within an exception in a statute establishing a market, see *Wiltshire v. Willett*, 31 L. J. M. C. 8. *Wiltshire v. Baker*, 11 C. B. (N. S.) 237–240. As to whether toll is imposed on the space occupied, or the article sold, see *Caswell v. Cook*, 31 L. J. M. C. 185. As to selling from door to door within the prescribed limits, id. 11 C. B. 637; 31 L. J. M. C. 185. Liability to poor-rate, see *Roberts v. Aylesbury*, 22 id. 34; 17 Jur. 236.

Selling corn by sample to a corn-dealer in his shop on market-day, and within the limits of the franchise, is not, it has been held, a disturbance of the market. *Mayor of Brecon v. Edwards*, 31 L. J. Ex. 368; 8 Jur. N. S. 461.

A lessee of a market may maintain an action for disturbance. *Bridgland v. Shapter*, 5 Mee. & W. 375.

An exemption from stallage in the case of the inhabitants of a town can be only by way of custom, not of grant or prescription. *Lockwood v. Wood*, 6 Q. B. 31; 15 L. J. Q. B. 37. See *Mayor of Yarmouth*, 8 Jur. N. S. 677.

[1] A *bonâ fide* sale made in a fair or market overt for a valuable consideration, in general transfers a complete property in the thing sold to the vendee. So that, however defective or illegal the title of the vendor may be, yet the vendee's is valid against everybody else, except the queen, whether infants, *feme coverts*, idiots, or lunatics, men beyond sea or in prison, whether they are possessed in their own right, or as executors or administrators, and whether any toll is paid to the owners of the market or not. *See* 4 Hen. 7, 5, pl. 1; Latch. 144; 2 Inst. 713; Bac. Abr. Fairs and Markets. The sale, in order to come within this protection, must, of course, take place on the market-day, and at the place assigned for the market. But the city of London is said to be a market-overt every day in the week, except Sunday; so that a sale on any of those days has the same ef-

MARQUE, Letters of. *See* Letters of Marque, *ante*, p. 361.

MARRIAGE. *See* also Husband and Wife, *ante*, p. 59; Matrimonial Causes, *post*, p. 468.

I. Who may Intermarry, p. 445.

(A) *Of Consanguinity*, p. 445.

(B) *Of Impotency, Malformation, &c.* p. 445.

II. How Contracted, p. 446.

(A) *Marriage in Church or Chapel*, p. 446.

(*a*) *Banns must be previously Published, or License obtained*, p. 446.

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fect as if on a fair or market-day in another place. *See* 2 Inst. 713; Moor, 360. And in London every shop in which goods are publicly exposed to sale is a market-overt for such things as the owner professes to trade in. *See* 2 Bl. Com. 449.

A sale of goods in a shop out of London has been said not to be a sale in a market-overt so as to alter the property. *Anon.* 12 Mod. 521. *Lee v. Bayes*, 16 C.B. 601. *Contra*, *Harris v. Show*, Ca. T. Hardw. 249. And a wharf in London is clearly not a market-overt for articles brought there. *Wilkinson v. King*, 2 Camp. 335; Moor, 625.

Goods sold to the shopkeeper in his shop in London, to be added to his stock, are not sold in market-overt, although, when sold by the shopkeeper there, they will be sold in market-overt: for example, if a servant steals his master's books, and sells them to a bookseller in the city of London, the sale to the bookseller is not a sale in market-overt, and the bookseller would acquire no right to the books, as against the true owner from whom they have been stolen; but if, after the books have been added to the bookseller's stock-in-trade, and exposed for sale in his shop in the city, they are purchased by a customer *bonâ fide* in the ordinary way of trade, the purchase would be a purchase in market-overt, which would change the ownership, and give the purchaser an indefeasible title to the books. *White v. Spettigue*, 13 Mee. & W. 603. See *Cooper v. Willomatt*, 1 C. B. 672.

The owner of property cannot maintain trover against a purchaser at a market-overt who sold the goods before conviction. *Horwood v. Smith*, 3 T. R. 750. And the stat. 21 Hen. 8, only extends to felonies, and not to false pretences and other criminal frauds, and, therefore, if goods be obtained from the owner by fraud, and pawned to a third person without notice, the owner is not entitled to them. *Parker v. Patrick*, 5 id. 175.

The sale will not be protected if the buyer know the person assuming to be the vendor has not the absolute property. *See* 2 Bl. Com. 442. So, a sale by an infant, whose tenderness of age is obvious, is not binding; nor a sale by a *feme covert*, except it be of those things which she usually trades in, or by the consent of her husband: the privilege does not extend to the case of a pawnee, for there is no market-overt for pawning (*see* 2 Stra. 1187; 1 Wils. 8; 3 Atk. 44; 2 Camp. 336, n.; 1 Leach, 522); and the contract of a sale ought to be originally and wholly made in the market, not to have its inception out of the market, and its consummation in it; and therefore, a sale by sample in the market, if the goods are not brought into it, is not a sale in market-overt (*see* 2 Inst. 220, 713; 4 Taunt. 532, 533). It ought also to be made in the day-time, which is explained to mean between sunrise and sunset, and not in the night; though a sale in the night-time is valid between the parties, it will not bind a stranger with regard to stolen goods; and it should be further observed that, at common law, if a man brought an appeal (now abolished) against a felon, and prosecuted him to conviction, he was held entitled to restitution, although the goods had been sold in market-overt. *See* 2 Inst. 716. And by 7 & 8 Geo. 4, c. 29, s. 57, the property in all chattels which have been stolen and afterwards sold in market-overt, reverts, on the conviction of the thief, to the original owner from whom they were stolen, so as to entitle him to maintain an action against the purchaser for the goods, or the value of them, without obtaining an order of restitution. *Scattergood v. Sylvester*, 15 Q. B. 510; 19 L. J. Q. B. 447.

Further, a sale, although made in market-overt, will not be binding if it be such as carries with it a presumption of fraud; as if it take place in a back-room or warehouse, or in a corner or covert place within a fair or market (*see* 5 Co. 832; Inst. 713; Moore, 325); or if the door or window be shut, and public observation precluded (*see* 2 Inst. 713); or if the sale be connivous and intended to defraud.

As to horses, *see* 2 Phil. & Mary, c. 7; 31 Eliz. c. 12; 2 Bl. Com. 450; W. Jones, 163; Palmer, 485; 2 Stark. 76.

The general rule that a thief cannot be sued for restitution of the goods stolen until after conviction, does not prevent an action being maintained against a person who has purchased them, not in market-overt, at the suit of the real owner. *Lee v. Bayes*, 18 C. B. 602; 25 L. J. C. P. 249. *Stone v. Marsh*, 6 B. & C. 551. *White v. Spettigue*, 13 Mee. & W. 605. *Beer v. Humphrey*, 2 Ad. & E. 495; 4 Nev. & M. 430.

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I. Who may Intermarry.

(A) *Of Consanguinity.*[1]
(B) *Of Impotency, Malformation, &c.*[2]

[1] Marriages between persons within the prohibited degrees of consanguinity or affinity are absolutely null and void, to all intents and purposes whatsoever. 5 & 6 Wm. 4, c. 54, s. 2.

Consanguinity and affinity are regulated by the canon and civil law. The civilians count upwards to the common ancestor, and then downwards from the common ancestor to his other descendant, reckoning a degree for each generation. The canonists, on the contrary, begin from the common ancestor, reckoning downwards; thus, the brother and sister are related, according to the civil law, in the second degree, but in the first degree, according to the canon; first cousins, or cousins-german, who by the civilians are classed in the fourth degree, are related in the second degree according to the canonists.

The first prohibition among collaterals is the marriage of brother and sister. Next in proximity after brother and sister, are uncle and aunt, whose intermarriage with the corresponding relationship of nephew and niece is also prohibited.

It is the modern practice to simplify the specification of persons prohibited from intermarrying, by referring only to the degree in which they stand according to the civil computation; which order and enumeration accord so perfectly with the canon and the spirit of the statute, that all the relationships which constitute impediments to lawful matrimony are contained in the first, second, and third degrees of the table of the civil law, which are the only prohibited degrees according to the law of England; it being always understood that the lineal degrees are prohibited *ad infinitum*. With respect to affinity it is to be observed, that the kindred of the husband is not of affinity to the kindred of the wife; for affinity, as respects the kindred of the wife, relates only to her husband, and terminates in him; and as respects the husband's kindred, it in like manner relates only to his wife. Hence, the husband's brother may lawfully marry his brother's wife's sister; the husband's son (by a first wife) may marry his father's (second) wife's daughter (by a former husband); a son (by a first marriage) may marry his father's (second) wife's sister. And though a man may not marry his brother's widow (she being by affinity his sister), he may marry the widow of his former wife's brother; for although a wife's brother is brother by affinity to a husband, yet the affinity does not extend to his wife. As to illegitimate kindred, it has been held that the impediments of consanguinity and affinity apply no less to such persons than to those lawfully related; for the disqualifications of bastardy are of civil institution only, and do not intrinsically weaken the natural ties of kindred. And this seems to be acknowledged, both by the canonists and by the courts of common law. In addition to the foregoing observations (which apply only to the civil suit), it is to be remarked, that persons who have contracted marriage contrary to the canon are liable to ecclesiastical punishment for the crime of incest.

It is unlawful to marry a brother's wife (*Harrison v. Burnell*, 2 Vent. 17), or a brother's daughter (*Murgatroyd v. Rotham*, T. Jones, 191), or the wife's sister's daughter (*Jones v. Bean*, 1 Mod. 25), or his own sister's daughter. *Clement v. Beard*, 6 id. 448.

The marriage of a man with his deceased wife's sister is absolutely void under Lord Lyndhurst's Act, and not merely voidable. *R. v. Chadwick*, 11 Q. B. 175. *Brook v. Brook*, 9 H. L. C. 193. *Coulson v. Allison*, De Gex, F. & J. 521.

A marriage of a widower with his deceased wife's sister, both being English-born subjects, is void, though the marriage was celebrated in a foreign country, by the law of which such a marriage was legal. *Brook v. Brook*, 7 Jur. N. S. 422. And this extends to an illegitimate as well as to a legitimate child of his late wife's parents. *Reg. v. Chadwick*, 11 Q. B. 173; 17 L. J. Q. B. 81. And a marriage between a man and the niece of his deceased wife is unlawful, notwithstanding the niece's mother was an illegitimate child of the deceased wife's mother. *Reg. v. Brighton*, 30 L. J. M. C. 197; 1 B. & S. 447.

The *lex loci contractus* cannot impart validity to a marriage prohibited by the laws of the domicile. Therefore, a marriage celebrated during a temporary residence in Denmark, between an Englishman domiciled in England and the sister of his deceased wife, is a nullity, though by the Danish law it is good. *Brook v. Brook*, 3 Sm. & Giff. 481; 9 H. L. C. 193. *Van Grutten v. Digby*, 7 L. T. (N. S.) 455.

[2] See *Castleden v. Castleden*, 9 H. L. C.

II. How Contracted.

(A) *Marriage in Church or Chapel.*

(*a*) *Banns must be previously Published, or License obtained.*[1]

(*b*) *Of the Banns.*[2]

186; 31 L. J. M. C. 103; id. 12. *Serrell v. Serrell*, id. 55; Arm. id. 164.

[1] By the 4 Geo. 4, c. 76, s. 2, it is required that, previously to the marriage, banns shall be published upon three successive Sundays, in manner therein mentioned, in the church or chapel where the marriage is to be solemnised; or, in lieu thereof, a license must be obtained from the ecclesiastical authority to marry without banns. *See* also 4 Geo. 4, c. 76, s. 10; 21 & 22 Vic. c. 85, s. 6.

The license is either a special license from the Archbishop of Canterbury (*see* 25 Hen. 8, c. 21; 4 Geo. 4, c. 76, ss. 10, 20; 6 & 7 Wm. 4, c. 85, s. 1), or a common license from the ordinary of the place, or his surrogate. *See* 10 & 11 Vic. c. 98, s. 5.

No license can be granted to marry in any church or chapel, unless one of the parties has had his or her usual place of abode in the parish to which it belongs for fifteen days immediately preceding (4 Geo. 4, c. 76, ss. 14, 26); and ministers are prohibited from solemnising any marriage more than three months after the complete publication of the banns or grant of the license. (Id. sects. 9, 19.)

The marriage, whether by banns or license, must be in a church or chapel wherein banns may be lawfully published, and shall take place between eight and twelve in the forenoon (except in the case of special license), and shall be solemnised by a person in holy orders, and before not less than two credible witnesses; and the rules prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer, and not thereby altered, shall be duly observed. 4 Geo. 4, c. 7, ss. 21, 28.

In the case of the publication of banns of a person not being a widower or a widow, if the parent or guardian openly signifies his dissent at the time they are published, such publication shall be void. (Id. c. 76, s. 16.)

No license to marry without banns can be granted unless oath is first made by one of the parties that he or she believes that there is no impediment of kindred or alliance, or of any other lawful cause; and unless one of the parties has, for the space of fifteen days immediately preceding the license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnised, and unless where one of the parties (not being a widower or widow) is under the age of twenty-one years, the consent of the person or persons whose consent is required, has been obtained, or there is no person having authority to give such consent. (Id. c. 7, ss. 17, 18.)

The person whose consent is required, in the case of infants, is the father, or, if he be dead, the guardian lawfully appointed; if no guardian, the mother, being unmarried; if no mother unmarried, the guardian appointed by the Court of Chancery. If the person whose consent is required is *non compos*, or, being the mother or guardian, is beyond the seas (*Ex-parte J. C.* 3 Mylne & C. 471; 2 Jur. 463), or unreasonably, or from undue motives, withholds consent to a proper marriage, relief may be obtained by petition to the Lord Chancellor. (Id. c. 76, ss. 16, 17.)

The ceremony is to be performed (excepting when time and place are dispensed with by special license) in a church or chapel wherein the banns have been published, or in the church or chapel specified in the license, by a priest in holy orders, and agreeably to ancient injunctions, in the presence of two witnesses at least, who, with the minister and the parties themselves, are to subscribe the certificate set forth in the act. *See* id. c. 74, s. 28.

The provisions of the 4 Geo. 4, c. 76, s. 28, that two witnesses shall be present at a marriage, and shall sign the register, is merely directory, and non-compliance is no ground for annulling a marriage. *Wing v. Taylor*, 2 Sm. & T. 278; 30 L. J. P. & M. 258. See *Beamish v. Beamish*, 9 H. L. C. 274.

Primâ facie the vestry is part of the church, and a marriage solemnised in it valid. *Wing v. Taylor*, 30 L. J. P. & M. 258.

The officiating minister must be duly authorised. *Maddox v. Peterborough*, 1 Mod. 22. *Reg. v. Willes*, 10 C. & F. 534.

At common law, a marriage between English subjects, celebrated according to the rites of the Church of England, but not in the presence of a priest in holy orders, is invalid. *Catherwood v. Caslon*, 13 Mee. & W. 261; 13 L. J. Ex. 443. *Beamish v. Beamish*, *supra*.

Marriages solemnised in chapels, &c., whilst the parish church is under repair, and in chapels wherein banns cannot be legally published, or of which the due consecration may be doubtful, are declared valid. 6 Geo. 4, c. 18.

Jews and Quakers are excepted from the operation of the 4 Geo. 4, c. 76, where both parties were of these persuasions (sect. 31); and by the Marriage Act, 6 & 7 Wm. 4, c. 85.

The matrimonial law of England as regards the Jews is their own matrimonial law.

As to the indictment against a clergyman for refusal to marry, see *Reg. v. James*, 19 L. J. M. C. 179; 14 Jur. 940. *Davis v. Black*, 1 Q. B. 900; 1 Gale & D. 432.

[2] Banns of matrimony are to be published in the parish church, or in some public chapel belonging to the parish wherein the

(c) *Of the License.*[1]

parties dwell, upon three Sundays preceding the solemnisation of marriage, during the time of morning service, or of evening service (if there be no morning service), immediately after the second lesson; and if the parties dwell in separate parishes, the banns must be published in like manner in their respective parishes.

By 26 Geo. 2, c. 33, s. 4, and 4 Geo. 4, c. 76, it is enacted, that no parson, vicar, minister, or curate, shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons so to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver, or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true christian and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively.

It is necessary that all parts of a baptismal name should be set forth. A publication of banns under a false name has been held to be no publication, it being presumed *primâ facie* that such a publication refers to the intended marriage of some other persons, who are lawfully entitled to the names which have been published. And when marriages have been had after an undue publication of banns, courts have pronounced such marriages to be *ipso facto* null and void. If both were cognisant of an undue publication, it is ground of nullity of marriage. *Brealey v. Reed*, 2 Curt. 833.

The banns are to be published by the true names; that is, the name by which the parties are known in the world. *Rex v. Inhabitants of Billingshurst*, 3 M. & S. 250. Consequently, a marriage by a party in an assumed name, and not by his real name, is not void, if not assumed for fraud. *Rex v. Inhabitants of Burton-upon-Trent*, 3 M. & S. 537.

A partial departure from the true name of one of the parties to a marriage, in a license obtained in the altered name by the other party, for the purpose of concealing the intended marriage, is no cause of nullity if the altered name may represent the person, and if such license was obtained for and by direction of such person. *Bevan v. M'Mahon*, 2 S. & T. 230; 30 L. J. (P. & M.) 61. But where the publication of banns was in the name of "John," instead of "Bower," and both parties were cognisant of the misdescription, the marriage was pronounced null. *Midgley v. Wood*, 31 L. J. (P. & M.) 57.

A repetition of the banns is required in case the marriage is not solemnised within three months. 26 Geo. 2, c. 23, s. 9.

[1] In conformity to the canons, and to the 14th and 16th sections of the Marriage Act (4 Geo. 4, c. 76), it is the practice of the Ecclesiastical Court to require, from the party applying for a license, an affidavit that there is no impediment of kindred or alliance, or any lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the said license; and that one of the parties, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnised: and further, where either of the parties (not being a widower or widow) is under the age of twenty-one years, that the consent of the father (or if the father be dead, of the guardian or guardians of the person of the minor lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother, if unmarried; and if there be no mother unmarried, then of the guardian or guardians of the person appointed by the High Court of Chancery), hath been obtained to such marriage. But if there shall be no such person or persons having authority to give such consent, then, upon oath to that effect by the party requiring the license, it may be granted, notwithstanding the absence of consent.

Unless the parties under age have been previously married, the parents or guardians are required to give consent to the marriage. But it has been decided that section 11 of the statute, requiring the consent of parents to the marriage of a minor, is directory merely; and a marriage has been held valid, though the husband was a minor, and his father, then living, did not consent. 8 B. & C. 29.

A license may be vitiated by fraud practised in obtaining it. But a false description of the parties merely, unless combined with circumstances tending to show an intention manifestly fraudulent; and unless the misrepresentation were such as to have had the effect of imposing on the court or its surrogate, by which some facility had been procured, which otherwise would not have been granted, will hardly invalidate a license. At any rate, a party impeaching the validity of a license in order to annul a marriage, ought neither to have been an agent in the fraud, nor conniving at it, nor acquiescing in the imposition; but complaining as soon as the injury suffered by it was ascertained. But as a license is an indulgence granted to a particular individual, it is the identity of the individual which must determine how far the indulgence is applicable to the party possessing it; and, therefore, a mere variation of name in a license has not generally (still less when both parties have attained the age of majority) been held to be analogous to a variation of names in a publication of banns, the very essence of which consists in the true designation of the parties.

Although the name be false, the marriage

(*d*) *By a Special License.*[1]

(*e*) *Effect of Non-Observance of required Solemnities.*[2]

(B) *Marriage before the Superintendent Registrar.*[3]

(*a*) *Without License.*[4]

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may be valid; but if there be an intent to deceive by using the name of another, it will, it seems, be void. *Lane v. Goodwin*, 4 Q. B. 361; 12 L. J. Q. B. 157; 3 Gale & D. 610.

By 4 Geo. 4, c. 76, s. 19, it is provided, that when a marriage shall not be consummated within three months after the grant of a license, no minister shall proceed to the solemnisation of such marriage, that is to say, of the persons named in such license, until a new license shall be obtained, unless by banns.

[1] By a regulation of Archbishop Secker, dated January 15, 1759, special licenses, dispensing with both time and place, are not to be granted, excepting to persons of the rank of peers, or peeresses in their own right, their sons and daughters; dowager peeresses, privy councillors, the judges of Westminster Hall, baronets, knights, and members of parliament: but this regulation does not bar his grace the Archbishop of Canterbury from granting occasional favours beyond these specific limits. In all cases a special *fiat* is addressed by his grace to the master of the facilities. To obtain a special license, the same form is required as if the license was merely for the dispensation of banns, the only material alteration consisting in the permission for the marriage to be solemnised at any time in any church or chapel, or other meet or convenient place. To persons of inferior rank, a special license, dispensing with the particular parish required by the act, or with the canonical hours, is sometimes granted on a particular application.

[2] The 4 Geo. 4, c. 76, s. 23, declares that the marriage shall be null and void to all purposes in the following cases: namely, if any person shall wilfully and knowingly intermarry in any other place than a church or a public chapel wherein banns may be lawfully published (unless by special license), or shall knowingly and wilfully intermarry without due publication of banns or license from a person having authority to grant the same first obtained (see *Midgley v. Wood*, 3 L. J. (N. S.) Pro. 57. *Bevan v. M'Mahon*, id. 61); or shall knowingly and wilfully consent to or acquiesce in the solemnisation of marriage by any person not being in holy orders.

It is made a felonious offence knowingly and wilfully to solemnise matrimony at any other time than between eight and twelve o'clock in the forenoon, unless by special license, or to solemnise it according to the Church of England, under a false pretence of being in holy orders; when a valid marriage by license or banns is solemnised between persons, either of whom is under age, by means of the false oath or fraudulent procurement of one of the parties, the party so offending is liable to forfeit all the property which would otherwise accrue from the marriage. (Id. s. 23.) In many instances the neglect of the prescribed statutory formalities, notwithstanding a penalty is attached to such neglect, does not invalidate the marriage. See *R. v. Birmingham*, 8 B. & C. 29. *R. v. Bramley*, 6 T. R. 331.

A misnomer from ignorance does not avoid the marriage. *Rex v. Wroxton*, 3 Nev. & M. 712; 4 B. & Adol. 640.

[3] By 6 & 7 Wm. 4, c. 85, and the acts passed for its amendment, it is provided that parties may be married by the certificate of the superintendent registrar of marriages, either with or without license.

[4] Where a person intends to be married by the superintendent registrar's certificate, without license, he must deliver to the superintendent registrar of the district within which both the persons about to marry have dwelt for not less than seven days, or if they have dwelt in different districts for that time, then to the superintendent registrar of each district, a notice of his or her intention to marry, expressed in the form or to the effect which the acts prescribe. *See* 6 & 7 Wm. 4, c. 85; 19 & 20 Vic. c. 119, ss. 3, 7, 8. This notice is to be entered by the superintendent registrar into a book called "The Marriage Notice Book," which is to be open at all reasonable times, without fee, to all persons desirous of inspection. (6 & 7 Wm. 4, c. 85, s. 5.) The notice must specify the church or other building in which the marriage is to be solemnised, which must be in general within the district where one of the parties has dwelt for the space of time to which the notice refers (3 & 4 Vic. c. 72, ss. 1, 2), or within two miles of it (19 & 20 id. c. 119, s. 14), except in the case of Quakers and Jews. (3 & 4 id. c. 72, s. 5; 19 & 20 id. c. 119, s. 13.) The person giving the notice is required to make or subscribe in the body or at its foot a solemn declaration that he or she believes that there is no impediment of kindred or alliance, or other lawful hindrance to the marriage, and that both the persons about to marry have, for the space of seven days immediately preceding, had their usual place of abode and residence within the district of the superintendent registrar to whom the notice is given; and when either of such persons (not being a widower or widow) shall be under the age of twenty-one, that the consent of the person or persons whose consent is by law required has been given, or (as the case may be) that

(*b*) *With License.*[1]

there is no person whose consent to such marriage is by law required. (*See* 19 & 20 Vic. c. 119, s. 2, sch. A.) This notice, or a copy thereof, under the hand of the superintendent registrar, must be suspended or affixed by the registrar in some conspicuous place in his office, during twenty-one successive days next after the day when it was entered in the marriage notice-book. (Id. s. 4.)

The issuing of the certificate may be forbidden by any person whose consent would be required by law to a marriage by ecclesiastical license immediately before the issuing of 6 & 7 Wm. 4, c. 85, by writing the word "Forbidden" opposite the entry of the notice in the marriage notice-book, and subscribing thereto his or her name and place of abode, and the character in which he or she is authorised so to do; and thereupon the notice and all the proceedings thereon are utterly void. (6 & 7 Wm. 4, c. 85, s. 9.) The certificate, where no lawful impediment has been shown to the satisfaction of the superintendent registrar, and there has been no such prohibition, is, after the expiration of the twenty-one days, issued under the hand of the superintendent registrar, upon the request of the person delivering the notice, and the certificate expresses that notice of the intended marriage in such a church or building has been duly entered, and that the issue of the certificate has not been forbidden by any person authorised so to do. (19 & 20 Vic. c. 119, s. 4, sch. B.) The superintendent registrar is entitled to a fee of a shilling for entering the notice (6 & 7 Wm. 4, c. 85, s. 5), and for granting the certificate (19 & 20 Vic. c. 119, s. 4).

The marriage may take place immediately upon the issuing of the certificate, but it must be within three calendar months from the entry of the notice. (19 & 20 Vic. c. 119, s. 4.) It may be solemnised according to several methods authorised by the act, namely: (1.) In a registered building, *i. e.* a building certified according to law as a place of religious worship, and registered as a place for the solemnisation of marriages, according to such form and ceremony as the parties think fit to adopt (6 & 7 Wm. 4, c. 85, ss. 18–20); but every such marriage must be solemnised before some "registrar" of the district and two or more credible witnesses, and be with open doors, and between the hours of eight and twelve o'clock in the forenoon; and in some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties must declare as follows:—"I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.;" and lastly, each of the parties must say to each other, "I call upon these parties here present to witness that I, A. B., do take thee, C. D., to be my wedded wife (or husband)." (6 & 7 Wm. 4, c. 85, s. 20.) (2.) The parties may contract marriage at the office of the superintendent registrar. The ceremony must take place in his presence, and in that of some registrar of the district, and also of two other witnesses, and must be with open doors, and between the hours of eight and twelve o'clock in the forenoon. The parties are to make the same declaration and use the same words as in the case of marriage in a certified and registered place of worship. (Id. s. 21.) No religious service can be read there (19 & 20 Vic. c. 119, s. 12), but the parties may afterwards have a religious marriage celebrated according to their own persuasion. (Id.) (3.) The marriage may be solemnised in the Church of England, and in such case it dispenses with the necessity of banns or ecclesiastical license. The church in which the marriage is solemnised must be one within the district of the superintendent registrar by whom the certificate is issued. (6 & 7 Wm. 4, c. 85, ss. 1, 4; 7 Wm. 4, and 1 Vic. c. 22, s. 36.) (4.) The marriage may be solemnised according to the usages of the Quakers, or of the Jews, where the parties are of those persuasions respectively. *See* 6 & 7 Wm. 4, c. 85, ss. 2, 39; 3 & 4 Vic. c. 72, s. 5; 19 & 20 id. c. 119, s. 21; 23 id. c. 18. *Moss v. Smith*, 1 Man. & G. 232.

[1] Where a person intends to be married by the superintendent's certificate with license, he must give a notice, and obtain a certificate as above. The course of proceeding and the law is the same as in the case where there is no certificate, with the following differences, namely: (1.) If both persons about to marry do not dwell in the same superintendent registrar's district, notice need not be given to the superintendent registrar of each district, but only to the superintendent registrar of the district in which one of such persons resides; and it is sufficient if the notice state how long he or she has there resided, without making any statement of the same kind with respect to the other party. (19 & 20 Vic. c. 119, s. 6.) (2.) It is necessary that the declaration in the notice should state that the person giving it has, for the space of fifteen days (instead of seven days) immediately preceding, had his or her usual place of abode or residence within the district of the superintendent registrar to whom the notice is given. (Id. s. 2.) (3.) It is not necessary that the notice or a copy should be affixed in the office of the registrar. (Id. s. 5.) (4.) The certificate may be obtained after the expiration of one day after the entry of the notice. (Id. s. 9.) Where there is no lawful impediment, and no forbidding of the certificate, the registrar shall give the certificate, and also a license for the marriage, under his hand, in a prescribed form (id. ss. 9, 21, sch. C.), and for this he is entitled to demand a fee of 1*l.* 10*s.* beyond the amount paid for the necessary stamps. (Id. s. 10.) The marriage must

(C) *Consent of Parents in case of Minors.*[1]

(D) *Marriage of English Subjects abroad.*[2]

take place within three calendar months after the entry of the notice (id. s. 9), and may be solemnised in any of the modes specified above, except that of the Church of England. (6 & 7 Wm. 4, c. 85, ss. 2, 11, 20, 22; 19 & 20 Vic. c. 119, s. 21.)

Unless the marriage take place within three calendar months of the entry of the notice, the notice, certificate, license, &c. are void. (6 & 7 Wm. 4, c. 85, s. 15; 7 Wm. 4, and 1 Vic. c. 22, s. 3; 19 & 20 Vic. c. 119, sch. B.) And by the 6 & 7 Wm. 4, c. 85, s. 42, it is enacted, that if any persons shall knowingly and wilfully intermarry in any other place than that specified in the notice and certificate, or without due notice to the superintendent registrar, or without certificate duly issued, or without license (where license is required), or in the absence of the registrar or superintendent registrar (where his presence is required), the marriage shall be null and void. And by sect. 43, "if any valid marriage shall be had under the provisions of this act, by means of any wilfully false notice, certificate, or declaration, made by either party to such marriage, as to any matter to which a notice, certificate, or declaration is herein required, it shall be lawful for his majesty's attorney-general, or solicitor-general, to sue for a forfeiture of all estate and interest in any property accruing to the offending party by such marriage, and the proceedings thereupon and consequences thereof, shall be the same as are provided in the like case with respect to marriages solemnised by license before the passing of this act, according to the rites of the Church of England." *See* also 19 & 20 Vic. c. 119, s. 19. And by 6 & 7 Wm. 4, c. 85, s. 39, "every person who shall knowingly and wilfully solemnise any marriage in England, except by special license, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion according to the usages of the Jews); and every person who in any such registered building or office shall knowingly and wilfully solemnise any marriage in the absence of a registrar of the district in which such registered building or office is situated, shall be guilty of felony; and every person who shall knowingly and wilfully solemnise any marriage in England (except by license) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid, or if the marriage is by license, within seven days after such entry, or after three calendar months after such entry, shall be guilty of felony."

[1] Formerly the personal consent of the parents and guardians (or a consent in writing when personal attendance could not be given) at the time of applying for a license for the marriage of minors, was indispensable; and the marriage of a minor, thus solemnised by virtue of a license, without the previous consent of parents or guardians, was, by the act of Geo. 2, null and void; but by the present act of the 4 Geo. 4, c. 76, the consent of the parent or guardian is still required to the marriage of a minor had by license, though the want of that consent appears no longer to furnish a ground for questioning the validity of such a marriage, if in other respects it be duly solemnised, however fraudulently the parental rights may have been evaded. But in case of fraudulent representation or concealment of the fact of the party being under age, the party so guilty may be deprived of all pecuniary benefit from the marriage. *See* 4 Geo. 4, c. 76, s. 23.

Where the husband alone incurs a forfeiture, the court has no authority to order any settlement of the wife's property on the issue of the wife by any subsequent marriage. *Attorney-General v. Mullay*, 7 Beav. 351. Where the husband was the offending party, a power of disposition by the wife was inserted in a settlement under the act, such power appearing advantageous to the wife, and being so limited as not to affect the interest of the issue of the marriage. *Attorney-General v. Lucas*, 2 Phil. 753; 18 L. J. Ch. 100.

[2] By 12 & 13 Vic. c. 68, "all marriages solemnised, as in that act provided, in any foreign country or place where there shall be a British consul duly authorised to act in that behalf, shall be as valid as if solemnised in the British dominions in due form of law, provided either of the parties thereto be a subject of the realm. The consul, on receiving due notice, is empowered to grant a license for the marriage, and seven days after such notice, if the marriage is to be by license, or twenty-one days after if it is to be without license, he may, at the British consulate, with open doors, between the hours of eight and twelve in the forenoon, and in the presence of two or more witnesses, proceed either himself to solemnise the same, or (at the option of the parties) to allow the same to be solemnised in his presence; and either according to the rites of the Church of England, or according to any other form or ceremony the parties may see fit to adopt. Such marriage is to be afterwards registered in accordance with the act for registering marriages in England, as far as the circumstances of the case will admit." See *Waldegrave Peerage*, 4 Clark & Fin. 649. *Kent v. Burgess*, 11 Sim. 361; 5 Jur. 166. *Swift v. Swift*, 3

(E) *Royal Marriage Act.*[1]

(F) *Registration of Marriage.*[2]

(G) *Clandestine Marriages.*[3]

Knapp, 303. *Catterall v. Catterall*, 1 Rob. Ecc. R. 580; 11 Jur. 914. By the 4 Geo. 4, c. 91, "marriages solemnised by a minister of the Church of England in the chapel or house of a British ambassador or resident minister, or in the chapel of a British factory abroad, or in the house of any British subject residing at such factory, or by a chaplain (or officer or other person officiating by authority of the commanding-officer within the lines of a British army abroad), shall be as valid as if solemnised in the British dominions in due form of law."

British subjects resident in a settlement abroad are governed by the local laws of the country, as in marriage. *Lautour v. Teesdale*, 2 Marsh. 243. Where there was evidence that British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service, in the language of the country, was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage-service of the Church of England, and they received a certificate of the marriage, which was afterwards lost, the court held this was sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated by the laws of that country, particularly after eleven years' cohabitation as man and wife, till the period of the husband's death. *Rex v. Inhabitants of Brampton*, 10 East, 282. See *Brook v. Brook*, 9 H. L. C. 193. *Van Grutten v. Digby*, 7 L. T. (N. S.) 455.

Although the *lex loci contractus quoad solemnitates* determines the validity of the contract of marriage, the question, whether the parties may enter into such contract must depend upon the *lex domicili*. *Brook v. Brook*, 7 Jur. N. S. 422.

[1] The Royal Marriage Act, 12 Geo. 3, c. 11, extends to prohibit the contracting of marriages, or to annul any already contracted in violation of its provisions, wherever the same may be contracted or solemnised, either within the realm of England or without. *Sussex Peerage*, 11 Clark & Fin. 85.

[2] By 6 & 7 Wm. 4, c. 85, s. 31, "every clergyman of the Church of England, immediately after every office of matrimony solemnised by him, shall register in duplicate, in two of the marriage-register books, the several particulars relating to that marriage, according to the form of the said schedule (C); and every such registering officer of the Quakers, as soon as conveniently may be after the solemnisation of any marriage between two Quakers in the district for which he is registering officer; and every such secretary of a synagogue, immediately after every marriage solemnised between any two persons professing the Jewish religion, of whom the husband shall belong to the synagogue whereof he is secretary, shall register or cause to be registered, in duplicate, in two of the said marriage-register books, the several particulars relating to that marriage, according to the prescribed form; and every such registering officer or secretary, whether he shall or shall not be present at such marriage, shall satisfy himself that the proceedings in relation thereto have been conformable to the usages of the said society, or of the persons professing the Jewish religion, as the case may be; and every such entry as hereinbefore is mentioned (whether made by such clergyman, or by such registering officer or secretary respectively, as aforesaid) shall be signed by the clergyman, or by the said registering officer or secretary, as the case may be, and by the parties married, and by two witnesses, and shall be made in order, from the beginning to the end of each book, and the number of the place of entry in each duplicate marriage register-book shall be the same." *See* also 19 & 20 Vic. c. 119, s. 22.

[3] By 4 Geo. 4, c. 76, s. 21, if any person solemnise matrimony in any other place than a church, or such public chapel where banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special license from the Archbishop of Canterbury; or solemnise matrimony without due publication of banns, unless license of marriage be first obtained; or if any person, falsely pretending to be in holy orders, solemnise matrimony according to the rites of the Church of England; every person knowingly and wilfully so offending shall be deemed guilty of felony, and be transported for fourteen years: Provided that all prosecutions for such felony be commenced within the space of three years after the offence committed. By the 22d section, if any person knowingly and wilfully intermarry in any other place than in a church or such public chapel, where banns may be lawfully published, unless by special license; or knowingly and wilfully intermarry without due publication of banns or license; or knowingly and wilfully consent to, or acquiesce in, the solemnisation of such marriage, by any persons not being in holy orders, the marriages of such persons shall be null and void, to all intents and purposes whatsoever. Clandestine marriages are punishable at common law, independent of the statute, with fine and imprisonment.

III. Of Divorce and other Proceedings putting an end to the Marriage, and of Judicial Separation.[1] *See* also *post*, p. 468.

(A) *Of Dissolution of Marriage.*[2]

(*a*) *Joinder of Co-Respondent.*[3]

(*b*) *Claim of Damages against Co-Respondent.*[4]

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[1] See Macqueen on Divorce; Inderwick; Divorce and Matrimonial Acts.

[2] By 20 & 21 Vic. c. 85, s. 7, "no decree shall hereafter be made for a divorce *a mensâ et thoro*, but in all cases in which a decree for a divorce *a mensâ et thoro* might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *a mensâ et thoro* now has."

By sect. 27, "it shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved on the ground that his wife has, since the celebration thereof, been guilty of adultery; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved on the ground that, since the celebration thereof, her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse, for two years or upwards; and every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded: Provided that, for the purposes of this act, incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person being married to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of her majesty or elsewhere."

If dissolution is claimed on the ground of adultery and bigamy, both acts must be proved to have taken place in relation to the same woman. *Horne v. Horne*, 2 S. & T. 48. If the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage-law of that country. *Burt v. Burt*, id. 88; 29 L. J. P. & M. 133.

A suit for dissolution of marriage abates on the death of the respondent; but the court will not, on the application of the petitioner, order that the petition and affidavit in support of it be removed from the file. *Brocas v. Brocas*, 30 L. J. P. & M. 172.

The court has jurisdiction to dissolve a marriage solemnised between foreigners in a foreign country, on the ground of the adultery of the wife committed abroad, if the husband at the time the adultery is committed, and at the time the petition is presented, is *bonâ fide* and permanently resident in England; although, for the purpose of succession, he may not have acquired an English domicile. *Brodie v. Brodie*, 30 L. J. P. & M. 185; 2 S. & T. 259. See *Bond v. Bond*, 2 S. & T. 93; 29 L. J. P. & M. 143.

[3] By 20 & 21 Vic. c. 85, s. 28, upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent, and the parties, or either of them, may insist on having the contested matters of fact tried by a jury, as hereinafter mentioned.

"In all cases now pending, or hereafter to be commenced, in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit if it shall think there is not sufficient evidence against him or her." 21 & 22 Vic. c. 108, s. 11.

Though not a ground for divorce, the wife's contemplated incontinence transpiring after the marriage, will aid proof and strengthen the claim for relief in the event of her committing adultery. Macq. Div. 189.

[4] By 20 & 21 Vic. c. 85, s. 33, any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation are now

(c) *In case of Connivance, Condonation, or Collusion, Petition will be Refused.*[1]

tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment, and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents, or either of them, may not appear; and after the verdict has been given, the court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

[1] Upon any such petition for the dissolution of a marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at, the adultery, or has condoned the same, and shall also inquire into any countercharge which may be made against the petitioner. 20 & 21 Vic. c. 85, s. 29.

In case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been accessory to, or conniving at, the adultery of the other party to the marriage, or has condoned the adultery complained of, or, that the petition is presented or prosecuted in collusion with either of the respondents, then, and in any of the said cases, the court shall dismiss the said petition. (Id. s. 30.)

The peremptory bars to a divorce, that is to say, those which cannot be got over, are four, namely: 1. Condonation; 2. Collusion; 3. Connivance; 4. Prostitution, or the having been accessory to the adultery. The discretionary bars, that is to say, those which may be got over, if the court, in its wisdom, think fit to overlook them, are seven, namely: 1. Recrimination; 2. Cruelty; 3. Desertion; 4. Wilful Separation; 5. Wilful Neglect; 6. Misconduct; 7. Unreasonable Delay. Macq. Div. 47.

Collusion is of two kinds: 1. Where the parties put forth false facts to form the basis of the judgment; 2. Where the parties put forward facts which are true, but which have been corruptly and fraudulently preconcerted to form the basis of the judgment. See *Duchess of Kingston's case*, 20 St. Tr. 355. *Shedden v. Patrick*, 1 Macq. R. 619. *Dolphin v. Robbins*, Macq. Div. 72. *Goldney v. Goldney*, 12 Court of Session Ca. 468 (Scot.). *Harris v. Harris*, 31 L. J. M. & P. 160. *Gethin v. Gethin*, id. 43. *Sugg v. Sugg*, id. 41.

A husband and wife executed a deed of separation in 1854, which recited that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust monies and other property to which Miss H., as well as the husband and wife, had been parties. In 1860, the wife petitioned for a judicial separation on the ground of the husband's adultery with H. in 1858–59. It was held, that the execution of the deed of separation by the wife, knowing at the time that the husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, and the court dismissed the petition. *Thomas v. Thomas*, 2 S. & T. 113.

Connivance has been divided into criminal and corrupt, or negligent and careless. See *Phillips v. Phillips*, 1 Rob. Ecc. R. 144. *Timmings v. Timmings*, 3 Hagg. Ecc. 78. *Crewe v. Crewe*, 3 Hagg. 125. Where a husband allowed his own apprentice, between whom and his wife he had seen indecent familiarities pass, to continue in his house, and she was subsequently guilty with another man, the husband's conduct was held to amount to connivance, and to disentitle him to relief. *Lovering v. Lovering*, 3 Hagg. 86. *Lloyd v. Lloyd*, L. J. M. & P. 97. *Glenne v. Glenne*, 31 id. 171. *Marris v. Marris*, id. 69; 2 S. & T. 530.

Condonation means a blotting out of the offence, so as to restore the wife to the position which she occupied before the offence was committed. The English word "forgiveness" does not fully express the meaning of condonation. A master might forgive a servant who had robbed him, without having the slightest intention to restore that servant to his employment. Condonation means far more than forgiveness, it is analogous to releasing a debt. *Per Cresswell, J. O.: Keats v. Keats*, 1 S. & T. 346. *Peacock v. Peacock*, 28 L. J. M. & P. 72. *Dempster v. Dempster*, 2 S. & T. 438; 31 L. J. M. & P. 20.

The law says, that if either husband or wife forgive each other a matrimonial injury, it cannot afterwards be set up as a ground of complaint without evidence of a subsequent injury (*Beeby v. Beeby*, 1 Hagg. Ecc. 793). But it may occasionally have an opposite tendency; as, if a husband sue his wife for adultery and she recriminate, if he can prove that she condoned the offence charged against him the bar to his suit will be removed. *Anichini v. Anichini*, 2 Curt. 210.

It is in general necessary, in order to constitute condonation, that the thing condoned should be known. *Durant v. Durant*, 1 Hagg. Ecc. 733. *Legrand v. Legrand*, 2 Cra. & Stu. 596. *Fairlie v. Fairlie*, 6 Pat. Rep. 21. "This, however," said the judge ordinary, "is perhaps not strictly applicable in all cases, because a man may condone, whether he knows of the offence or not, in this way: He may say, 'I have heard stories about my wife. A. and B. have told me she has committed adultery. I can hardly believe it,

(*d*) *And the Court may refuse the Petition on the ground of other Misconduct.*[1]

(*e*) *The Court may order Alimony.*[2]

(*f*) *Of the Costs.*[3]

(B) *Of Judicial Separation.*[4]

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and I am in doubt about it; but, whether guilty or not, I will take her back.' That would be a condonation without actual knowledge." *Keats v. Keats*, 1 S. & T. 346. But see *Timmings v. Timmings*, *ante*, p. 453. Where there is a jury, condonation is a question of fact to be decided by them. *Peacock v. Peacock*, 31 L. T. 302. *Bostock v. Bostock*, 28 L. J. M. & P. 72. *Seller v. Seller*, id. 99. *Furness v. Furness*, 29 id. 133. *Norris v. Norris*, 30 id. 111. *Goode v. Goode*, id. 105. *Lewis v. Lewis*, id. 199.

All condonation is conditional on no offence of which the Matrimonial Court can take cognisance, being in future perpetrated. Cruelty once condoned may be so revived by subsequent adultery as to form, coupled with that adultery, ground for a sentence of dissolution. *Palmer v. Palmer*, 2 S. & T. 61.

As absence of condonation is not introduced into the latter part of the 31st section as a necessary ingredient in the matters to be dealt with by the court according to its discretion, it will consider such condonation only as one of the circumstances of the case in determining whether or not it will grant the prayer of the petitioner. *Goode v. Goode*, 2 S. & T. 253; 30 L. J. P. & M. 105. *See* Macq. Divorce, p. 45. The court will take notice of condonation, though not pleaded. *Coster v. Coster*, 1 S. & T. 192.

Condonation of adultery committed by a wife with A., is a bar to any proceedings by the husband against A. *Norris v. Norris*, 30 L. J. P. & M. 111.

It seems that condonation subsequent to a decree *nisi* is not a ground on which, under 23 & 24 Vic. c. 144, s. 7, the court may reverse such a decree when properly obtained. *Lewis v. Lewis*, 30 L. J. P. & M. 199; 7 Jur. N. S. 131. *See* also Condonation, vol. iii. p. 172.

[1] In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved: Provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery. 20 & 21 Vic. c. 85, s. 31. *Duchess of Kingston's case*, 12 St. Tr. 355. *Lloyd v. Lloyd*, 30 L. J. M. & P. 97.

[2] The court may, if it shall think fit, on any such decree [*i. e.* for dissolution of marriage], order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage, the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation. *See* Alimony, vol. i. p. 297.

[3] Whenever, in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings. 20 & 21 Vic. c. 85, s. 34.

[4] By 20 & 21 Vic. c. 85, s. 16, a sentence of judicial separation (which shall have the effect of a divorce *a mensâ et thoro* under the existing law, and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause, for two years and upwards.

Application for restitution of conjugal rights, or for judicial separation on any one of the grounds aforesaid (*see* sect. 16, *supra*), may be made, by either husband or wife, by petition to the court: and the court, on being satisfied of the truth of the allegations in the petition, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife, may make any order for alimony which shall be deemed just. 20 & 21 Vic. c. 85, s. 17. *See* 21 & 22 Vic. c. 108, s. 19.

In every case of a judicial separation, the wife shall, from the date of the sentence, and

(C) *What constitutes Cruelty.*[1]

(D) *Of Desertion.*[2]

whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all repects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: Provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject however to any agreement in writing made between herself and her husband whilst separate. 20 & 21 Vic. c. 85, s. 25.

In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued, in any civil proceeding, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also, that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband. (Id. s. 26.)

The committee of a lunatic may maintain a suit for judicial separation on the ground of the adultery of the wife of the lunatic. *Woodgate v. Taylor*, 30 L. J. P. & M. 197.

[1] There must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence. *Lockwood v. Lockwood*, 2 Cur. 282: *per Dr. Lushington.* There may, however, be what is called cruelty, and ill-usage may be most aggravated, although no blow is struck. *De Manneville v. De Manneville*, 10 Ves. 59. *Milner v. Milner*, 31 L. J. M. & P. 159.

Words of menace may amount to cruelty. *Carpenter v. Carpenter*, Millward's Ecc. 159. So may acts of gross insult, as spitting in the face. *Clobwin's case*, Hetley, 149. *Waddell v. Waddell*, 2 S. & T. 584; 31 L. J. M. & P. 123. *Smallwood v. Smallwood*, 2 S. & T. 397. 1 Rob. 549. *D'Aguilar v. Aguilar*, 1 Hagg. 779. The father's ill-treatment of the children is considered cruelty to the mother. *Luggate v. Luggate*, Macq. Div. 170. In *Sanders v. Sanders*, 10 Jur. 144, 1 Rob. 549, an article to the effect that the husband, with the view and intention of annoying and vexing his wife, had wilfully and grossly insulted her relations, for the purpose of keeping them away from his house, was admitted by Dr. Lushington.

On the question of cruelty, the wife's feeble frame and the delicacy of her constitution will be taken into account as circumstances of aggravation. *Otway v. Otway*, 2 Phi l. 98.

Many acts of cruelty are not required. One act, which would lead the court to expect a repetition, with real suffering, will suffice to found a sentence. *Holden v. Holden*, 1 Hagg. Con. 453. *Popkin v. Popkin*, 1 Hagg. 768. *Smallwood v. Smallwood*, *infra*.

Petty vexations, arising merely from an exquisite and diseased sensibility of mind, may certainly in time wear out the animal machine, but still they are not causes for legal relief. *Per Sir W. Scott*, 1 Hagg. Con. 40.

If it appears that the wife, by her own provocation, has brought upon herself the ill-treatment complained of, she is not entitled to demand relief from the court. *Waring v. Waring*, 2 id. 154.

It may be by false imputations. "Suppose," said *Lord Brougham* (*Paterson v. Russell*, 7 Bell, App. Ca. 337), "a man were continually charging his wife with every sort of immoral and criminal conduct, and that there was not the shadow of a foundation for these charges, made before her family, friends, relations, and servants, and in the face of the world, I have little doubt that what rests now only upon opinions would ultimately assume the form of a decision: namely, that to such injurious treatment, making the marriage state impossible to be endured, and rendering life itself almost unbearable, the probability is very right that the consistory courts of the country would extend the remedy of divorce *a mensâ et thoro*. *See* also *Bray v. Bray*, 1 Hagg. Ecc. 167.

It is not necessary in the petition to state all the facts intended to be proved: there must, however, be enough to show that the case is one which comes up to the standard of legal cruelty. The court does not require that the dates of particular acts shall be precisely specified. Macq. Div. 300.

Delay in presenting the petition is a material fact, as tending to show there was no apprehension of further violence. *Smallwood v. Smallwood*, 31 L. J. P. & M. 3.

The defendant may plead condonation to a charge of cruelty: such a defence, however, must be clearly established, as it is not favoured by the court (*see* Macq. Div. 298. *Dempster v. Dempster*, *ante*, p. 453); or the cruelty may be recriminated; *i. e.* the charge of cruelty by the petitioner may be met by a counter-charge of cruelty by the respondent. (Id.)

On any petition presented by a wife, praying that her marriage may be dissolved on the ground of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion. 22 & 23 Vic. c. 61. s. 6.

[2] Where the offence of desertion without

(E) *Of the Intervention of Queen's Proctor.*[1]

(F) *Decree of Nullity of Marriage.*[2]

(H) *Court may make Order with respect to Wife's Property.*[3]

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cause for two years had been once completed, the judge ordinary held that the wife had a complete right to the relief given by the statute, although the husband had made, subsequently to the two years, a *bonâ fide* offer to return. *Cargill v. Cargill*, 22 Jur. 764.

In *Astrope v. Astrope*, Macq. Div. 304, the wife sued the husband for divorce on the ground of adultery coupled with desertion. It appeared that from the 4th October, 1854, to the 16th November, 1856, he had not been seen by his wife. It, however, came out that on two distinct occasions between 1854 and November, 1856, he had been imprisoned for debt, the first time for seven days, the next time for eighteen days. It further appeared that on the 16th November, 1856, he had been arrested on a charge of embezzlement, and, after trial, had been sentenced to four years' penal servitude, which had not expired at the time of the application. The full court, with some doubt and hesitation, came to the conclusion that the desertion had been sufficiently established, and as the adultery was proved, they dissolved the marriage. See *Laurence v. Laurence*, 2 S. & T. 575; 31 L. J. M. & P. 145.

The desertion must be contrary to the will of the person charging it. *Ward v. Ward*, 27 L. J. P. & M. 63. *Thompson v. Thompson*, id. 68.

A husband who had left his home in pecuniary difficulties, and subject to executions, in 1843, and had never afterwards come near his wife, or done anything to provide for her, and who, in 1848, wrote her a letter bidding her "farewell for ever," was held by the judge ordinary to have deserted his wife "without cause for two years and upwards," under the 14th sect. of the Divorce Act, 1857. *Cudlipp v. Cudlipp*, 27 L. J. P. & M. 65. See *Harris v. Harris*, 31 id 6.

If a separation with intent to desert be once shown, the intent will be presumed to continue till the contrary appear. 1 Greenl. *Evid.* ss. 41, 42.

As to the time at which the Desertion may be considered to begin. — If the parties separate by consent, and one of them afterwards in good faith seeks a reconciliation, but the other refuses, this will be desertion on the party refusing from the time of the refusal. *Butler v. Butler*, Parsons, 329. Where husband and wife were living separate, the husband making his wife an allowance, and he withdrew the allowance, after having written a letter, in which he said, "I now cease to give you any further support. I wish a legal divorce. The tie is broken. It is better for us to live separate than, by leading an unhappy life together, show a bad example to our children;" it was held that the desertion commenced from the time when the support was withdrawn upon the sending of this letter. *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. R. 47.

The desertion must be *animo et facto;* the mere intent will not suffice, and the mere fact will not suffice. There must be a concurrence of both. The fact, however, and the intent, need not be coeval with each other. Thus, where a husband left his wife in business, not meaning to desert, but afterwards resolved to desert, the desertion was held to have begun when he determined to desert: in other words, when the fact and the intent concurred. *Reed v. Reed*, Wright, 224. And the very fact of a protracted absence may assist presumptions as to the original intent. *Ahrenfeldt v. Ahrenfeldt*, *supra.*

[1] By 23 & 24 Vic. c. 61, s. 5, "in every case of a petition for a dissolution of marriage it shall be lawful for the court, if it shall see fit, to direct all necessary papers in the matter to be sent to her majesty's proctor, who shall, under the directions of the attorney-general, instruct counsel to argue before the court any question in relation to such matter, and which the court may deem it necessary or expedient to have fully argued; and her majesty's proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the costs of his office.

[2] Very strict proof is necessary of non-consummation of the marriage. *Castleden v. Castleden*, 5 L. T. (N. S.) 164.

In cases of malformation, if the result of the medical evidence is that the malformation might, but at great risk of life, and with doubtful success as to the end desired, be removed, the petitioner need not call upon the respondent to submit to an operation, and it is equivalent to a permanent and irremovable malformation. *Williams v. Homfrey*, 2 S. & T. 240; 30 L. J. P. & M. 73.

Where the petition for a decree of nullity of marriage was founded on an allegation that the petitioner had, before marriage, intercourse with his wife's mother:—*Held*, that affinity could not be so constituted by the law of England, and that the 28 Hen. 8, c. 7, had been repealed, and not revived by any subsequent statute. *Wing v. Taylor*, 2 S. & T. 278; 30 L. J. M. 258.

After the death of either of the parties the marriage cannot be impugned, even on the ground of affinity. *Hincks v. Harris*, 4 Mod. 182; 2 Salk. 458; Carth. 271; Comb. 200; 12 Mod. 35.

[3] In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settle-

(I) *And may make Orders with respect to Marriage Settlements.*[1]

(K) *And the Custody of Children.*[2]

(L) *Of the Order or Decree protecting Property of Wife.*[3]

(M) *New Trial may be Ordered.*[4]

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ment as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them. 20 & 21 Vic. c. 85, s. 45.

Any instrument executed pursuant to any order of the court, made under this enactment, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof. 23 & 24 Vic. c. 144, s. 6.

[1] The court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or to their respective parents, as to the court shall seem fit. 22 & 23 Vic. c. 61, s. 5.

[2] By 20 & 21 Vic. c. 85, s. 35, in any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

The court, after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may, upon application (by petition) for this purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree, or by interim orders, in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the judge ordinary alone, or with one or more of the other judges of the court. 22 & 23 Vic. c. 61, s. 4.

[3] Every wife deserted by her husband, wheresoever resident in England, may, at any time after such desertion, apply to the said judge ordinary for any order to protect any money or property in England she may have acquired, or may acquire, by her own lawful industry, and any property she may have become possessed of, or may become possessed of, after such desertion, against her husband and his creditors, and any person claiming under him; and the judge ordinary shall exercise, in respect of every such application, all the powers conferred upon the Court for Divorce and Matrimonial Causes under the 20 & 21 Vic. c. 85, s. 21. *See* Desertion, vol. iv. p. 64.

The provisions contained in this act, and in the said act 20 & 21 Vic. c. 85, respecting the property of a wife who has obtained a decree for judicial separation, or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee, since the sentence of separation, or the commencement of the desertion (as the case may be), and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix. (Id. s. 22.)

By 21 & 22 Vic. c. 108, s. 8, "in every case in which the wife shall, under this act, or under the said act 20 & 21 Vic. c. 85, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual, and no discharge, variation, or reversal of such order or decree, shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged, in respect of any debts, contracts, or acts of the wife, incurred, entered into or done, between the times of the making such order or decree and of the discharge, variation, or reversal thereof, and property of or to which the wife is possessed or entitled for an estate in remainder or reversion, at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree."

Every order which shall be obtained by a wife under the said act 20 & 21 Vic. c. 85, or under this act, for the protection of her earnings or property, shall state the time at which the desertion, in consequence whereof the order is made, commenced, and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced. 21 & 22 Vic. c. 108, s. 9.

[4] Where any trial shall have been had by a jury before the full court, or before the judge ordinary, or upon any issue directed by the full court or by the judge ordinary, it shall be lawful for the judge ordinary, subject to any rules to be hereafter made, to grant a rule *nisi* for a new trial, but

(N) *Of Appeals.*[1]

(O) *General Power of Court over Costs.*[2]

(P) *Decree of Divorce is* Nisi *only.*[3]

no such rule shall be made absolute except by the full court. (Id. s. 18.)

Either party dissatisfied with the decision of the judge ordinary sitting alone, in granting or refusing any application for a new trial, may, within fourteen days after the pronouncing thereof, appeal to the full court, whose decision is final. 23 & 24 Vic. c. 144, s. 2.

[1] By 20 & 21 Vic. c. 85, s. 23, "any husband or wife, upon the application of whose wife or husband (as the case may be), a decree of judicial separation has been pronounced, may at any time thereafter present a petition to the court, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed in respect of any debts, contracts, or acts of the wife, incurred, entered into or done, between the times of the sentence of separation, and of the reversal thereof."

Either party dissatisfied with any decision of the court, in any matter which, according to the provisions aforesaid, may be made by the judge ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full court, whose decision shall be final. 20 & 21 Vic. c. 85, s. 55.

Either party dissatisfied with the decision of the full court on any petition for the dissolution of a marriage, may, within three months after the pronouncing thereof, appeal therefrom to the House of Lords, if parliament be then sitting, or if parliament be not sitting at the end of such three months, then within fourteen days next after its meeting; and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to the court, to be dealt with in all respects as the House of Lords shall direct. (Id. s. 56.)

The 21 & 22 Vic. c. 108, s. 17, reciting that doubts may be entertained whether the right of appeal given by the act 20 & 21 Vic. c. 85, s. 56, extends to sentences on petitions for nullity of marriage, enacts and declares, that either party dissatisfied with any such sentence may appeal therefrom in the same manner, within the same time, and subject to the same regulations, as affect appeals against sentences on petitions for the dissolution of marriage.

Where there is a right of appeal to the House of Lords from the decision of the full court, there is the like right of appeal to that house from the decision of the judge ordinary alone, or with another judge. 23 & 24 Vic. c. 61, s. 3.

[2] The court, on the hearing of any suit, proceeding, or petition under this act, and the House of Lords on the hearing of any appeal under this act, may make such order as to costs as to such court or house respectively may seem just: Provided always, that there shall be no appeal on the subject of costs only. 20 & 21 Vic. c. 85, s. 51.

[3] By 23 & 24 Vic. c. 61, s. 7, it is enacted, that "every decree of divorce shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall, by general or special order in that behalf, from time to time direct, to show cause why the said decree should not be made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court; and on cause being so shown the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise, as justice may require; and at any time during the progress of the cause, or before the decree is made absolute, any person may give information to her majesty's proctor of any matter material to the due decision of the case, who may thereupon take such steps as the attorney-general may deem necessary or expedient; and if from any such information or otherwise the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the attorney-general, and by leave of the court, intervene in the suit alleging such case of collusion, and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the court to order the costs of such counsel and witnesses, and otherwise arising from such intervention, to be paid by the parties, or such of them as it shall see fit, including a wife, if she have separate property; and in case the said proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference, as part of the expense of his office. 23 & 24 Vic. c. 145, s. 7, made perpetual by 25 & 26 Vic. c. 81.

Upon a motion to make a decree of dissolution of marriage absolute a copy of the decree *nisi* should be filed. *Fowler v. Fowler*, 31 L. J. P. & M. 31. The court refused to make absolute a decree *nisi* of dissolution of marriage pronounced on the 30th of January, upon an affidavit that on the 30th of the ensuing April search had been made in the

(Q) *Divorced Persons may Marry again.*[1]

(R) *Effect of Decree.*[2]

IV. Restitution of Conjugal Rights. *See* Conjugal Rights, vol. iii. p. 176.

V. Jactitation of Marriage.[3]

VI. Contracts in Restraint of or for Procuring.[4]

VII. Of Marriage Settlements.[5]

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registry, and that no appearance had been entered in opposition to the decree, the search having been made a day too soon. *Serrill v. Serrill*, 2 S. & T. 422; 31 L. J. P. & M. 114.

[1] When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when, in the result of any appeal, any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always, that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnise the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnising, or refusing to solemnise, the marriage of any such person (20 & 21 Vic. c. 5, s. 57): Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said united church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel. (Id. s. 58.)

[2] The principle on which the common-law doctrine of estoppel rests, is applicable to matrimonial suits, and therefore a judgment of the court upon a matter directly in issue is conclusive upon the same matter between the same parties in another suit. *Sopwith v. Sopwith*, 30 L. J. P. & M. 131; 2 S. & T. 160.

A Scotch divorce is inoperative on the marriage of a domiciled Englishman. *Tollemache v. Tollemache*, 1 S. & T. 557; 30 L. J. P. & M. 113.

[3] A suit of jactitation is when one of the parties maliciously boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. Unless the defendant takes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head. 3 Bl. Com. 93. See *Duchess of Kingston's case*, 20 St. Tr. 538. *Lindo v. Belisario*, 1 Hagg. 216. *Goldsmid v. Bromer*, 1 Hagg. 324. *Hawke v. Corri*, 2 Hagg. Con. 281. *See* form, Inderwick, 151.

[4] Contracts in restraint of marriage are void. *Lowe v. Peers*, 4 Burr. 2225. As, a bond not to marry any person except the obligee (*Anon.* Lofft. Ind. Marriage); or a wager that a party will not marry within six years. *Hartley v. Rice*, 10 East, 22. *Baker v. White*, 2 Vern. 415. But a devise restraining intermarriage with persons of a particular country is legal. *Perrin v. Lyon*, 3 East, 170. And a devise to daughters, who are not to have portions unless their trustees consent to a marriage, is valid; and if they marry without consent, they lose their fortunes. *Hervey v. Aston*, Willes, 83. A covenant to pay money so long as a woman continues unmarried is valid. *Gibson v. Dickie*, 3 M. & S. 463. All contracts for procuring marriages are void. *Hall v. Potter*, 3 Lev. 411. *Cole v. Gibson*, 6 Ves. sen. 503. *Booth v. Warrington*, 4 Bro. P. C. 163.

[5] Marriage is a valuable consideration. Every settlement, therefore, made by parties of full age previous to, or in consideration of marriage, in pursuance of written articles, stands on the footing of a purchase, and has equal validity. Wms. Real Pro. 236.

The wife's fortune may be settled on her husband, so as to revert to her on his failure or bankruptcy. *Lockyer v. Savage*, 2 Stra. 947.

A settlement by the father on his daughter on her marriage, if strong words be used, will apply to a subsequent husband (*Beable v. Dodd*, 1 T. R. 193): and cannot be destroyed by destruction of the particular estate by which, whilst a contingent remainder, it had been supported, at least as soon as the contingent remainder is consummated. *Doe d. Willis v. Martin*, 4 id. 39.

The wife, under a settlement, may become tenant for life, after a possibility of issue is extinct. *Williams v. Williams*, 12 East, 209.

A bond by a husband, which settled all lands of which he should be seised during his life on his intended wife and issue, does not comprehend land purchased after the wife's decease, as regards the children. *Prebble v. Boghurst*, 7 Taunt. 538; 1 Moore, 258. So, where by a settlement lands vested

VIII. Action for Breach of Promise of.

(A) *Of the Declaration.*[1]

(B) „ *Pleas.*[2]

in trustees, with remainder to his children, as tenants in common; and if they died before twenty-one, without issue, then to the survivors. A child having died without issue after twenty-one:—*Held*, that his share went to the settlor. *Meyrick v. Whishaw*, 2 B. & A. 810.

Under a settlement to the use of the settlor and his wife for life, then to his sons, and, in default of issue by them, to his daughters, as tenants in common:—*Held*, that the sons took estates in tail, and the daughters in fee. *Doe v. Smeddle*, id. 126.

A settlement made subsequent to a void marriage may be enforced. *Boughton v. Sandilands*, 3 Taunt. 342.

The word "issue," in a bond given on a marriage to pay a sum in case the wife, or any issue of her body begotten, should survive, is not confined to issue of that marriage, but extends to issue by a subsequent marriage. *Hayden v. Wilshere*, 3 T. R. 372.

Where, under a marriage settlement, the husband covenanted to pay off prior incumbrances, and the jury gave nominal damages, the court set the finding aside. *Lethbridge v. Mytton*, 2 B. & Adol. 773.

Under a settlement to the children as tenants in common, they take an estate for life. *Wheeler v. Duke*, 1 C. & D. 210; 3 Tyr. 61.

Limitation first to A. B., and then to C. D., and E. F. his wife; before the marriage, A. B. died:—*Held*, that his executors took no interest. *Trevelyan v. Trevelyan*, 3 Bing. 617.

A limitation in a marriage settlement, after limitations to the husband and wife, and issue by that or any other future wife in tail male, to the use of the brothers of the settlor and their issue in tail male:—*Held* void, as against a subsequent purchaser for a valuable consideration. *Johnson v. Legard*, 6 M. & S. 60. But a limitation to the issue of a second marriage by the settlor is good. *Clayton v. Earl of Wilton*, id. 67, n.

Where a deed purported to be made in consideration of esteem for A. T., and for divers other good considerations, evidence is inadmissible that it was made in consideration of an intended marriage with A. T.; and it is admissible evidence of this fact that the settlor (the future husband) instructed his solicitor to prepare the deed as a marriage settlement; and that, after the deed was executed, and before the marriage, he spoke of it as such. *Tull v. Parlett*, 1 M. & M. 472.

A parol ante-nuptial contract is not a good consideration to support a post-nuptial settlement as against creditors. *Goldicutt v. Townsend*, 28 Beav. 445.

A gift in an ante-nuptial settlement to the natural child of the woman, out of her own estate, is valid against a subsequent mortgagee. *Clark v. Wright*, 30 L. J. Ex. 113; 7 Jur. N. S. 1032.

Where the parents mutually agreed in writing, after the marriage, to give each a sum of money, promised before marriage to the husband, it was held the latter could not sue the executor of his father-in-law upon this promise, he being a stranger to the consideration. *Tweedle v. Atkinson*, 30 L. J. Q. B. 265.

A wife may contract in equity with her husband for a post-nuptial settlement upon her of her own property, for a valuable consideration, and the husband may be a purchaser from the wife. Where property belonging to her is the subject of the settlement, so that the settlement is a bargain for value between the husband and wife, it is sustainable against creditors. *Hewison v. Negus*, 22 L. J. Ch. 655. *Harman v. Richards*, id. 1066.

Where a party, after a post-nuptial settlement, mortgaged the same premises:—*Held*, that as his declarations could only bind him whilst the interest remained in him, his declarations as to the consideration paid by the subsequent purchaser were inadmissible against the claimants under the settlement, which would be to enable him to cut down his own previous acts. *Doe v. Webber*, 3 Nev. & M. 586.

An action lies for a breach of promise of marriage. *Harrison v. Cage*, Carth. 467. The consideration consists in the mutual promise. S. C. 5 Mod. 411.

[1] The following form of declaration is prescribed by the Common-Law Procedure Act, 1852, sched. (B).

"That the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff."

Where the promise is to marry on request, the declaration should state a request, unless the party be previously married. *Harrison v. Cage*, 1 Ld. Raym. 386. *Baker v. Lade*, Carth. 253.

[2] Being within the Levitical degrees is an answer to the action (*Harrison v. Cage*, 1 Ld. Raym. 387); or want of chastity in the female (*Young v. Murphy*, 3 Bing. N. C. 54; 3 Scott, 379. *Foulkes v. Sellway*, 3 Esp. 236); or that the man was of bad character. *Johnson v. Smith*, 1 Holt, 151. *Leeds v. Cook*, 4 Esp. 257.

The defendant may plead that the plaintiff discharged him from his promise (*King v. Gillett*, 7 Mee. & W. 55); or that before

(C) *Of the Evidence.*[1]

MARTIAL LAW and Courts Martial. *See* Courts Martial, vol. iii. p. 442.

MASTER and **SERVANT.** *See* also Apprentice, vol. i. p. 394; Factories, vol. iv. p. 427; *post*, Truck-Act.

I. Of the Hiring, p. 461.

(A) *When it must be in Writing*, p. 461.

(B) *Implied Term of Service in case of a General Hiring*, p. 462.

II. Determination of Contract by Notice or Dismissal for Misconduct, p. 463.

III. Obligation of Master to provide Medical Attendance, p. 464.

IV. Action for Wages, p. 464.

V. Responsibility of Master for Negligent Acts of Servants, p. 465.

VI. „ „ Injury sustained by his Servant in the course of his Service, p. 466.

VII. Jurisdiction of Justices, p. 466.

(A) *In Disputes with respect to Wages*, p. 466.

(B) *Where Servant refuses to fulfil his Contract of Service*, p. 467.

I. Of the Hiring.

(A) *When it must be in Writing.*[2]

suit the contract was rescinded or dissolved by mutual consent. Id. *Davis v. Bomford*, 30 L. J. Ex. 139.

As to what is evidence of exoneration upon a return of letters, see *Davis v. Bomford*, 6 30 H. & N. 245; 30 L. J. Ex. 139.

It was held by a majority of the judges, that it is no answer to the action that the state of the defendant's health was such as to render performance of the contract dangerous to life, however much this fact would go in mitigation of damages. *Hall v. Wright*, El. B. & El. 746; 27 L. J. Q. B. 345, affirmed Ex. Ch. 29 id. 43.

It is no answer that the plaintiff, at the time of the making of the promise, was engaged in marriage to another, and that this fact was concealed from the defendant (*Beachey v. Brown*, id. 796; 29 L. J. Q. B. 105); nor that the plaintiff had previously been of unsound mind, and confined in a lunatic asylum. *Baker v. Cartwright*, 10 C. B. (N. S.) 124; 30 L. J. C. P. 364; 7 Jur. N. S. 1247.

[1] A promise to marry was formerly holden to be within the Statute of Frauds. *Philpott v. Wallett*, 3 Lev. 65. But this case is now overruled, and a verbal promise suffices. *Cork v. Baker*, 1 Stra. 34; 1 Ld. Raym. 386. And if in writing, it need not be stamped. *Orford v. Cole*, 2 Stark. 351.

The promise is usually by parol, and may be inferred from circumstances. *Hutton v. Mansell*, 3 Salk. 64; 1 id. 24; 2 C. & P. 553. And is binding, though no precise time is fixed for its fulfilment. *Potter v. Debroos*, 1 Stark. 82.

Where the defendant, by letter, promised to marry a woman then abroad, if she would come to him in England, and she thereupon came to England, and was ready to marry the defendant, it was held a sufficient acceptance of the offer, and compliance with the condition, to support an action for breach of promise. *Harvey v. Johnston*, 17 L.J.C.P. 298.

If either party puts it out of his or her power to fulfil the contract by marrying somebody else, there is a breach of the contract, and an action is immediately sustainable, notwithstanding the time for performance has not yet arrived. *Short v. Stone*, 8 Q. B. 358. *Lovelock v. Franklyn*, id. 378; 15 L. J. Q. B. 146.

[2] A contract for the hire and service of an agent, clerk, or servant, need not be in writing, unless by the terms of the bargain the employment is to extend beyond a year, in which case a written agreement is necessary under the 4th sect. of the Statute of Frauds, 29 Car. 2, c. 3. *Bracegirdle v. Heald*, 1 B. & A. 722. But it seems that a contract

(B) *Implied Term of Service in case of a General Hiring.*[1]

of hiring for a year, or from which a yearly hiring may be implied, need not be reduced into writing (*Beeston v. Collyer*, 4 Bing. 309; 12 Moore, 552; 2 C. & P. 607); unless it is to commence at a future period, which would extend the time beyond the year.

Where the agreement is in writing, the consideration for the servant's promise to remain in the master's employ should appear on the face of the document. And a written promise by a party "to remain with the plaintiff for two years for the purpose of learning his business," was held to be invalid for want of mutuality, it not appearing from the memorandum that the plaintiff was bound to retain or teach the defendant during any part of that period. *Pilkington v. Scott*, 15 Mee. & W. 657. *Sykes v. Dixon*, 9 Ad. & E. 693. *Hartley v. Cummings*, 2 C. & Kir. 433. *Lees v. Whitcomb*, 5 Bing. 34; 2 M. & P. 86.

[1] In such case the duration of the term of hiring will be regulated and controlled by custom and usage, and the surrounding circumstances of the case. *Todd v. Kellage*, 8 Ex. 151; 22 L. J. Ex. 1.

In the instance of a domestic or menial servant, a general hiring, that is, a hiring without any engagement as to the duration of the service, will be construed to be a hiring for a year, the service to be determined by a month's warning, or by payment of a month's wages. *Per Parke, B.: Turner v. Mason*, 14 Mee. & W. 112, 116. *Fawcett v. Cash*, 5 B. & Adol. 904, 907. And if the contract for the hiring of a domestic servant is put into writing, the customary power of determining the contract by a month's notice or wages is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words. *Johnson v. Blenkensopp*, 5 Jur. 870. Accordingly it has been held, that if a master turn away his domestic servant without such previous notice, there having been no fault or misconduct on the part of the servant, he is entitled to a month's wages, although there was no express contract to that effect. *Robinson v. Hindman*, 3 Esp. 235. *Beeston v. Collyer, supra*. *Sed vide* 1 Bl. Com. 425; and *per Abbott, C. J.: Huttman v. Boulnois*, 2 C. & P. 511, 512. But the month's wages are payable in such a case, not for the bygone services, but for the improper dismissal of the servant, and therefore they cannot be recovered under the common count for work and labour. *Fewings v. Tisdal*, 1 Ex. 295. *Forgan v. Burke*, 12 Ir. C. L. Rep. 495.

With regard, however, to cases other than those of domestic or menial servants, there is no inflexible rule of law that a general or indefinite hiring is a hiring for a year, and the question must, therefore, be considered in connexion with the circumstances of each particular case. *Baxter v. Nurse*, 6 Man. & G. 935. But it appears that, if there be no evidence to the contrary, the general engagement of a clerk will be deemed to be a yearly hiring. Thus, in *Beeston v. Collyer, supra* (see *Huttman v. Boulnois*, 2 C. & P. 510), it appeared that the plaintiff commenced his services in March, and served the defendant as army agent for many years in the capacity of his clerk. In 1811 the plaintiff's salary was paid quarterly: for the last six years, before 1826, it was paid monthly. The defendant having dismissed the plaintiff in December, 1826, without assigning any reason, it was held that there was an implied yearly hiring, and that the defendant was bound to pay the salary until March. And *Mr. Justice Gaselee* said, "There can be no doubt that a general hiring is a hiring for a year. In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice, as a month's warning or a month's wages; there does not appear to be any such practice with respect to servants in husbandry; and we have no evidence what is the custom with clerks. We must, therefore, decide this case according to the general rule, and hold a contract between the parties to be a hiring for a year." But a person who is engaged by a gentleman as his head-gardener, and who lives in a house within the gentleman's grounds, is a domestic servant within the meaning of the rule above stated. *Nowlan v. Ablet*, 2 C., M. & R. 54. *Johnson v. Blenkensopp, supra*.

Where the engagement of a clerk was for three years, "at the option" of the employer, it was held that it merely justified him in determining the service at the end of any one of the three years, but not in the middle of a year. *Down v. Pinto*, 9 Ex. 327; 28 L. J. Ex. 103.

By the custom of particular trades, a general hiring of a commercial traveller is a hiring for a year, subject to an implied understanding that either party may determine the engagement by giving three months' notice. *Metzner v. Bolton*, 9 Ex. 518; 23 L. J. Ex. 130.

Servants in husbandry are frequently hired by the year from Michaelmas, and this is an entire hiring. *Spain v. Arnott*, 2 Stark. 257. And it seems to be now settled that a general hiring of a husbandry servant is a yearly hiring. *Lilley v. Elwin*, 12 Jur. 623. *Huttman v. Boulnois*, 2 C. & P. 511. And so it would appear that in other cases of a like kind a general hiring, if unexplained, is to be taken to be a hiring for a year. *Per Parke, B.: Bayley v. Rimmell*, 1 Mee. & W. 506, 507.

A general hiring of a governess at a yearly salary, with board in the house, is a hiring for a year. *Todd v. Kellage, supra*.

Where A. covenants with B. to serve him in a certain capacity for a definite time, the court will not, from this circumstance, merely imply a covenant on the part of B. to retain A. in his employment until the expiration of that time. *Aspdin v. Austin*, 5 Q. B. 671. *Dunn v. Sayles*, id. 685. And if

II. Determination of Contract by Notice or Dismissal for Misconduct.[1]

the nature of the employment or the terms of the contract are inconsistent with the notion of a weekly hiring, the reservation of weekly wages will be regarded merely as a mode of payment, and not as an indication of the duration of the contract. *Davis v. Marshall*, 9 W. R. 520.

Where it was agreed between the plaintiff and a joint-stock company that the plaintiff should be the permanent attorney of the company, and should receive and accept a salary of 100*l.* a-year in lieu of his annual bill of costs, and should for such salary advise and act for the company on all occasions: it was held that there was an implied contract on the part of the company to retain the attorney in their service for one year at least, and pay him the salary he had agreed to accept; but that the word "permanent" did not confer any durable appointment beyond the year, preventing the employer from withdrawing the retainer. *Emmens v. Elderton*, 13 C. B. 495; 4 H. L. C. 645; 18 Jur. 21 See *Rust v. Nottidge*, 1 Ell. & Ell. 99. *Reg. v. Welch*, 2 Ell. & B. 362. *Hartley v. Cummings*, 17 L. J. C. P. 84. *Pilkington v. Scott*, 15 Mee. & W. 660.

[1] Where the hiring is for a year, and so from year to year, so long as the parties respectively please, it can be determined only by reasonable notice, expiring at the end of some year of the service. *Williams v. Byrne*, 7 Ad. & E. 177.

Whether or not a contract by a party to remain in the service of his employer during the life of the former is valid may admit of some doubt. It would seem, however, that such a contract is not illegal, although probably but slight damages would be given for violating so improvident a bargain. *See* 1 Bl. Com. 424.

If a servant wilfully disobey any lawful order of his master, or unlawfully absent himself from his work, or if he be guilty of moral misconduct or habitual neglect (*Turner v. Mason*, 14 Mee. & W. 112–116. *Amor v. Fearon*, 9 Ad. & E. 548. *Lilley v. Elwin*, 12 Jur. 623–626. *Callo v. Brouncker*, 4 C. & P. 518. *Spain v. Arnott*, 2 Stark. 257. *See* also *Turner v. Robinson*, 5 B. & Adol. 789. *Baillie v. Kell*, 6 Scott, 379. *Lacy v. Osbaldiston*, 8 C. & P. 80), he may be discharged without warning before the expiration of the period for which he was hired, and he is not entitled to any wages from the day he is so discharged, if they had not then accrued due. *Robinson v. Hindman*, 3 Esp. 235. *Spain v. Arnott*, 2 Stark. 256. *Gandell v. Pontigny*, 4 Camp. 375; 1 Stark. 198.

A dismissal may be justified on the ground that the servant was guilty of fraudulent misrepresentations and deceit in the conduct of his employer's business, to the injury of his employer (*Harmer v. Cornelius*, 5 C. B. (N. S.) 246); that he refused to work during the customary hours of labour (*Lilley v. Elwin*, 11 Q. B. 742; 17 L. J. Q. B. 132; 12 Jur. 623); or habitually neglected to perform the duties he had undertaken to discharge. *Arding v. Lomax*, 24 L. J. Ex. 80.

In *Atkin v. Acton*, 4 C. & P. 208, the plaintiff, a clerk, assaulted his employer's maid-servant with intent to commit a rape: this was held to be a good ground for discharging him. In *Crawford v. Reid*, 1 Show. Parl. Ca. 124, it was held, that if a principal gardener absent himself for four days upon an unfounded pretence he may be immediately discharged, though engaged for a fixed period. If a female yearly servant become pregnant, she may be dismissed at once. Caldecot, 11–14.

A gamekeeper or bailiff may be dismissed for misconduct, and expelled from a house of his employer, which he occupied as a servant. *Anon.* Moore, 8, 9; *Curtis's case*, Litt. Rep. 139. *Bertie v. Beaumont*, 16 East, 33.

If a master-carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and when in such a case a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given him to keep the paths, and upon complaint by the gentleman the master dismissed the journeyman, the judge left it to the jury to say whether the master was not justified in such dismissal. *Read v. Dunsmore*, 9 C. & P. 588.

A master need not, at the time of dismissing a servant, allege any special act of misconduct on the part of the latter as the cause of such dismissal: it being sufficient, if such a cause existed in fact at the time (*Mercer v. Whall*, 5 Q. B. 447–466. *Ridgway v. Hungerford Market Co.* 3 Ad. & E. 171. *Cussons v. Skinner*, 11 Mee. & W. 161). And if a ground of dismissal exists, the master may avail himself of it in an action for wrongful dismissal, although at the time when he dismissed his servant he was ignorant of the existence of this cause for so doing. *Spotswood v. Barrow*, 5 Ex. 110; 19 L. J. Ex. 226. *Sed qu.? Smith v. Allen*, 3 F. & F. 157.

Where the payment is to be quarterly, or yearly, or at any other fixed period, and the servant improperly leaves his master (*Huttman v. Boulnois*, 2 C. & P. 510), or is guilty of such misconduct as to justify his discharge during the currency of such period, he is not entitled to wages for any part thereof, even to the day he quits. *Lilley v. Elwin*, 12 Jur. 623. *Ridgway v. Hungerford Market Co. supra.* See *Atkin v. Acton*, 4 C. & P. 208–9. But where the contract is determined by mutual consent, the servant may recover wages *pro ratâ*. *Lamburn v. Cruden*, 2 Scott, N. R. 533. *Thomas v. Williams*, 1 Ad. & E. 685. And where there is

III. Obligation of Master to provide Medical Attendance.[1]

IV. Action for Wages.[2]

no evidence of any special contract of hiring, but merely proof of service, and it is shown that the party voluntarily quitted his employment, he will be entitled to be paid for his services up to the time of his so quitting, so much as they are worth. *Bayley v. Rimmell*, 1 Mee. & W. 506.

Where wages are payable quarterly, or at some other stated period, and the servant is tortiously discharged during the currency of such period, he may recover at once for the time he has actually served, on the general count for work and labour (see *Hulle v. Heightman*, 2 East, 145); but he cannot recover his whole wages in this form of action until after the time at which, by the contract, they would have accrued due (*Smith v. Hayward*, 7 Ad. & E. 544. *Broxam v. Wagstaffe*, 5 Jur. 845. *Fewings v. Tisdal*, 1 Ex. 295. *Archard v. Hornor*, 3 C. & P. 349: overruling *Gandell v. Pontigny*, 1 Stark. 198; 4 Camp. 375: recognised in *Collins v. Price*, 2 M. & P. 233; 5 Bing. 132. *Crocker v. Molyneux*, 3 C. & P. 470). So, under the special count for wrongfully preventing him from completing his term of service (see *Hulle v. Heightman, supra. Cutter v. Powell*, 6 T. R. 323, 326), the servant can only recover damages for the wrongful dismissal, and if there be any arrear of wages due, he must sue for them under the common count. *Hartley v. Harman*, 11 Ad. & E. 798.

Considerable doubt has been thrown on the doctrine of constructive service, and it seems to be considered that, if the servant is improperly dismissed, he ought not to keep himself in a state of readiness to serve during the residue of the term of hiring, but should endeavour to find another situation, and should sue on the special contract for the damage he has sustained by reason of the wrongful dismissal. *Emmens v. Elderton*, 18 Jur. 24: *per Parke, B. Fewings v. Tisdal, supra.* And where the plaintiff was hired by the defendant to travel with him in the capacity of courier, from the 1st June, 1852, and before that day the defendant informed the plaintiff that he should not go abroad, and should not require his services, it was held that the plaintiff might sue before the time arrived for fulfilling the contract, as the defendant had dispensed with the necessity of the plaintiff's being ready on that day. *Hochster v. De La Tour*, 2 E. & B. 678; 22 L. J. Q. B. 455.

Whenever one party has absolutely refused to perform his contract, he puts it in the power of the other either to sue for a breach of it, or to treat the contract as rescinded or abandoned, and sue for the work actually done. *De Bernardy v. Harding*, 8 Ex. 822. *Prickett v. Badger*, 1 C. B. (N. S.) 305. If the servant elects to treat the contract as subsisting, and sue specially upon it, he cannot afterwards go for a *quantum meruit*, as on an abandoned contract. If, for example, a servant hired for the year at yearly wages, payable quarterly, brings an action upon the contract, and recovers damages for a wrongful dismissal, he cannot afterwards maintain an action of *indebitatus assumpsit* for wages *pro ratâ* up to the time of his dismissal. The damages, therefore, in the action on the special contract should be assessed so as to include the wages up to the time of the dismissal. *Goodman v. Pocock*, 15 Q. B. 576; 19 L. J. Q. B. 410.

In declaring against a master for the wrongful dismissal of his servant, it is sufficient to allege that the plaintiff "was ready and willing" to continue in the service, and the averment that he "offered" so to continue is immaterial. *Wallis v. Warren*, 18 L. J. Ex. 449.

[1] A master is bound to provide medical attendance and medicines for his apprentice (*Rex v. Smith*, 8 C. & P. 153); but not for his servant in husbandry (see *Newby v. Wiltshire*, 2 Esp. 739. *Wennall v. Adney*, 3 B. & P. 247. *Watling v. Walters*, 1 C. & P. 132); or for his menial servant (see *Rex v. Smith*, 8 id. 153. *Sellen v. Norman*, 4 id. 80. *Cooper v. Phillips*, id. 581. *Scarman v. Castell*, 1 Esp. 270), even though the illness of the servant arise from an accident which occurred whilst he was performing the duties of his situation. But if a master send for a medical practitioner for his servant whilst under his roof, he is liable, and he cannot deduct the expense occasioned thereby from the servant's wages, unless it was specially so agreed. *Sellen v. Norman, supra;* Chit. Contr. 502.

[2] If a person retain a servant and agree to pay him so much by the day, month, or year, the servant may have an action against the master on the contract, or against his executors, and every such retainer will be presumed to be in consideration of wages, unless the contrary appear. Bac. Abr. Master and Servant (H.), citing *Pinchon's case*, 9 Co. 88, A. B. *Sands v. Leake*, 2 Roll. R. 269. *Davies v. Davies*, 9 C. & P. 87.

Where a slave (*see* 1 Bl. Com, 425, n. Chitty's edit.), before slavery was abolished, came over from the West Indies, and continued in the service of his master in England, it was held he was not entitled to wages, unless there had been some subsequent express contract conferring a right to them. *Alfred v. Marquis of Fitzjames*, 3 Esp. 3. But it has always been considered that the party ceased to be a slave when he reached England, or any part of the British dominions in which slavery was not permitted. *Somerset's case*, 11 St. Tr. 340; 20 Howell, St. Tr. 79; Lofft, 1. *Forbes v. Cochrane*, 2 B. & C. 448; 2 D. & R. 679.

It seems that where a domestic servant has left his master for a considerable period, it will, in general, be presumed that his

V. Responsibility of Master for Negligent Acts of Servants.[1]

wages have been paid, unless there be an admission that they are in arrear, or some other circumstances to rebut such presumption (*Sellen v. Norman, infra*); and the same presumption arises in the case of workmen or labourers on proof that it was customary for the employer to pay his men at stated periods, *e.g.* weekly. *Lucas v. Novosilieske*, 1 Esp. 296. *Sellen v. Norman*, 4 C. & P. 81 n. a. See *Evans v. Birch*, 3 Camp. 10.

If, while the contract remains in force, the servant is disabled from performing his work otherwise than by his own misconduct, no deduction can be made in respect thereof from his wages. *Cuckson v. Stories*, 1 E. & E. 255. *Rex v. Sudbrook*, 1 Smith, 59. *Chandler v. Greeves*, 2 H. Black. 606, n. Where the plaintiff was engaged as brewer for a term of ten years, the court said, "If by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendant, we think that the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, the defendant may have dismissed him, and employed another brewer in his stead. *Cuckson v. Stories*, 1 E. & E. 253.

In an action by a servant for wages, the latter cannot set off the value of goods lost by the servant's negligence; but if it has been agreed between a master and servant that the latter shall pay out of his wages for all goods lost by his negligence, the value of goods thus lost may, in an action for wages, be deducted therefrom under the general issue by virtue of the agreement. *Le Loir v. Bristow*, 4 Camp. 134. See *Cleworth v. Pickford*, 7 Mee. & W. 314.

If the servant were under age the master cannot deduct from or set off against his wages any sums advanced or paid by him to or for the servant, for articles which were not necessary for the latter. *Hedgley v. Holt*, 4 C. & P. 104. As to the action for wages where the servant has been dismissed before the end of the year, *see ante*, p. 463.

[1] Where the relation of master and servant clearly exists (*Butler v. Hunter*, 7 H. & N. 826; 31 L. J. Ex. 214), the employer is responsible for injury occasioned by the negligent conduct of the servant in carrying out his orders, or in the course of his employment. *Reedie v. London and North-Western Railway Co.* 4 Ex. 255. *Bartonshill Coal Co. v. Reed*, 3 Macq. 266. *Martin v. Temperley*, 4 Q. B. 298. *Holmes v. Onion*, 2 C. B. (N. S.) 790; 26 L. J. C. P. 261. This does not prevent the servant who did the mischief from being also liable. *Hutchinson v. York, Newcastle, and Berwick Railway Co.* 5 Ex. 343: *per Cur.* It makes no difference in the responsibility of the master, that the servant has been engaged through the intervention of an agent (*Quarman v. Burnett*, 6 Mee. & W. 509). And the master is responsible for the act of his servant, whether the work be done by a domestic servant or day labourer, or by a person who works by the job or piece, and contracts to do the work for a specific sum (*Birkel v. Whitehaven Junction Railway Co.* 4 Ex. 137); provided he is an ordinary labourer personally engaged in the execution of the work, acting under the control of the employer, and not a contractor exercising an independent employment, and selecting his own servants and workmen for the performance of the work (*Sadler v. Henlock*, 4 E. & B. 578; 24 L. J. Q. B. 138. *Cuthbertson v. Parsons*, 12 C. B. 304. *Milligan v. Wedge*, 4 Ad. & E. 737. *Reedie v. London and North Western Railway Co.* 4 Ex. 244. *Overton v. Freeman*, 11 C. B. 873; 21 L. J. C. P. 52. *Randleson v. Murray*, 8 Ad. & E. 109. See *Rapson v. Cubitt*, 9 Mee. & W. 710). But a servant or steward who employs labourers or servants under him to do his master's work, is not liable; but the master is. *Stone v. Cartwright*, 6 T. R. 411. *Wilson v. Peto*, 6 Moore, 49. The surveyor to a parish is liable for the negligence of persons hired by him, and not the vestry. *Holloway v. St. Leonards*, 30 L.J.C.P. 361. *Knight v. Fox*, 20 L.J.Ex. 9. The owner of a steamer which is hired for the day, and navigated by his servants, is responsible for their negligence while it is so hired. *Dalyell v. Tyrer*, 28 L. J. Q. B. 52.

Where horses are hired of a livery stable-keeper, and driven by his servant in the carriage of the hirer, the livery stable keeper is responsible for damage done by the negligent driving of his servant (*Smith v. Lawrence*, 2 M. & R. 1); but he will not, it seems, be answerable if the driver is a person merely sent by him and paid by the hirer. *Laugher v. Pointer*, 5 B. & C. 547; but see *Quarman v. Burnett*, 6 Mee. & W. 499; and *per Lord Abinger, C. B.: Brady v. Giles*, 1 M. & Rob. 495.

The master is, as we have seen, responsible for the negligent act, or even the careless, and reckless, and wanton conduct of his servant, if it were in the course of his employment. *Limpus v. the London General Omnibus Co.* 32 L. J. Ex. 34. *Greenwood v. Seymour*, 7 H. & N. 355; 30 L. J. Ex. 327. But not a wilful mischief done by a servant, out of the scope of his employment. *Lyons v. Martin*, 8 A. & E. 512. *Gordon v. Rolt*, 4 Ex. 365; 18 L. J. Ex. 432. *Goodman v. Kennell*, 3 C. & P. 167.

If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable; but if in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of

VI. Responsibility of Master for Injury sustained by Servant in the course of his Service.[1]

VII. Jurisdiction of Justices.

(A) *In Disputes with respect to Wages.*[2]

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the servant's employment. *Croft v. Alison*, 4 B. & A. 590. See *Sleath v. Wilson*, 7 C. & P. 66. So, the master is not responsible for a wilful fraud committed by his servant out of the scope of his employment, or inconsistent with the nature of his duties. *Coleman v. Riches*, 16 C. B. 104; 24 L. J. C. P. 125. As, if the mischief happen while a coachman is using the carriage for his own purpose, and without his master's consent. *Joel v. Morrison*, 6 C. & P. 501. *Mitchell v. Cresswell*, 13 C. B. 237. But if a master command his servant to do an illegal act, the master, as well as the servant, will be responsible. *Sands v. Child*, 3 Lev. 352. *Michael v. Alestree*, 2 id. 172.

If the work which a contractor is employed to do is itself a nuisance, the person so employing him will be responsible for damage occasioned by it. *Ellis v. Sheffield Gas Co.* 2 E. & B. 767; 23 L. J. Q. B. 42. *Hole v. Sittingbourne and Sheerness Railway Co.* 30 L. J. Ex. 81.

[1] Upon the ground that the servant impliedly takes upon himself the risks and dangers ordinarily attendant upon his calling, a master is not, in general, responsible for any injury sustained by his servant, whether inflicted by the negligence of a fellow-workman while engaged in the employment of the same master, and in furtherance of a common object (*Searle v. Lindsay*, 11 C. B. (N. S.) 429; 31 L. J. C. P. 106. *Bartonshill Coal Co. v. Reid*, 3 Macq. 266. *Skipp v. Eastern Counties Railway Co.* 9 Ex. 223. *Priestley v. Fowler*, 3 Mee. & W. 1. *Couch v. Steel*, 3 El. & Bl. 402. *Wiggett v. Fox*, 11 Ex. 837; 25 L. J. Ex. 188. *Smith v. Dowell*, 3 F. & F. 238); or from the defective or improper construction or state of machinery or tools of the master. *Skipp v. Eastern Counties Railway Co. supra. Dynen v. Leach*, 26 L. J. Ex. 221. *Alsop v. Yates*, 2 H. & N. 770; 27 L. J. Ex. 156. *Griffiths v. Gidlow*, id. 404. *Winterbottom v. Wright*, 10 Mee. & W. 115. *Priestley v. Fowler*, 3 id. 6. *Weems v. Mathieson*, 4 Macq. H. L. C. 215. But if the master has personally interfered, and has been guilty of negligence, he will be responsible. As if he has employed a person whom he knew to be a negligent and dangerous workman, and by the negligent act of such workman, in the course of the employment, a fellow-workman is injured (*Ormenend v. Holland*, 1 El. Bl. & El. 102. *Scott v. Craig*, 24 Sc. Sess. C. 789. *Mellon v. Shaw*, 1 B. & S. 437); or if he knows that an implement or machinery is dangerous to be used, and requires the workmen to use it, and they, not knowing of the danger, are injured thereby, he will be responsible, provided they were not guilty of any contributory negligence. See *Wigmore v. Jay*, 19 L. J. Ex. 300. *Williams v. Clough*, 3 H. & N. 258. *Paterson v. Wallace*, 1 Macq. 784. *Roberts v. Smith*, 2 H. & N. 213. *Holmes v. Clark*, 30 L. J. Ex. 135; in Ex. Ch. 31 L. J. 356.

Where there were sub-contractors, whose servants worked together with and under the general direction of the contractor in the common object, they were held to be fellow-servants within the rule. *Wiggett v. Fox*, 11 Ex. 832; 25 L. J. Ex. 193.

A person who volunteers to assist in drawing a weight, or hauling at a rope, or other labour, is in the same position with reference to the responsibility of the master of the men, in case he should be injured while rendering such assistance, as if he were in such master's service, and he is not therefore entitled to maintain an action against him in respect thereof. *Degg v. Midland Railway Co.* 1 H. & N. 773; 26 L. J. Ex. 173. *Potter v. Faulkner*, 1 Best & Smith, 800. But notwithstanding persons may be engaged together in mutually forwarding a common object, if they are in the service of different masters, and one is injured by the negligent act of another in the course of the work, the master of the negligent workman will, it seems, be answerable. For example: where a carter in the employment of a person engaged to carry cotton from a warehouse to a wharf was injured by the fall of a bale of cotton, which was being lowered from the warehouse into the cart, through the negligence of the warehouseman's servants, it was held that the warehouseman was responsible. *Abrahams v. Reynolds*, 5 H. & N. 143. And, although it has never been distinctly decided, it would also seem that if the person injured has nothing to do with the department of the person causing the injury, and there is no community of object, he will not be precluded from suing the master, notwithstanding he is also in his service. See *per Lord Cranworth: Bartonshill Railway Co. v. Reid*, 3 Macq. 266.

[2] By the 20 Geo. 2, c. 19, s. 1, all complaints, differences, and disputes which shall happen or arise between masters and servants in husbandry (*Ex-parte Hughes*, 23 L. J. M. C. 138. *Branwell v. Penneck*, 7 B. & C. 536), who shall be hired for one year, or longer, or for less than a year (31 Geo. 4, c. 11, s. 3), or which shall happen or arise between masters and artificers, handicraftsmen, miners (tinners and miners in Devon and Cornwall; 27 Geo. 2, c. 6, s. 2), colliers, keelmen, pitmen, glassmen, potters, and other labourers (*Lowther v. Earl Radnor*, 8 East, 113) employed for any certain time, or in any other manner, shall be heard and determined by one or more justice or justices of the peace of the county, riding, city, liberty, town-corporate, or place where such master shall inhabit, although no rate or as-

(B) *Where Servant refuses to fulfil his Contract of Service.*[1]

sessment of wages has been made that year. And they are empowered to examine the servant upon oath touching the complaint or difference, and to make such order for payment of so much wages to the servant (and within such time ; 4 Geo. 4, c. 34, s. 5) as seems reasonable, not exceeding 10*l.* with regard to any servant, nor 5*l.* with regard to any artificer, handicraftsmen, miner, collier, keelmen, pitmen, glassmen, potter, or labourer. Payment of the wages so ordered is enforceable by distress. 20 Geo. 2, c. 19, s. 1. The order is final. *Reg. v. Bedwell*, 24 L. J. M. C. 17.

If the master reside at a distance, the steward, agent, or foreman, intrusted with the management of the business, may be summoned instead of the master. 4 Geo. 4, c. 34, s. 4.

The justices have jurisdiction, notwithstanding the hiring was for an indefinite time. *Taylor v. Carr*, 31 L. J. M. C. 111.

As to paying wages otherwise than in the current coin, *see post*, Truck Act.

After an unsuccessful action in the county court for a wrongful dismissal, the servant cannot summon the master before justices for wages claimed on the same ground that the dismissal was wrongful. *Routledge v. Hislop*, 29 L. J. M. C. 90 ; 24 Jur. 398.

[1] By 4 Geo. 4, c. 34, s. 3, where any servant in husbandry (*Davies v. Lord Berwick*, 30 L. J. M. C. 84), or any artificer, calico-printer (*Ex-parte Ormerod*, 1 D. & L. 825 ; 13 L. J. M. C. 73), handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer (*Lowther v. Earl Radnor*, *supra*), or other person, shall contract (*Whittle v. Frankland*, 31 L. J. M. C. 81 ; 8 Jur. N. S. 382) with any person whomsoever to serve him, her, or them, for any time whatsoever, or in any other manner, and shall not enter into or commence his service according to his contract (such contract being in writing, and signed by the contracting parties), or, having entered into such service, shall absent himself from his service before the term of his contract (whether such contract shall be in writing or not in writing) shall be completed, or neglect to fulfil the same, or shall be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, any justice of the peace of the county or place where such servant or artificer shall have so contracted, or be employed, or be found (*Johnson v. Reed*, 6 Mee. & W. 124 ; 9 L. J. M. C. 25), upon complaint thereof made upon oath to him by the person with whom such servant, &c., shall have so contracted, or by his steward, manager, or agent, may issue his warrant for apprehending such servant, &c., and examine into the nature of the complaint ; and if it shall appear to such justice that any such servant in husbandry, artificer, &c., shall not have fulfilled such contract, or shall have been guilty of any other misconduct or misdemeanor as aforesaid, such justice may commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages for and during such period as he or she shall be so confined in the house of correction ; or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, artificer, &c., from his contract, service, or employment, which discharge shall be given under the hand and seal of such justice gratis. *See* also 6 Geo. 3, c. 25, s. 4. *Ex-parte Baker*, 26 L.J.M.C. 193.

A workman employed to do a specific piece of work is not under a contract of hiring within the act. *Hardy v. Ryle*, 9 B. & C. 603. *Ex-parte Johnson*, 7 Dowl. 702 ; 9 L. J. M. C. 27. *Lancaster v. Greaves*, 6 B. & C. 628. And domestic servants are not included. *Kitchen v. Shaw*, 6 Ad. & E. 729.

If the complaint is that the labourer or artificer did not enter upon his service, the contract must be in writing ; if, that having entered upon it, he absented himself, it may have been made by parol. *Lindsay v. Leigh*, 17 L. J. M. C. 50. *Re Askew*, 20 id. 241.

If the misconduct complained of amount to felony, the justice has no jurisdiction under this act. *Ex-parte Jacklin*, 2 D. & L. 103 ; 13 L. J. M. C. 139.

The defendant will not be liable to the punishment inflicted by the statute if he left his employment under the honest belief that his service was ended. *Willett v. Boote*, 6 H. & N. 26 ; 30 L. J. M. C. 6. *Rider v. Wood*, 29 L. J. Q. B 9.

An infant cannot be convicted for breach of his agreement, unless it appear to have been a beneficial contract for him. *R. v. Lord*, 17 L. J. M. C. 181.

The conviction and commitment need not be distinct. *Re Hammond*, 15 L. J. M. C. 136. See *Ex-parte Jacklin*, 2 D. & L. 103 ; 13 L. J. M. C. 139. It ought to show the capacity in which the defendant was hired (*R. v. Lewis*, 1 D. & L. 822 ; 13 L. J. M. C. 46), that the facts were proved upon oath (*Re Gray*, 2 D. & L. 539. *R. v. Lewis*, *supra*. *Ex-parte Bailey*, 23 L. J. M. C. 161) ; but they need not be set out (*Re Geswood*, 23 L. J. M. C. 35) in the breach of the contract ; and if for absenting himself, that it was without lawful excuse (*Re Turner*, 15 id. 140), and that the offence was committed within the jurisdiction (*Johnson v. Reid*, 6 Mee. & W. 124), and that the defendant was present (*Re Tordoff*, 13 L. J. M. C. 145), must be stated.

It is doubtful whether, if an artificer is punished under the statute for absenting himself without reasonable excuse, he can, on the expiration of his sentence of imprisonment, be again punished for not returning. *Ex-parte Baker*, 2 H. & N. 219 ; 26 L. J. M. C. 193.

The commitment must provide for an abatement of the wages during imprisonment. (Id.)

As to colliers and miners, *see* also 39 & 40 Geo. 3, c. 77.

MASTERS of Superior Courts.[1]

MATRIMONIAL CAUSES. *See ante*, Husband and Wife, p. 59; Marriage, p. 443.

I. Of the Court for, p. 470.

(A) *Of the Judges of the Court, and their Jurisdiction*, p. 470.
(B) „ *Officers of the Court*, p. 470.
(C) „ *Practitioners in the Court*, p. 470.

II. Of the Jurisdiction of the Court.

(A) *In Suits for Judicial Separation.* *See* Marriage, *ante*, p. 443.
(B) „ *Dissolution of Marriage.* „ „
(C) „ *Nullity of Marriage.* „ „
(D) „ *Restitution of Conjugal Rights.* „ „
(E) „ *Jactitation of Marriage.* „ „
(F) *In Petitions for Alimony.* *See* Alimony, vol. i. p. 297.
(G) *To protect Property of Wife.* *See* Marriage, *ante*, p. 443.

[1] The masters, of whom there are five to each court, are, next to the judges, the superior officers of the common-law courts. Their mode of appointment and salaries are regulated by 7 Wm. 4, and 1 Vic. c. 30. They tax all bills of costs, issue, sign, and pass writs, file and keep the custody of the records of the court, take the oral examination of witnesses or parties, act under references of inquiry into damages on judgments by default, determine the amount of security for costs. While in court, they examine and sign all affidavits and writs of *habeas corpus*, and commitments thereon, enter minutes of all judgments, rules, and orders, record the proceedings, and report the practice of the court when called upon by the judges, and receive and carry out their directions. They also pay into the Bank of England the moneys paid into court by suitors, and pay out the same. They also collect and account for the fee fund.

By Reg. Gen. (Pr.) H. T. 1853, r. 173, "the masters' offices in the several courts shall be open in term time from eleven o'clock in the forenoon till five o'clock in the afternoon, and not in the evening; and, in the vacation, from eleven o'clock in the forenoon till three o'clock in the afternoon, except between the 10th day of August, and the 24th day of October, when they are to be open from eleven in the morning till two in the afternoon, except on Good Friday, Easter Eve, Monday and Tuesday in Easter week, Christmas day, and the three following days, and such of the four following days as may not fall in the time of term, but not otherwise, namely, the Queen's Birth-day, the Queen's Accession, Whit Monday, and Whit Tuesday, when the offices shall be closed." And by Reg. Gen. H. T. 1853, "Directions to the Taxing-Masters," r. 1, "between the 1st day of September and the 24th day of October in each year, one of the masters of the courts of Queen's Bench, Common Pleas, or Exchequer, shall have authority to tax bills of costs, take references, and perform other necessary and immediate matters arising in or appertaining to any or either of the said courts, at the office of his own court; and for such purpose, one of the masters shall attend on certain days in each week, as may be found necessary, and of which due notice shall be affixed in the judges' chambers, and in the respective offices of the master of each court, and such master shall be considered as the vacation master."

"On every appointment made by a master, the party on whom the same shall be served shall attend such appointment without waiting for a second, or in default thereof the master may proceed *ex-parte* on the first appointment." Reg. Gen. (Pr.) H. T. 1853, r. 172.

In general, the court will not discuss the correctness of the master's report. *Rex v. Morley*, 4 Ad. & E. 849. Though, where reasons are stated, it may be disputed. *Corry v. Wharton*, 1 Scott, 664.

Upon a reference by the court to the master, who had refused to allow further affidavits to be filed after a fixed day, the court refused to interfere with the discretion exercised by him. *Hall v. Anderton*, 8 Dowl. P. C. 326.

On an application for a rule to compute principal and interest on a bill of exchange, without the production of the instrument before the master, the court refused to give an opinion as to whether the production of the bill was necessary, but granted the rule, leaving the matter for the decision of the master. *Saunderson v. Lee*, 7 Dowl. P. C. 97.

As to the taxation of costs by the masters, *see* Costs, vol. iii. p. 310.

III. Of the Proceedings in Matrimonial Suits, p. 471.

(A) *They are commenced by Petition, which must be accompanied by an Affidavit*, p. 471.

(*a*) *Form of Petition*, p. 471.

(*b*) *Service of Petition*, p. 471.

(B) *Of the Citation and its Service*, p. 472.

(*a*) *Form of Citation*, p. 472.

(C) *Of the Appearance*, p. 472.

(D) *Return of Citation*, p. 473.

(E) *Answer and Affidavit*, p. 473.

(*a*) *Form of Answer*, p. 473.

(F) *Reply*, p. 473.

(G) *Effect of Delay in delivering Answer Reply, &c.* p. 473.

(H) *Extension of Time*, p. 474.

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(K) „ *Affidavits and Depositions*, p. 474.

(*a*) *Before whom they may be Sworn*, p. 474.

(L) *Notices*, p. 475.

(M) *Mode of Trial*, p. 475.

(N) *Record*, p. 475.

(*a*) *Form of Record*, p. 476.

(O) *Setting down for Trial*, p. 476.

(P) *Subpœnas*, p. 476.

(*a*) *Forms of Subpœnas, and Præcipes for*, p. 476.

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(*a*) *Form of Notice to Admit*, p. 477.

(R) *Of the Hearing*, p. 477.

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IV. Suits in Formâ Pauperis, p. 479.

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I. Of the Court for.[1]

(A) *Of the Judges of the Court, and their Jurisdiction.*[2]

(B) „ *Officers of the Court.*[3]

(C) „ *Practitioners in the Court.*[4]

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[1] The jurisdiction in matrimonial causes was exercised by the ecclesiastical courts previous to the passing of the 20 & 21 Vic. c. 85, by which a new court, called the Court for Divorce and Matrimonial Causes, was established, and the jurisdiction of the ecclesiastical courts in this respect abolished.

It is enacted by sect. 2 of this statute, that "as soon as this act shall come into operation, all jurisdiction now exercisable by any ecclesiastical court in England, in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, shall cease to be so exercisable, except so far as relates to the granting of marriage licenses, which may be granted as if this act had not been passed."

And by sect. 6, "as soon as this act shall come into operation all jurisdiction now vested in or exercisable by any ecclesiastical court or person in England, in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licenses, shall belong to and be vested in her majesty, and such jurisdiction, together with the jurisdiction conferred by this act, shall be exercised in the name of her majesty, in a court to be called the Court for Divorce and Matrimonial Causes."

[2] By 20 & 21 Vic. c. 85, s. 9, "the judge of the Court of Probate shall be called the judge ordinary of the said court, and shall have full authority, either alone or with one or more of the other judges of the said court, to hear and determine all matters arising therein, except petitions for the dissolving of or annulling marriages, and applications for new trials of questions or issues before a jury, bills of exception, special verdicts, and special cases, and, except as aforesaid, may exercise all the powers and authority of the said court."

All the judges of the three superior courts of common law are judges of the court. 22 & 23 Vic. c. 61, s. 1. The judge ordinary has precedence next after the chief baron. (Sect. 3.)

By the 20 & 21 Vic. c. 85, s. 10, "all petitions either for the dissolution or for a sentence of nullity of marriage, and applications for new trials of questions or issues before a jury, were to be heard before three or more judges of the court, of whom the judge of the Court of Probate was to be one." But by the 23 & 24 Vic. c. 145, s. 1, the judge ordinary is empowered "to hear and determine alone all matters, and exercise all powers and authority, which might be heard and determined and exercised by the full court, or by three or more judges of the said court, the judge ordinary being one. And he is authorised, where he deems it expedient in relation to any matter which he might hear and determine alone by virtue of this act, to have the assistance of another judge: Provided that the judge ordinary may, where he shall deem it expedient, direct that any such matter as aforesaid shall be heard and determined by the full court." (Sect. 2.)

The judge ordinary will not, except for some sufficient reason, order a suit which he is empowered, by the 23 & 24 Vic. c. 144, to hear alone, to be heard before the full court. *Bevan v. Bevan*, 30 L. J. P. & M. 23.

The judge ordinary may sit in chambers for the dispatch of business, which may more conveniently be heard there than in court. *See* 21 & 22 Vic. c. 108, ss. 1–3.

The sittings of the full court are holden during the seventh and five following days of sitting in each term, and on such other days as the judges may appoint. 23 & 24 Vic. c. 61, s. 4.

By 20 & 21 Vic. c. 85, s. 22, "in all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed and act, and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this act."

[3] The registrar and other officers of the principal registry of the Court of Probate attend the sittings of the Court for Divorce and Matrimonial Causes, and act as officers of the court. 20 & 21 Vic. c. 85, s. 14. *See* 21 & 22 Vic. c. 108, s. 4.

The registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the registrars of the principal registry of the Court of Probate, in the same way, and to the same extent, as the principal registry of the Court of Probate, and the clerks therein, is and are. (R. 55.)

The record keepers, the clerk of papers, the sealer, the ushers, and other officers belonging to the Court of Probate, shall discharge the same duties in the Court for Divorce and Matrimonial Causes, and in the registry thereof, as they discharge in the Court of Probate and the principal registry thereof. (R. 56.) The 25 & 26 Vic. c. 81, makes perpetual the prior acts.

[4] All persons admitted to practise as advocates or proctors respectively in any ec-

III. Of the Proceedings in Matrimonial Suits.

(A) *They are commenced by a Petition, which must be accompanied by an Affidavit.*[1]

(*a*) *Form of Petition.*[2]

(*b*) *Service of Petition.*[3]

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clesiastical court in England, and all barristers, attornies, and solicitors, entitled to practise in the superior courts at Westminster, are entitled to practise in the Court of Divorce and Matrimonial Causes; and such advocates and barristers have the same relative rank and precedence which they have in the judicial committee of the privy council. 20 & 21 Vic. c. 85, s. 15.

Proctors are subject to the same stamp-duty on admission, as was formerly payable on admission to practise in the ecclesiastical courts; and proctors or solicitors practising in the court must have an annual certificate. 20 & 21 Vic. c. 85, s. 63.

The judge ordinary of the Court for Divorce and Matrimonial Causes shall have and exercise over proctors, solicitors, and attornies practising in the said court, the like authority and control as is now exercised by the judges of any court of equity or of common law over persons practising therein as proctors, solicitors, or attornies. 21 & 22 Vic. c. 108, s. 14.

[1] Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition. A form of such petition is given *infra*, No. 3. (R. 1.)

Every such petition shall be accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition, of which he or she has personal cognisance, and such affidavit shall be filed with the petition. (R. 2.)

Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same, so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage. 20 & 21 Vic. c. 85, s. 41.

In cases where the petitioner is seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage. (R. 3.)

It is not sufficient in the petition to allege merely that the respondent was guilty of cruelty, but such acts should be specified as, if proved, would constitute cruelty; but the precise date of the commission of such acts need not be stated. *Suggate v. Suggate*, 28 L. J. P. & M. 7.

A petition for dissolution of marriage alleged a specific act of adultery on the 25th of August, and then went on to allege other acts of adultery between that day and the 31st of October. The judge ordinary declined to order particulars of the dates of those latter acts of adultery. *Boddy v. Boddy*, 28 L. J. P. & M. 16.

By obtaining time to plead, the respondent waives any objection to the sufficiency of the charge of adultery in the petition; he is still, however, entitled to particulars of the charge. *Hepworth v. Hepworth*, 30 L. J. P. & M. 215.

[2] *Form of Petition for Divorce.*

(Prescribed by Rule, form No. 3.)

To the Judge Ordinary of her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18

The petition of A. B. of sheweth:—

1. That your petitioner was on the day of 18 lawfully married to C. B., then C. L., widow, at

2. That after his said marriage your petitioner lived and cohabited with his said wife at and at and that your petitioner and his said wife have had issue of their said marriage three children: to wit, one son and two daughters.

3. That on the day of 18 and other days between that day and the said C. B. at in the county of committed adultery with R. S.

4. That in and during the months of January, February, and March, 18 the said C. B. frequently visited the said R. S. at and on divers of such occasions committed adultery with the said R. S.

Your petitioner therefore humbly prays:—

That your lordship will be pleased to decree [*here set out the relief sought*]:

And that your petitioner may have such further and other relief in the premises as to your lordship shall seem meet.

And your petitioner will ever pray, &c.

[3] Every such petition shall be served on the party to be affected thereby, either within or without her majesty's dominions, in such manner as the court shall, by any general or special order, from time to time direct, and for that purpose the court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said court may dispense with such service altogether, in case it shall seem necessary or expedient so to do. 20

(B) *Of the Citation and its Service.*[1]

(*a*) *Form of Citation.*[2]

(C) *Of the Appearance.*[3]

& 21 Vic. c. 85, s. 42.

A petition was filed, and a citation issued on the part of the wife, for a judicial separation, on the ground of cruelty. Neither were served. The wife's solicitor, in consequence of fresh instructions, afterwards filed a second petition for judicial separation, on the ground of adultery coupled with cruelty, and a citation issued thereon. The husband was served, and entered an appearance on the second suit. The court directed the second suit to proceed. *Turner v. Turner*, 2 S. & T. 426; 31 L. J. P. & M. 134.

[1] Every petitioner who files a petition and affidavit shall forthwith issue a citation, to be served on the respondent in the cause, according to form No. 1. (R. 4.) *See infra.*

A similar citation shall be served upon any party whom it is intended to make a co-respondent in the cause. (R. 5.)

To each respondent in the cause shall be delivered, together with the citation, a copy of the petition, certified under the seal of the court. (R. 6.)

Every citation shall be written or printed on parchment, and the party taking out the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there deposit the præcipe, and get the citation signed and sealed. The form of præcipe is given, No. 2, R. 7. *See infra.*

The party applying for a citation to be sealed, shall, on depositing the præcipe in the registry, give an address within three miles of the General Post-Office, at which it shall be sufficient to leave all notices, instruments, and other proceedings not by these rules and orders expressly requiring personal service. (R. 8.)

Before a party can proceed after the service of a citation, unless by the express leave of the court, an appearance must have been previously entered by or on the behalf of the party cited, or an affidavit of personal service of the citation must have been filed in the registry. (R. 9.)

In cases where personal service cannot be effected, application may be made to the judge ordinary, upon motion in open court, to substitute some other mode of service, or to dispense with service altogether. (R. 10.)

Personal service of a citation shall be effected by leaving a copy of the citation with the party, and producing the original, if required by him or her so to do. (R. 11.)

An affidavit of service of the citation, &c. should allege that the party served is a respondent in the suit. *Temple v. Temple*, 31 L. J. P. & M. 34.

To entitle the petitioner in a suit for dissolution of marriage to proceed without personal service of a citation, it is not sufficient to show that the respondent is abroad, and that the petitioner does not know where he is, some attempt should be made to discover and serve him. *Sudlow v. Sudlow*, 28 L. J. P. & M. 4.

As to the circumstances under which personal service will be dispensed with, or leave to proceed without service be given, *see* further, *Chandler v. Chandler*, 28 L. J. P. & M. 6. *Cook v. Cook*, id. 5. *Lacy v. Lacy*, id. 24. *Moon v. Moon*, 5 Jur. N. S. 1353.

[2] *Form of Citation.*

(Sched. of Forms, No. 1.)

In Her Majesty's Court for Divorce and Matrimonial Causes.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To A. B. of in the county of

Whereas C. B. of claiming to have been lawfully married to you, the said A. B., has filed her petition against you in our said court, praying for wherein she alleges that you have committed adultery (or have been guilty of cruelty towards her, the said C. B., *or as the case may be*): Now this is to command you, that within eight days of the service of this on you, inclusive of the day of such service, you do appear in our said court, then and there to make answer to the said petition, a copy whereof, sealed with the seal of our said court, is herewith served upon you. And take notice, that in default of your so doing, the judge ordinary of our said court (*or* the judges of our said court) will proceed to hear the said charge (*or* charges) proved in due course of law, and to pronounce sentence therein, your absence notwithstanding.

(Signed) E. F. Registrar.

(L. S.)

Indorsement to be made after Service.

This citation was duly served by G. H. on the within-named A. B. of at on the day of 18

(Signed) G. H.

No. 2. *Præcipe for Citation.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Citation for A. B. of against C. B. of for a judicial separation by reason of adultery (*or as the case may be*).

(Signed) P. A. proctor, solicitor, or attorney for the said C. B. (*or* C. B. in person.)

[3] Every entry of an appearance shall be accompanied by an address within three miles of the General Post-Office, at which it

(D) *Return of Citation.*[1]

(E) *Answer and Affidavit.*[2]

(*a*) *Form of Answer.*[3]

(F) *Reply.*[4]

(G) *Effect of Delay in delivering Answer, Reply, &c.*[5]

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shall be sufficient to leave all notices, instruments, and other proceedings. (R. 12.)

The court refused to allow the co-respondent to enter an appearance on the day previous to the trial, which was before a jury, on the ground of delay. *Pounsford v. Pounsford*, 30 L. J. P. & M. 188.

In a suit by the husband for dissolution of marriage, the wife did not appear; the co-respondent filed an answer, and the issue raised was set down for trial. The court subsequently allowed the wife to enter an appearance upon an affidavit by her, denying the adultery, and stating that she had been prevented by poverty from appearing earlier, but directed that the costs should not be taxed against the husband. *Bent v. Bent*, 30 L. J. P. & M. 160.

No. 3. *Entry of an Appearance.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

A. B. Petitioner, *v.* C. B. Respondent. } The respondent appears in person [*or* E. F. proctor, solicitor, or attorney for C. B., appears for the respondent]. [*Here insert the address required by Rule, No.* 13.]

Entered this day of 18

When the respondent has appeared, the court will not allow the petitioner to withdraw the petition, unless the respondent consent, or has had notice of the motion. *Lutwyche v. Lutwyche*, 28 L. J. P. & M. 56.

[1] After personal service of citation has been effected, the citation, with the certificate of service indorsed thereon, shall be forthwith returned into and filed in the registry. (R. 13.)

The citation must be returned to the registry before a petition for a dissolution can be set down for hearing, such return being necessary in order to preserve evidence that the proper steps have been taken. The petitioner, in a suit for dissolution of marriage, sent out citations for service on the respondent and co-respondent, who had gone to Australia. The solicitor in Australia employed to effect service having omitted to return the citation to this country, the judge ordinary refused to allow the petition to be set down for hearing until they should be returned. *Cook v. Cook*, 28 L. J. P. & M. 37.

[2] Within twenty-one days from the service of the citation, the respondent shall file his or her answer in the registry, otherwise the petitioner shall be at liberty to proceed to proof of the petition. A form of answer is given in No. 4. (R. 14.)

15. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent verifying such other or additional matter; such affidavit shall be filed with the answer.

16. In cases involving a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the other party to the marriage.

17. The respondent shall file his or her answer in the registry, and on the same day deliver to the petitioner, or his or her proctor, solicitor, or attorney, a copy thereof.

A respondent may plead and demur to the same part of the petition without leave of the court. *Leete v. Leete*, 2 S. & T. 568; 31 L. J. P. & M. 121.

[3] *Form of Answer.*

(Sched. of Forms, No. 4.)

In Her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18

A. B. *v.* C. B.

The respondent C. B., by P. A. her proctor, solicitor, or attorney [*or* in person], saith:—

1. That she denies that she committed adultery with R. S. as set forth in the said petition.

2. Respondent further saith, that on the day of 18 and on other days, between that day and the said A. B. at in the county of committed adultery with X. Y.

[*In like manner respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the petition.*]

Wherefore this respondent humbly prays,—

That your Lordship will be pleased to reject the prayer of the said petition and decree, &c.

And this respondent will ever pray, &c.

[4] Within fifteen days from the filing of the answer, the petitioner may file a reply thereto, and the same period shall be allowed for bringing in and filing any further statement by way of answer to such replication. (R. 18.)

[5] If the petitioner or respondent, unless by leave of the judge ordinary previously obtained, fail to deliver the answer, reply, or other proceeding within the time specified in

(H) *Extension of Time.*[1]

(I) *Of Amendments.*[2]

(K) „ *Affidavits and Depositions.*[3]

(*a*) *Before whom Affidavits may be Sworn.*[4]

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these rules, the other party shall not be compelled to receive the same, unless by direction of the judge ordinary. The expense of every such application to the judge ordinary shall fall on the party causing the delay, unless the judge ordinary shall otherwise direct. (R. 46.)

Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the judge ordinary. (R. 47.)

An answer filed without the leave of the judge ordinary, after the time allowed by the rules for filing it has elapsed, may be treated by the petitioner as a nullity. *Avila v. Avila*, 30 L. J. P. & M. 104. *Ward v. Ward*, 27 id. 34.

[1] 57. The judge ordinary shall, in every case in which a time is fixed by these rules for the performance of any act, have power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit.

[2] If either party desire to amend his or her petition, answer, or subsequent statement, it may be done by permission of the judge ordinary, and in such form and under such terms as the judge ordinary may approve. (R. 19.)

After the petition had been served on the respondent, his solicitor, on two occasions, applied to the judges in chambers for further time to file the answer, and both applications were granted:—*Held*, that it was too late afterwards to take objection to the form of the petition, and to ask that certain paragraphs of it should be struck out. *Hepworth v. Hepworth*, 5 Jur. N. S. 831.

Where the petitioner, after an adjournment of the case part heard, in order to procure further evidence, asks leave to amend his petition, by adding a new charge, it is an objection to granting his application that the charge in question had come to his knowledge before the petition in its original form was drawn. *Bannister v. Bannister*, 29 L. J. P. & M. 53.

After the hearing of a petition by a wife for judicial separation, on the ground of adultery and cruelty, no decree having been pronounced, the court allowed the petition to be amended by the addition of a charge of bigamy, which came to the knowledge of the petitioner in the interval between the cause being set down for hearing and the hearing. *Walker v. Walker*, 30 L. J. P. & M. 214. The petition was again served upon the respondent. When it came on anew for hearing the court treated it as a fresh petition, and required proof of all the facts necessary to found a decree, as well as of the additional allegation. *Walker v. Walker*, 31 L. J. P. & M. 117.

[3] The addition and true place of abode of every person making an affidavit is to be inserted therein. (R. 49.)

In every affidavit made by two or more persons, the names of the several persons making it are to be written on the jurat. (R. 50.)

No affidavit shall be read or made use of in any matter depending in court in the jurat, of which there is any interlineation or erasure. (R. 51.)

Where an affidavit is made by any person who is blind, or who, from his or her signature, or otherwise, appears to be illiterate, the person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed to, and according to the belief of such person did, understand the same, and also that the said party made his or her mark, or wrote his or her signature, in the presence of the person before whom the affidavit was made. (R. 52.)

No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a clerk of his proctor, solicitor, or attorney. (R. 53.)

A proctor, solicitor, or attorney, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting. (R. 54.)

As a general rule, a commission to examine witnesses in a suit will not be granted before issue joined. *Shaw v. Shaw*, 2 S. & T. 515; 31 L. J. P. & M. 95; 8 Jur. N. S. 141.

[4] Registrars, surrogates, commissioners for taking oaths in the Court of Chancery, and all other persons authorised to administer oaths under the act 20 & 21 Vic. c. 77, have power to administer oaths under 20 & 21 Vic. c. 85; 21 & 22 Vic. c. 108, s. 12. The judge has power to appoint commissioners for taking oaths. (Id. s. 16.) Affidavits, declarations, and admissions, may be sworn in foreign parts before persons empowered to administer oaths under 6 Geo. 4, c. 87, or 18 & 19 Vic. c. 42; or, where there are none such, before any foreign local magistrate, or other person having authority to administer an oath there. 21 & 22 Vic. c. 108, s. 20.

Affidavits, declarations, and affirmations, to be used in the Court for Divorce and Matrimonial Causes, may be sworn and taken in Scotland, Ireland, the Isle of Man, the Channel Islands, or any colony, island, plan-

(L) *Notices.*[1]

(M) *Mode of Trial.*[2]

(N) *Record.*[3]

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tation, or place out of England under the dominion of her majesty, before any court, judge, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place, respectively, or, so far as relates to the Isle of Man and the Channel Islands, before any commissary, ecclesiastical judge, or surrogate, who at the time of the passing of the act 20 & 21 Vic. c. 77, was authorised to administer oaths in the Isle of Man or in the Channel Islands respectively; and all registrars and other officers of the Court for Divorce and Matrimonial Causes, shall take judicial notice of the seal or signature, as the case may be, of any such judge, notary public, or person, which shall be attached, suspended, or subscribed to any such affidavit, declaration, or affirmation, or to any other document. 21 & 22 Vic. c. 108, s. 21. As to forging the seal or signature *see* id. s. 22. And as to perjury in the affidavit, &c. *see* id. s. 23.

[1] Wherever it becomes necessary to give a notice to the opposite party in the cause, such notice shall be in writing, signed by the party, or by his or her proctor, solicitor, or attorney. (R. 48.)

[2] By 20 & 21 Vic. c. 85, s. 36, in questions of fact arising in proceedings under this act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon the court, to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said court, by the verdict of a special or common jury.

By sect. 37, the court, or any judge thereof, may make all such rules and orders upon the sheriff, or any other person, for procuring the attendance of a special or common jury for the trial of such question, as may now be made by any of the superior courts of common law at Westminster, and may also make any other orders which to such court or judge may seem requisite, and every such jury shall consist of persons possessing the like qualifications, and shall be struck, summoned, balloted for and called, in like manner as if such jury were a jury for the trial of any cause in any of the said superior courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said superior courts; and every party to any such proceeding shall be entitled to the same rights, as to challenge and otherwise, as if he were a party to any such cause.

By sect. 38, when any such question shall be so ordered to be tried such question shall be reduced into writing in such form as the court shall direct, and at the trial, the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence, and upon every such trial, the court or judge shall have the same powers, jurisdiction and authority, as any judge of any of the said superior courts sitting at Nisi Prius.

By sect. 39, upon the trial of any such question, or of any issue under this act, a bill of exceptions may be tendered, and a general or special verdict or verdicts, subject to a special case, may be returned, in like manner as in any cause tried in any of the said superior courts; and every such bill of exceptions, special verdict, and special case respectively, shall be stated, settled, and sealed, in like manner as in any cause tried in any of the said superior courts, and where the trial shall not have been had in the Court for Divorce and Matrimonial Causes, shall be returned into such court without any writ of error or other writ, and the matter of law in every such bill of exceptions, special verdict, and special case, shall be heard and determined by the full court, subject to such right of appeal as is hereinafter given in other cases.

By sect. 40, it shall be lawful for the court to direct one or more issue or issues to be tried in any court of common law, and either before a judge of assize in any county, or at the sittings for the trial of causes in London and Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery.

When the proceedings have raised the questions of fact necessary to be determined, either party may, within fifteen days from the filing of the last proceeding, apply to the judge ordinary to direct the truth of any question of fact arising in the proceedings to be tried by a jury. (R. 20.)

If either party claim that the cause shall be heard before a jury, the judge ordinary shall determine whether the same shall be tried by a jury or before the court itself, and whether by oral evidence or upon affidavit. (R. 21.)

Before the petitioner applies to the court to direct the mode of hearing, an affidavit should be filed that search has been made for an appearance by the respondent, although service of a citation and copy of a petition upon him may have been dispensed with. *Cook v. Cook*, 28 L. J. P. & M. 56. The affidavit should state that the party served is the respondent. *Temple v. Temple*, 31 id. 34.

[3] Whenever a case is to be tried before a jury, the judge ordinary shall direct the questions at issue to be stated in the form of a record, to be settled by one of the registrars. A form of record is given, No. 11. r. 22. *See post*, p. 476.

After the record has been so settled, either party shall be at liberty to apply to the judge ordinary to alter or amend the same, and

(*a*) *Form of Record.*[1]

(O) *Setting down for Trial.*[2]

(P) *Subpœnas.*[3]

(*a*) *Forms of Subpœnas, and Præcipes for.*[4]

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his decision shall be final and binding on the parties. (R. 23.)

The power given to the court to direct questions of fact arising in proceedings to be tried by a jury, does not extend to issues raised between the parties on matters which, under the proviso in the 31st section, give the court a discretion as to dissolving the marriage, though the petitioner's case may have been proved. Such issues, therefore, should not be included in the record. *Kretzschmar v. Kretzschmar*, 28 L. J. M. & P. 128.

The issues are taken to be those stated on the record, although they may not be identical with those raised in the pleadings. *Cherry v. Cherry*, 1 S. & T. 319.

[1] *Form of Record.*

(Sched. of Forms, No. 11.)

In Her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18

A. B. *v.* C. B.

A. B. did, in his petition presented in this cause, allege that C. B. did, to wit, on the day of 18 commit adultery with R. S. [*here insert the allegations of the petition*].

C.B. did, in answer thereto, deny [*insert the denial and any other necessary matter contained in the answer*]: Whereupon the said A. B. denied that [*here insert the substance of the replication, if any, and so on for the further statements, if any*]:

Therefore, let a jury come.

[2] The petitioner shall file the record, and set down the cause as ready for trial, and on the day upon which it is set down shall give notice of his or her having done so to each party for whom an appearance has been entered, and if the petitioner delay filing the record and setting down the cause as ready for trial, for the space of one month from the day on which the record was finally settled, the respondent may file the record, and set the cause down as ready for trial, and give a similar notice to the petitioner, and the aforesaid other parties. A copy of every such notice shall be filed in the registry, and the cause, unless the judge ordinary shall otherwise direct, shall come on in its turn. (R. 24.)

The court will not postpone the trial on the application of one of the parties, unless notice has been previously given to the other. *Hepworth v. Hepworth*, 30 L. J. P. & M. 198.

[3] Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and there deposit the præcipe. Forms of subpœna are given, Nos. 6 and 8, and forms of præcipe, Nos. 7 and 9. (R. 31.)

[4] No. 6. *Form of Subpœna ad Testificandum.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*names of all witness included in the subpœna*] greeting:

We command you, and every of you, to be and appear in your proper persons before [*insert the name of the judge*], judge ordinary of our Court for Divorce and Matrimonial Causes, at on the day of 18 by of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is tried, to testify the truth according to your knowledge in a certain cause now in our county before our said judge depending [*or* now before our said court depending] between A. B., petitioner, and C. B., respondent [*or* in a certain cause or proceeding now in our court before our said judge depending, *or* now before our said court depending], in default of the appearance of on the part of the [petitioner *or* respondent, *or as the case may be*], and at the aforesaid day, between the parties aforesaid to be tried [*or* in default as aforesaid, between the parties aforesaid to be tried]: And this you, nor any of you, shall in nowise omit, under the penalty of every of you of 100*l.*

Witness [*insert the name of the judge*] at the Court for Divorce and Matrimonial Causes, the day of 18 in the year of our reign.

(Signed) E. F. Registrar.

No. 7. *Præcipe for Subpœna ad Testificandum.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna of [*insert witnesses' names*] to testify between A. B., petitioner, and C. B., respondent, on the part of the petitioner [*or* respondent.]

(Signed) { A.B. / C.D. } or { P. A., petitioner's [*or* respondent's] proctor, solicitor, or attorney.

No. 8. *Subpœna duces Tecum.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*names of all parties included in the subpœna*] greeting:

We command you, and every of you, to be and appear in your proper persons before [*insert the name of the judge*], judge ordinary of our Court for Divorce and Matrimonial Causes [*or* before our said court, *as*

(Q) *Notice to Admit.*[1]

(*a*) *Form of Notice to Admit.*[2]

(R) *Of the Hearing.*[3]

the case may be] at on the day of by of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is heard, and also that you bring with you and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c., required to be produced*], then and there to testify and show all and singular those things which you, or either of you, know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in our said court before our said judge ordinary [*or* now before our said court, *as the case may be*], depending between A. B., petitioner, and C. B., respondent [*or* in a certain cause or proceeding now in our said court before our said judge ordinary, *or* now before our said court] depending, in default of the appearance of on the part of the petitioner [*or* respondent], and on the aforesaid day between the parties aforesaid to be tried: And this you, nor any of you, shall in nowise omit, under the penalty of every of you of 100*l.*

Witness [*insert the name of the judge*] at our Court for Divorce and Matrimonial Causes, the day of 18 in the year of our reign.

(Signed) E. F., Registrar.

No. 9. *Præcipe for Subpœna duces Tecum.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna for to testify and produce, &c., between A. B., petitioner, and C. B., respondent, on the part of the petitioner [*or* respondent].

(Signed) {A.B. / C.D.} or {P. A., petitioner's [*or* respondent's] proctor, solicitor, or attorney.

[1] The petitioner or respondent may call upon the other party, by notice in writing, to admit any document, saving any just exceptions, and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the judge ordinary shall certify that the refusal to admit was reasonable; and when such notice to admit has not been given, no costs of proving any documents shall be given, except in cases where the omission to give the notice is, in the opinion of the registrar, a saving of expense. (R. 32.)

[2] No. 10. *Notice to admit Documents.*

A. B. *v.* C. B.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Take notice that the {petitioner / respondent} in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the {respondent / petitioner} at on between the hours of and and the {respondent / petitioner} is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, that such as are specified to be copies are true copies, and that such documents as are stated to have been served, sent, or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause.

To {C.B. / A.B.} *or* to E. F., proctor, solicitor, or attorney for.

(Signed) {A.B. / C.B.} *or* G. H., proctor, solicitor, or attorney for.

[*Here describe the documents.*]

[3] The hearing of the cause shall be conducted in court, and the counsel shall address the court subject to the same rules and regulations as now obtain in the courts of common law. (R. 35.)

The registrar shall, in cases tried by a jury, enter on the record the finding of the jury and the decree of the court, and shall sign the same. In all cases the registrar shall enter the decree of the court in the court-book. (R. 34.)

Where the papers required by the practice of the court to be delivered to the full court three days before the hearing of a cause have not been delivered, the court will order the cause to be struck out of the list. *Evans v. Evans*, 29 L. J. P. & M. 53.

If the minutes required by the practice of the court to be filed before the hearing are not so filed, the cause will be struck out of the list. *Murphy v. Murphy*, 31 id. 162.

Where, upon a petition for dissolution of marriage, it appeared that by far the greater part of the witnesses resided at a great distance from London, the court directed issues upon the charges and counter-charges of adultery and cruelty to be tried at the assizes. *Richards v. Richards*, 30 id. 48.

In a suit for dissolution of marriage, if the respondent does not appear, proof must be given of the identity of the respondent and the person served with the petition. *Goldsmith v. Goldsmith*, 31 id. 163.

Where the jury has been sworn, and neither of the parties appear, the court will discharge the jury. *Haydon v. Haydon*, 30 id. 112.

Where a case has been in part heard before the judge ordinary, and stands over for further proof and argument before the full court, the facts proved before the judge ordinary must be proved again before the

(S) *Trial upon Affidavits.*[1]

(T) *Cross-Examination of Deponent.*[2]

(U) *The Court may Examine Petitioner.*[3]

(V) *New Trial.*[4]

(W) *Decree, how Enforced.*[5]

(X) *Reversal of Decree.*[6]

(*a*) *Form of Petition for Reversal of Decree.*[7]

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full court. *Brodie v. Brodie*, 30 L.J.P.& M. 185.

The judge ordinary has no power, even with consent of the parties, to exclude the public from the court during the hearing of a cause. *Barnett v. Barnett*, 29 id. 28.

As to the Right to Begin.—In a petition for restitution of conjugal rights by the husband, to which the wife answered by pleading his cruelty, and the husband took issue thereon, the court, after hearing counsel, held that substantially the affirmative issue was on the respondent, and that her counsel had a right to begin. *Cherry v. Cherry*, 1 S. & T. 319.

Where, in a suit for dissolution by husband against wife, the wife pleaded that the marriage was null on account of the husband's impotency, the court held that, there being substantially a traverse of the marriage, the petitioner had a right to begin. *Serrell v. Serrell*, 2 id. 422; 31 L.J.P.& M. 55.

Where the judge ordinary is sitting without a jury, as the question of the fact of the marriage must be proved before him, the right to begin is not taken from the petitioner, although the only real issue in the case lies on the respondent. *Burroughs v. Burroughs*, 2 S.& T. 544; 31 L. J. P. & M. 56.

[1] In cases to be tried upon affidavit, the petitioner and respondent shall file their affidavits within eight days from the filing of the last proceeding. (R. 35.)

Counter-affidavits to any facts stated in any such affidavits may be filed by either party within fifteen days from the filing of the affidavit which they are intended to answer. (R. 36.)

Affidavits in reply to counter-affidavits, may be filed by permission of the judge ordinary, granted on motion or summons, but not otherwise. (R. 37.)

[2] Applications to produce a deponent in the cause for the purpose of cross-examination, shall be made on summons to the judge ordinary sitting in chambers. (R. 38.)

[3] The court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined, or cross-examined, on oath, on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or her has been guilty of adultery. 20 & 21 Vic. c. 85, s. 43.

[4] Every application for a new trial in respect of causes tried before a jury is to be lodged in the registry within a month from the day on which the cause was tried. (R. 45.)

When a verdict has been found for the respondent, the court will not dismiss the petition until after the expiration of the month allowed for applying for a new trial. *Hitchcock v. Hitchcock*, 30 L. J. P. & M. 198. See *Hill v. Hill*, id.

[5] All decrees and orders to be made by the court in any suit, proceeding, or petition, to be instituted under authority of this act, shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution. 20 & 21 Vic. c. 85, s. 52.

An affidavit of non-payment of taxed costs and alimony to the person to whom they are ordered cannot be read on a motion for an attachment, if filed subsequently to the notice of motion. *Symons v. Symons*, 30 L. J. P. & M. 215.

On the 8th of May, 1861, an order was made for attachment to issue against the respondent for non-payment of taxed costs, and the respondent was subsequently confined in Chester gaol under the attachment. It was held to be too late, in January 1862, to move to set aside the attachment, on the ground that the amount of costs to be paid was not indorsed on the writ, the *allocatur* and order for payment having been previously served upon the respondent. *Pearson v. Pearson*, 2 S. & T. 546; 31 L. J. P. & M. 102.

[6] Petitioners to the court for the reversal of a decree of judicial separation must set out the grounds upon which the petitioner relies, as in form No. 14, R. 41.

[7] No. 14. *Petition for Reversal of Decree.*

To the Judge Ordinary of her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18

The petition of A. B., of sheweth:

1. That your petitioner was on the day of lawfully married to

2. That on the day of your lordship, at the petition of pronounced a decree affecting this petitioner to the effect following; to wit [*here set out the decree*].

3. That such decree was obtained in the absence of your petitioner, who was then residing at [*state facts tending to show that the petitioner did not know of the proceed-*

IV. Suits in Formâ Pauperis.[1]

V. Application for Protection of Wife's Earnings.[2]

VI. Fees and Costs.

(A) *Table of.*[3]

ings; and further, that had he known, he might have offered a sufficient defence]; or that there was reasonable grounds for your petitioner leaving his said wife, for that his said wife [*here state any legal grounds justifying the petitioner's separation from his wife*].

Your petitioner therefore humbly prays:

That your lordship will be pleased to reverse the said decree.

And your petitioner will ever pray, &c.

[1] Any person desirous of prosecuting a suit *in formâ pauperis* shall lay a case before counsel, and obtain an opinion from such counsel that he or she has reasonable grounds for applying to the court for relief. (R. 42.)

No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the judge ordinary, and to obtain such order the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or of his or her attorney, that the same case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth 25*l.* after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made. (R. 43.)

Where a pauper omits to proceed to trial pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid. (R. 44.)

[2] Applications on the part of a wife deserted by her husband for an order to protect her earnings and property acquired since the commencement of such desertion, shall be made on summons to the judge ordinary in chambers, and supplied by affidavit. A form of application is given in No. 13, R. 39.

Applications for the discharge of any order made to protect the earnings and property of the wife are to be founded on affidavit. (R. 40.)

[3] TABLE OF FEES.

	£	s.	d.
On every citation	0	5	0
On entering appearance	0	2	6
Filing a petition	0	5	0
Filing an answer	0	5	0
Filing a reply	0	5	0
Filing any further replication to a petition	0	5	0
Filing application for an order for the protection of a wife's earnings and property	0	5	0
Filing application for discharge of such order	0	5	0
Filing interrogatories	0	5	0
Filing answer of each deponent to interrogatories	0	5	0
On every motion by counsel, inclusive of filing the case for motion	0	5	0
Entering order of the court on motion	0	5	0
Summons to attend in chambers	0	2	6
For entering order of court on summons	0	2	6
Filing notice	0	1	0
On depositing the record	1	0	0
For the settling of the record by one of the registrars	1	0	0
Setting a cause down for hearing or trial	0	5	0
Entering sentence or final decree in a cause	0	10	0
Entering special verdict, if five folios of seventy-two words or under	0	2	6
If exceeding five folios, per folio of seventy-two words	0	0	6
Entering a decree or order in pursuance of a written judgment from the judge of an ecclesiastical court	0	10	0
Entering any decree or order for alimony	0	5	0
Entering order directing how damages shall be applied	0	5	0
Entering order providing for custody, maintenance, or education of children, if two folios of seventy-two words or under	0	5	0
Entering order for the settlement of the wife's property, if two folios of seventy-two words or under	0	5	0
If either of the above orders exceed five folios, for each additional folio	0	2	0
Entering any minute, order, or decree in the court-book other than the decrees or orders before specified	0	2	6
On withdrawal of a cause after same is set down for hearing, to be paid by the party at whose instance it is withdrawn	0	5	0

	£	s.	d.
On the hearing or trial of a cause :—			
From the plaintiff	1	0	0
From the defendant or defendants	0	15	0
If the hearing or trial continues more than one day, for each day :—			
From the plaintiff	0	10	0
From the defendant or defendants	0	10	0
Producing the judge's notes	0	5	0
Bill of exceptions signed by the judge	0	5	0
Entering on the record the finding of the jury or the decision of the judge	0	5	0
On every subpœna	0	2	6
On a certificate under the hand of a judge	0	2	6
On every commission issuing under the seal of the court	1	0	0
Writ of attachment	0	7	6
Writ of sequestration	1	0	0
On lodging instrument of appeal	0	10	0
Search in court-books, if within the last two years	0	1	0
If at an earlier period than within two years	0	2	0
In case the court books to be searched, or the documents required are not in the registry, in addition to the above	0	2	6
Filing and entry of remission of appeal	0	10	0
Filing exhibits, not exceeding ten, for each exhibit	0	1	0
Exceeding ten, but not exceeding twenty	0	10	0
Exceeding twenty, but not exceeding fifty	0	15	0
If exceeding fifty	1	0	0
Office copies of minutes, orders, or decrees, judge's notes, or other documents filed in a cause, if five folios of seventy-two words or under	0	2	6
If exceeding five folios of seventy-two words, per folio	0	0	6
In case the same are under seal of the court, in addition for the seal	0	5	0
Filing every affidavit or other document brought into court or deposited in the registry, for filing which no fee is before specified	0	2	6
Taxing every bill of costs —			
If three folios of seventy-two words or under	0	2	6
If exceeding three folios of seventy-two words, when taxed as between party and party, per folio	0	0	6
When taxed as between practitioner and client, per folio	0	1	0
For administering oaths to each deponent	0	1	0
Examiner appointed to take evidence under a commission for examination of witnesses, for each day's attendance, besides travelling expenses	3	3	0

Additional Table of Fees to be taken in the Registry of the Court for Divorce and Matrimonial Causes. (*Dated 3d December*, 1858.)

For marking each exhibit annexed to an affidavit	0	1	0
For settling the form of advertisements of citations or other advertisements	0	5	0
For taking the evidence of one or more witnesses before the registrar, for each day, if within three miles of the General Post Office	3	3	0
If beyond that distance	5	5	0
If for part of a day only, such smaller fee as the registrar in his discretion shall think proper.			
For entering order for the protection of a wife's earnings and property	0	5	0
For the order under seal of the court	0	10	0
For entering an order of the registrar of the Court of Probate, the same fee as would be payable for entering similar order made by the judge.			
For each appointment of a commissioner	1	0	0
For a rule *nisi* for a new trial	0	5	0

Fees to be taken for their own use by the Proctors, Solicitors, and Attorneys, practising in her Majesty's Court for Divorce and Matrimonial Causes. (*Dated 3d December*, 1858.)

Citations, Subpœnas, Writs, and Service of same.

Citation, including præcipe	0	7	6
Citation to see proceedings, including præcipe	0	7	6
Certificate of service	0	2	6
Subpœna ad testificandum and præcipe	0	7	6
Subpœna duces tecum, if five folios of seventy-two words or under, and præcipe	0	7	6
If the subpœna exceeds five folios in length, for each additional folio of seventy-two words	0	1	0
Writ of attachment, including præcipe	0	7	6
Writ of sequestration, including præcipe	0	7	6

	£	s.	d.
Service of citation, petition, or subpœna, if within two miles of the place of business of the practitioner, or of the person employed to effect the service	0	5	0
If beyond that distance, and not exceeding ten miles, for every mile one way	0	1	0
Drawing and engrossing affidavit of service, if three folios of seventy-two words or under	0	5	0
If above, for every additional folio, including a copy for the court	0	1	4
In cases in which the person to be served shall avoid service, or shall reside beyond the jurisdiction, except in Scotland or Ireland, a sum to be allowed for service according to the circumstances.			

Instructions.

Instructions for citations, petitions, answers, or other pleadings, for interrogatories, special affidavits, or applications for an order for protection of a wife's earnings and property	0	6	8
Ditto to defend suit	0	6	8
Ditto for brief or case for hearing	0	13	4
If there are several witnesses examined, and the brief or case is necessarily long, an additional fee will be allowed.			

Pleadings.

Drawing and engrossing petition, if ten folios of seventy-two words or under, including a copy to file	1	0	0
If exceeding ten folios, for every additional folio, including a copy to file	0	1	4
Drawing and engrossing answers, replications, and other subsequent statements, petitions for alimony, and answers thereto, if ten folios of seventy-two words or under, including a copy to file	1	0	0
If exceeding ten folios, for every additional folio, including a copy to file	0	1	4
Copies of petitions, answers, and other pleadings, also of exhibits or other documents, at per folio of seventy-two words	0	0	4
If any exhibits or other document to be copied, or any part thereof, contain pencil marks or writing, or the copy thereof, or any part thereof is required to be made fac-simile, in addition to any other fee for the copy:—			
For every folio of pencil marks or writing, or copy fac-simile, or part of a folio	0	0	4
Drawing the record, if fifteen folios of seventy-two words or under, including copy to file	0	10	0
If exceeding fifteen folios, for every additional folio of seventy-two words, including copy to file	0	0	8
Engrossing record to file, at per folio of seventy-two words, exclusive of parchment	0	0	6
For case for motion, including fair copy for judge	0	10	0
If necessarily more than seven folios of seventy-two words in length, for every additional folio, including copy for the judge	0	1	4
Copy for adverse party, per folio of seventy-two words	0	0	4
Drawing and engrossing demurrer, inclusive of the statement of any matter of law to be argued, for ten folios of seventy-two words or under	0	10	0
If exceeding ten folios of seventy-two words, for every additional folio of seventy-two words	0	1	0
Copy of the issue on demurrer, at per folio of seventy-two words	0	0	4
Drawing bill of costs, per folio of seventy-two words, including copy for taxation	0	1	0
Copy for the adverse party, per folio of seventy-two words	0	0	4
Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, inclusive of fair copy to be filed or issued, per folio of seventy-two words	0	1	4
For perusing and abstracting pleadings, affidavits, exhibits, and other documents, per folio of seventy-two words	0	0	4

Notices.

All necessary notices, if three folios or under, inclusive of copy and service	0	5	0
If exceeding three folios, for every additional folio, including copy and service	0	1	0
In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, or of the person employed to effect the service, the same fee as upon the service of a citation.			
Copy of summons or order of the judge, or rule *nisi*, and service	0	5	0

Attendances.

On entering appearance	0	6	8

(B) *Taxation of Costs.*[1]

MAYHEM.[2]

MAYOR'S Court of London. *See* Foreign Attachment, vol. iv. p. 488; *ante*, London, p. 404.

	£	s.	d.
To search for appearance to citation	0	6	8
On counsel with brief, when the fee to counsel is one guinea	0	3	4
When the fee to counsel exceeds one guinea, and is under five guineas	0	6	8
When the fee is five guineas and upwards	0	13	4
On consultation	0	13	4
On conference	0	6	8
In pursuance of notice to admit	0	6	8
For every hour after the first	0	6	8
On trial or hearing when cause is in paper and not tried or heard, or on motion in court	0	13	4
On trial or hearing	1	1	0
If it lasts the whole day	2	2	0
On taxation of bill of costs	0	13	4
If very long an additional fee will be allowed.			
On examination of witnesses under a commission:—			
If in England or Wales, per diem	2	2	0
If elsewhere	3	3	0
For all necessary attendances in chambers before the judge ordinary, or before a commissioner, or counsel, in the registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8

BRIEFS, CASES FOR HEARING, LETTERS, &c.

For drawing brief or case for hearing, per folio of seventy-two words	0	1	0
For each copy, per folio of seventy-two words	0	0	4
Every necessary letter during the dependence of the cause	0	3	6
Term fees, letters, and messengers, each term in which any business is done	0	15	0
For maps or plans each from 1 1 0 to	3	3	0
Copies of same, if required „ 0 10 0 to	1	0	0

AFFIDAVITS.

For drawing affidavit, if five folios of seventy-two words or under, including copy for the court or registry	0	6	8
If above five folios, for each additional folio, including copy for the court	0	1	4

INTERROGATORIES.

For drawing the same, at per folio of seventy-two words	0	1	0
Copy thereof to be delivered to the examiner and filed, at per folio of seventy-two words	0	0	4
If it becomes necessary for proctors, solicitors, or attorneys to transact any business for which no fee is herein specified, such fees shall be taken by them as would be allowed for similar business done in the courts of common law and equity, as the case may be.			

The fees in this court are generally collected by stamps, and are "stamp duties" under the management of the Commissioners of Inland Revenue. 20 & 21 Vic. c. 85, ss. 60, 61, 62, 68.

[1] The bill of any proctor, attorney, or solicitor, for any fees, charges, or disbursements, in respect of any business transacted in the Court for Divorce and Matrimonial Causes, and whether the same was transacted before the full court or before the judge ordinary, shall, as well between proctor or attorney, or solicitor and client, as between party and party, be subject to taxation by any one of the registrars belonging to the principal registry of the Court of Probate, and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under the act 20 & 21 Vic. c. 85, and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said court. 21 & 22 Vic. c. 108, s. 13.

[2] Mayhem is the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary; by the ancient law of England punished by the loss of *membrum pro membro*. 4 Steph. Com. p. 163; 4 Black. 206; 3 Inst. 118. *See* Maim, *ante*, p. 412.

MEDICAL Practitioners. *See* also Apothecary, vol. i. p. 376.

I. Disqualifications of Medical Practitioner not Registered, p. 483.

II. Privileges conferred by Registration, p. 483.

(A) *He may Sue for his Fees*, p. 483.

(B) *And is Exempt from certain Offices*, p. 484.

III. Falsely Pretending to be Registered, p. 484.

IV. Liability for Negligence, p. 484.

I. Disqualifications of Medical Practitioner not Registered.[1]

II. Privileges conferred by Registration.

(A) *He may Sue for his Fees.*[2]

[1] The 21 & 22 Vic. c. 90, "The Medical Register Act, 1858," provides for the registration of medical practitioners, and sect. 17 enacts, that after the 1st January, 1859, none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners, nor to recover any charge in any court of law for any medical or surgical advice, or attendance, or for the performance of any operation, or for any medicine which they have both prescribed and supplied (sect. 32), nor to hold any appointment as a physician, surgeon, or other medical officer, either in the military or naval service, or in emigrant or other vessels, or in any hospital, infirmary, dispensary, or lying-in hospital, not supported wholly by voluntary contributions, or in any lunatic asylum, gaol, penitentiary, house of correction, house of industry, parochial or union workhouse, or poorhouse, parish, union, or other public establishment, body, or institution, or to any friendly or other society for affording mutual relief in sickness, infirmity, or old age, or as a medical officer of health. (Sect. 36.) And no certificate required by any act of parliament from any physician, surgeon, licentiate in medicine and surgery, or other medical practitioner, is valid, unless the person signing the same is registered. (Sect. 37.) *See*, as to persons entitled to be registered, sect. 15; & 22 Vic. c. 21; 23 Vic. c. 7; 23 & 24 Vic. c. 66; and 25 & 26 Vic. c. 91. The act does not extend to the lawful occupation, trade, or business of chemists and druggists, and dentists, or the rights, privileges, or employment of duly licensed apothecaries, so far as the same extend to selling or compounding medicines. 21 & 22 Vic. c. 90, s. 55. (*See* Apothecary, vol. i. p. 376.) Nor has the act a retrospective effect, as to prevent a person who is not registered from maintaining an action for medical and surgical advice given, or medicines supplied, before the act came into operation (*Wright v. Greenroyd*, 1 B. & S. 758; 31 L. J. Q. B. 4. *Thistleton v. Ferves*, 31 L. J. Ex. 230). Proof that the plaintiff is registered at the time he tenders the register in evidence at the trial, is sufficient to entitle him to recover for services performed prior to registration. *Haffield v. Mackenzie*, 10 Ir. C. L. Rep. Ex. 289. And if a surgeon and a surgeon and apothecary be in partnership, and each registered according to his professional *status*, the firm may recover as general practitioners for *medicines, attendances, and surgical services. Turner and another v. Reynell*, E. T. C. P. 1863.

As to the election of members of the council, see *Reg. v. Storar*, 28 L. J. Q. B. 326 : 33 L. T. (N. S.) 286.

Book containing entry, published and sold at the office of general council, is admissible as evidence. *Predgrift v. Chevallier*, 8 C. B. (N. S.) 246.

[2] By 21 & 22 Vic. c. 90, s. 31, every person registered under this act shall be entitled, according to his qualification or qualifications (*see* sect. 15), to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of her majesty's dominions, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients: Provided always, that it shall be lawful for any college of physicians to pass a bye-law to the effect that no one of the members or fellows shall be entitled to sue in manner aforesaid, in any court of law, and thereupon such bye-law may be pleaded in bar to any action for the purposes aforesaid, commenced by any fellow or member of such college. And by sect. 32, "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this act." *Vide supra.*

The proviso with respect to a prohibitory bye-law is in terms confined to physicians, and does not include the case of surgeons,

(B) *And is Exempt from certain Offices.*[1]

III. Falsely Pretending to be Registered.[2]

IV. Liability for Negligence.[3] *See post*, Negligence, p. 517.

MEDIETATE Linguæ, Jury de. *See* Jury, *ante*, p. 277.

MEDITATIONE Fugæ Warrant. In the Scottish law, a warrant to apprehend a debtor leaving the country.

MELIOR est Conditio defendentis. Hobart, 199. *The position of a defendant is preferred.* This maxim is applicable where both parties are equally affected with fraud or illegality in reference to the subject-matter of the suit. *See* vol. iii. p. 530.

MERGER.[4] *See* Estates, vol. iv. p. 268; Lease, *ante*, p. 338.

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who are entitled, even in the absence of a special contract, to recover at law a reasonable compensation for their services. See *Richmond v. Coles*, 1 Dowl. N. S. 560. *Lipscombe v. Holmes*, 2 Camp. 441. *Baxter v. Gray*, 4 Scott, N. R. 374. *Simpson v. Rolfe*, 4 Tyr. 325.

By 3 Hen. 8, c. 11, no one shall act as a surgeon within the City of London, or seven miles round, unless he be examined and licensed by the College of Surgeons, under a penalty of five pounds a month. *See* 18 Geo. 2, c. 15, s. 8.

A surgeon may administer medicines in the cure of a medical case, without being subject to the penalties of the Apothecaries' Act. *Apothecaries' Co. v. Lotingu*, 2 M. & Rob. 495. *See* vol. i. p. 376.

And a surgeon and apothecary may, besides his charges for medicines, recover reasonable fees for attendance. *Hardy v. Heman*, 4 C. & P. 110. *Simpson v. Rolfe*, 4 Tyr. 325. *Turner v. Reynell*, p. 483, n.

A chemist, if he attend patients and administer medicines, is subject to penalties under the Apothecaries' Act (55 Geo. 3, c. 194). *Apothecaries' Co. v. Greenough*, 1 F. & F. 804.

A physician who acts as surgeon may recover in the latter capacity. *Little v. Oldacre*, Car. & M. 370. *Batterby v. Laurence*, id. 277.

[1] Registered medical practitioners are exempt from juries or inquests, from serving on all corporate, parochial, ward, hundred, and township offices, and from serving in the militia. 21 & 22 Vic. c. 90, s. 35.

[2] 21 & 22 Vic. c. 90, s. 40, enacts, that any person who shall wilfully and falsely pretend to be, or take, or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description, implying that he is registered under this act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding 20*l.*

See *Predgrift v. Chevallier*, 8 C. B. (N. S.) 240. *Ellis v. Kelly*, 6 H. & N. 222; 30 L. J. M. C. 35. *Steele v. Hamilton*, 3 L. T. (N. S.) 322.

[3] To render a medical man liable for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed. Nor is it enough that he himself acknowledged some degree or want of care. There must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. *Rich v. Pierpoint*, 3 F. & F. 35: *Erle, C. J. Lanpheis v. Phopos*, 8 C. & P. 475. *Hancke v. Hooper*, 7 id. 81. But if a medical man ignorantly and unskilfully administers improper medicines, and the patient, consequently, derives no benefit from his attendance, the medical man is not entitled to any remuneration for what he has done; but if he has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure being then attributable to some vice or peculiarity in the constitution of the patient, for which the medical man is not responsible. *Kannen v. M'Mullen*, Peake, 83. *Hupe v. Phelps*, 2 Stark. 480. Add. Contr. 454.

A surgeon having been employed by a railway company to examine a passenger who had sustained an injury in a collision on their line, and he having, so far as he could see or judge, on his own statement of his injuries, told him that they were so slight that he accepted a small sum in compensation: — *Held*, even assuming that his injuries were greater, there was no ground of action. *Pimm v. Roper*, 2 F. & F. 783: *Bramwell.*

[4] Merger is the absorption of the less estate in the greater, where two estates meet in the same person, without any such estate between them as will prevent them from coalescing. Smith, R. & P. P. 1044.

MERITS, Affidavit of.[1]

MESNE Process.[2]

MESNE Profits.

I. Action for, p. 485.

II. Damages in, p. 486.

III. Recovery of in Ejectment between Landlord and Tenant. *See* vol. iv. p. 187.

I. Action for.[3]

[1] This is generally required where a party seeks to set aside or stay regular proceedings. Affidavit of town agent swearing to belief is sufficient (*Johnson v. Popplewell*, 2 C. & J. 545; 3 Tyr. 715); but it is not enough for a defendant and his attorney to swear that "they are advised and believe," &c. *Worthington v.* ——, 2 C., M. & R. 315; 4 Dowl. P. C. 243.

An affidavit to set aside a regular judgment made by the London agent to the country attorney, and stating that the deponent believed, from the instructions from the country attorney, that the defendant had a good defence to the action on the merits: — *Held*, sufficient. *Schofield v. Huggins*, 3 Dowl. P. C. 427. But an affidavit on a motion to set aside a verdict, &c., stating only the belief that he had a good, substantial, and available defence to the action: — *Held*, insufficient. *Page v. South*, 7 id. 412. And an affidavit of merits that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient. *Tate v. Bodfield*, 3 id. 218. So, an affidavit in support of a rule for setting aside a judgment signed by the plaintiff for want of a plea, alleging that the defendant had merits and a good cause of defence to the action: — *Held*, insufficient: the affidavit must express that the defendant had a good defence to the action. *Lane v. Isaacs*, id. 652. *Semble*, that an affidavit of merits made by the defendant's attorney as to his belief from instructions received, is insufficient when the defendant himself might make the affidavit. *Bower v. Austin*, 4 id. 161. An affidavit of merits, sworn by a clerk of the defendant's attorney, must add that he has the management of the cause in question. *Doe v. Macdonnell*, 8 id. 501. Where a motion is made by a defendant to set aside proceedings on an affidavit of merits and payment of costs, the plaintiff is not entitled to go into a long statement in his affidavit to show that the defendant has no merits, and if he does the court will order the master not to allow them. *Heane v. Battersby*, 3 id. 213. But, where a defendant moves to set aside proceedings on the ground of irregularity, as for not giving notice of the execution of a writ of inquiry, it is not necessary to swear to merits. *Williams v. Williams*, 2 C. & M. 473.

[2] The process in an action or suit previous to the final judgment or decree. Arrest on mesne process was abolished by 1 & 2 Vic. c. 110, save for the purpose of preventing the debtor effecting an intended purpose of leaving the country. *See* vol. i. p. 526.

[3] After judgment in ejectment the plaintiff may proceed by action of trespass against the defendant for the recovery of the mesne profits. Where the ejectment is brought by a landlord against his tenant, the former may, after proof of his right to recover, give evidence of and recover the mesne profits, from the day of the determination of the tenant's interest down to the time of the verdict, or some day specially mentioned in the verdict; but, save in such case, a distinct action must be brought for the mesne profits, no other cause of action being allowed to be joined with ejectment. (C. L. P. Act, 1852, s. 214; *see* vol. iv. p. 187.) The statute requires the plaintiff to prove, before going into evidence of the mesne profits, that the tenant or his attorney has been served with due notice of trial. Where the mesne profits have been recovered on the trial in ejectment, an action may be subsequently brought for the mesne profits which may have accrued after the verdict, or the day down to which they were given, down to the day of delivery of possession of the premises recovered in the ejectment. (Id. sect. 214.)

The action should be brought against the person actually withholding possession. It lies against a tenant for the holding over of his under-tenants, if he identify himself with them. *Doe v. Harlow*, 12 Ad. & E. 40.

The recovery in ejectment operates as an estoppel against a defendant in that action denying the possession, from the date of the writ in ejectment (*Wilkinson v. Kirby*, 23 L. J. C. P. 224), provided it be pleaded. *Mathew v. Osborne*, 13 C. B. 919. See *Doe d. Challis*, 17 Q. B. 166. *Doe v. Wellsman*, 2 Ex. 368.

II. Damages in.[1]

METAL, Dealers in Old. *See* 24 & 25 Vic. c. 51, regulating their trade, requiring registration, and giving powers of search and visitation to the police.

MILITIA.[2]

MILL. *See* Custom, vol. iii. p. 538.

MINES.

I. What are of the Royal Prerogatives, and of the Nature and Incidents of the Property in.[3]

The proceedings in the action are the same as in other personal actions.

[1] The plaintiff, in addition to the rent, may recover as damages the costs of the ejectment, where such costs have not been recovered in that proceeding. *Doe v. Davis*, 1 Esp. 358. The instance in which this may occur, is where there has been no appearance to the writ, and judgment has been signed under the Common-Law Procedure Act, 1852, s. 177, no costs being given by the act in that event. But if costs have been recovered in the ejectment, nothing can be allowed in the action for mesne profits in respect of extra costs disallowed on taxation. *Doe v. Davis*, *supra*. In estimating the damages, the jury are not confined strictly to the mere rent. *Goodtitle v. Tombs*, 3 Wils. 121. Ground-rent necessarily paid by the tenant should be allowed for in estimating the damages. *Doe v. Hare*, 2 C. & M. 145.

[2] The militia is regulated principally by statute 42 Geo. 3, c. 90. The following statutes relate to the same subject:—51 Geo. 3, c. 118; 15 & 16 Vic. c. 50; 17 & 18 Vic. cc. 13, 105, 106, 123; 19 & 20 Vic. cc. 52, 90; 20 & 21 Vic. cc. 65, 82; 22 & 23 Vic. c. 38; 23 & 24 Vic. cc. 94, 120, 133; 24 & 25 Vic. c. 119; 25 & 26 Vic. c. 80. The scope of these statutes is to provide for the disciplining, at stated periods, a certain number of the inhabitants of every county, for the internal defence of the country. The militia are enlisted for five years, and are officered by the lord lieutenant, the deputy-lieutenants, and other persons with a certain qualification in point of property (in the case of captains and officers of superior rank, *see* 15 & 16 Vic. c. 50, ss. 2, 3), under a commission from the Crown. 2 Steph. 609.

[3] *See* Bainbridge on Mines; Collier, id. The place where coal, copper, and ore lie buried under ground is, before they are worked, called a vein, and after they are worked, a mine (*Astry v. Ballard*, 2 Mod. 193); but a vein of ore not open, but close, may be called a mine. *Case of Mines*, Plowd. 337. Mine held to have the sense of a *quarry*, 14 Mee. & W. 859–872: *Parke, B.*

The king, by his prerogative, is entitled to all mines of gold and silver which may be discovered, not only in his own, but even in a subject's lands within his dominions. *See* Plowd. 315, b; 5 Bac. Abr. 513; 1 Bl. Com. 295. The danger of rendering a subject too formidable by vesting in him so immense a treasure as a mine of gold or silver might afford, is the reason assigned for this royal prerogative. *See* Plowd. 316. But mines containing baser metal belong to the subject in whose lands they are discovered. It was formerly held, that if such mines contained gold or silver, the whole mine belonged to the king, because gold and silver, being the nobler and more valuable metals, should attract the less valuable, and because a subject cannot hold property jointly with the sovereign, and the king's property, though ever so small, ought not to be lost by mixture with the subject's. *See* id. 323, 328, 336. The injustice of such a doctrine called for a remedy; and accordingly it was enacted by the statute 1 Wm. & M. sess. 1, c. 30, s. 4, that no mine of copper, tin, iron, or lead, should be adjudged a royal mine, although gold or silver might be extracted out of the same. And it is further provided by the statute 5 & 6 Wm. & M. c. 6, that the owner of any mine, wherein any ore shall be discovered, opened, found or wrought, and in which there is copper, tin, iron, or lead, shall hold and enjoy the same mine and ore, and continue in the possession thereof, and dig and work the said mine or ore, notwithstanding that such mine or ore shall be pretended or claimed to be a royal mine: Provided, that the king and all claiming any royal mines under him shall have the ore of any such mine (other than tin, in the counties of Devon and Cornwall), paying to the proprietor or owner of the said mine wherein such ore shall be found, within thirty days after the said ore is, or shall be, raised and laid upon the banks of the said mine.

The king may legally grant his right to royal mines, and in the hands of a subject they are a franchise; but such grant must be in express terms: so that, if the king grant to T. S. certain lands, and the mines therein contained, and royal mines are found within, they do not pass to the subject. *See* Plowd. 336.

If a person be seised of lands in which there are mines open and mines not open, and a lease be made of the land, the mines only, and not the veins, pass; and therefore the lessee cannot open new mines (*Astry v.*

II. Stealing Ore, &c. from Mines. *See* Larceny, *ante*, p. 311.

III. Malicious Injuries to Machinery, &c. in. *See* Malicious Injuries, *ante*, p. 415.

MISCHIEVOUS Animals.

See Animals, vol. i. p. 353; Nuisance, vol. vi. p. 1.

MISDEMEANORS.

What are, and how Punished.[1]

Ballard, p. 486), even though the lease be of the land and all mines (*Pomfret v. Ricroft*, 1 Saund. 323), for in such a case, if there be open mines at the time of making the demise, the lessee cannot sink new pits. *Green v. Cole*, 2 Saund. 259.

The shares in a mine worked on the cost-book principle are personalty, and may be transferred without writing. *Watson v. Spratley*, 10 Ex. 222; 24 L. J. Ex. 53. *See* 27 L. J. C. P. 121.

A tenant agreed to work a coal-mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it:—*Held*, that under these circumstances the tenant was not bound to work the mine, and that under the words "fairly workable," a tenant was not bound to work at a dead loss. *Jones v. Shears*, 7 C. & P. 346.

The right to dig and search for ore is an hereditament within the 11 Geo. 2, and therefore the subject of an action for use and occupation. *Jones v. Reynolds*, 6 Nev. & M. 441; 4 Ad. & E. 805; 7 C. & P. 335.

The grant of a license to mine may be assigned; and where there is to be a re-entry for not employing six miners, the notice must state that the party intends to determine the holding. *Muskett v. Hill*, 5 Bing. N. S. 694; 7 Scott, 855.

In working a mine, defendant is bound to put proper supports. *Harris v. Ryding*, 5 Mee. & W. 60. But undermining more than twenty years ago does not render a subsequent occupier liable. *Partridge v. Scott*, 3 Mee. & W. 220.

In trover for copper ore raised under the plaintiff's land:—*Held*, that the presumption that the right to the minerals accompanied the fee-simple of the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. *Rowe v. Grenfel*, 1 R. & M. 396.

Where the defendant, in working his coal-mine, broke through the barrier, and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale:—*Held*, in trespass for such working, that the proper estimate of damages was the value of the coal so raised, without the expense of getting it. *Martin v. Porter*, 5 Mee. & W. 352.

A mining concern is such a trading that the members may bind each other as partners (*Tredwen v. Bourne*, 6 id. 461); but the party must be shown to be a shareholder, or the credit personal. *Vice v. Viscountess Anson*, 7 B. & C. 409; 1 M. & R. 113.

Partnerships engaged in working mines are exempt from 25 & 26 Vic. c. 89, s. 4, unless they choose to register. As to the general jurisdiction in mining companies of the Vice-warden of Stannaries (*see* sect. 68); in winding up (sect. 108); court of Vice-warden (sects. 108–116); power to make rules (sect. 199).

[1] A misdemeanor is any crime less than felony. *See* vol. iv. p. 450. "Crime" and "misdemeanor," strictly, are mere synonymous terms. 4 Bl. Com. 5; 7 Steph. Com. 57; 1 Russ. 45.

It seems to be an established rule, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law. *See* 4 Bl. Com. 65, n.; 1 Hawk. P. C. c. 5, s. 4. Also, it seems to be a general principle, that wherever a statute prohibits a matter of public grievance, or commands a matter of public convenience, as the opening of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment, for his contempt of the statute, unless such method of proceeding be carefully excluded by the legislative enactment. *See* 2 Hawk. P. C. c. 25, s. 4. But no injuries of a private nature are indictable, unless they in some way concern the Crown. (Id.) 8 T. R. 637.

It is a misdemeanor to neglect to provide for an infant under the control of the defendant (*Rex v. Friend*, 1 Russ. C. & M. 44. *Rex v. Ridley*, 2 Camp. 650); to sell unwholesome food (*Rex v. Dixon*, 4 Camp. 12; 3 M. & S. 11); to carry a child infected with smallpox along a public highway. *Rex v. Vantandillo*, 4 id. 73. An unsuccessful attempt to commit a misdemeanor created by statute is itself a misdemeanor. *Rex v. Butler*, 6 C. & P. 368. See *Rex v. Harris*, id. 129. A mere trespass is not indictable (*Rex v. Storr*, 3 Burr. 1699), if it be a private injury (*Rex v. Gardiner*, 1 Russ. C. & M. 52), as pulling thatch off a man's house in order to get possession. *Rex v. Atkins*, 3 Burr. 1706. But if such force be used as to amount to a breach of the peace, it will be indictable. *Rex v. Storr, supra. Anon.* 3 Salk. 187.

By the 24 & 25 Vic. c. 100, s. 35, "whosoever having the charge of any carriage or vehicle shall, by wanton or furious driving

MISJOINDER.

I. In Civil Proceedings.

(A) *Of Parties.* *See* Abatement, vol. i. p. 19; *post*, Parties.

(B) *Of Causes of Action.*[1]

II. In Criminal Proceedings. *See* Indictment, *ante*, p. 105.

MISNOMER. *See* Abatement, vol. i. p. 13; Amendment, id. p. 324; *ante*, Indictment, p. 105; *post*, Name, p. 512.

MISREPRESENTATION. *See* Cheat, vol. iii. p. 95; Deceit, id. p. 561; False Pretence, vol. iv. p. 434; *post*, Warranty.

MIXED Actions. *See* vol. i. p. 137, n. [1].

MODUS. *See post*, Tithes.

MODUS et Conventio vincunt legem. 2 Rep. 73. *The form of agreement and the convention of parties overrule the law.* Broom's *Max.* 538; Co. Litt. 19, a.[2]

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or racing, or other wilful misconduct, do, or cause to be done, any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

It is a misdemeanor to attempt to bribe a cabinet minister (*Rex v. Vaughan*, 4 Burr. 2494); or a judge (*Anon.* 2 East, 14, 17, 22); or a juror (*Young's case*, id. 14); or a mayor. *Plympton's case*, 2 Ld. Raym. 1377. Various acts are made misdemeanors by statute. These will be found under their appropriate titles.

A misdemeanor, it is said, is merged by a statute making the offence a felony. *Rex v. Cross*, 1 Ld. Raym. 711; 3 Salk. 193. But see *R. v. Button*, 18 L. J. M. C. 19. And by 14 & 15 Vic. c. 100, s. 12, it is enacted, that "if upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial shall be had may think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with, in all respects, as if he had not been put upon his trial for such misdemeanor."

By 24 & 25 Vic. c. 97 ("The Malicious Injuries Act"), s. 56, "every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender."

In crimes under the degree of felony there can be no accessories; but all persons concerned therein, if guilty at all, are principals. *See* 4 Bl. Com. 36; 1 Hale, 613.

The indictment merely states the offence as in ordinary cases.

The evidence must establish the offence as charged in the indictment.

The punishment is of course influenced by the nature of the offence. As a general rule, though a statute make the doing of anything felonious, yet if a subsequent statute make it penal only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. *See* 1 Hawk. P. C. c. 40, s. 5. And it should also be observed, that where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows, that if it be not so laid in the indictment, it shall be punished but as the first offence, for the gentler method shall at first be tried, which, perhaps, may prove effectual. *See* id. s. 1.

[1] By the C. L. P. Act, 1852, s. 41, "causes of action of whatever kind, provided they be by and between the same parties and in the same rights, may be joined in the same suit, except replevin and ejectment; but the court or a judge has power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case they may order separate records to be made up, and separate trials to be had."

And by sect. 40 of the same act, in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the court or a judge think fit: Provided that, in the case of the death of either plaintiff, the suit, so far as relates only to the causes, if any, which do not survive, shall abate. See *Johnson v. Lucas*, 22 L. J. Q. B. 174.

[2] This maxim applies to all contracts not contrary to sound morals or to positive prohibitions by the legislature. Story on Bailment, s. 32.

MOLLITER Manus imposuit. *See* Assault and Battery, vol. i. p. 562.

MONEY, Payment of, into Court. *See post*, Payment of Money into Court.

MONEY Counts.

I. Money Lent, p. 489.
(A) *Form of Count*, p. 489.
(B) *When it Lies*, p. 489.
II. Money Paid, p. 489.
(A) *Form of Count*, p. 489.
(B) *When it Lies*, p. 489.
III. Money Received, p. 490.
(A) *Form of Count*, p. 490.
(B) *When it Lies*, p. 490.

I. Money Lent.

(A) *Form of Count.*[1]

(B) *When it Lies.*[2]

II. Money Paid.

(A) *Form of Count.*[3]

(B) *When it Lies.*[4]

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[1] "Money payable by defendant to plaintiff, for money lent by the plaintiff to the defendant."

[2] This action lies to recover money lent to defendant or to a third person, on defendant's sole credit (1 Ch. Pl. 360), provided there be no deed executed. *Bristow v. Needham*, 9 Mee. & W. 729. An I O U alone will not support this count. *Fesey-meyer v. Adcock*, 16 Mee. & W. 321. *See ante*, p. 234.

Money deposited by a customer in the hands of a banker may be recovered under this count. *Pott v. Clegg*, 16 Mee. & W. 321. *Pollard v. Ogden*, 2 E. & B. 459.

Money advanced under a special contract of loan, rescinded before completion, may be recovered as money lent. *James v. Cotton*, 7 Bing. 266. And where there is a deposit of shares as security, the action is maintainable without a return of the shares, that not being a condition precedent. *Scott v. Parke*, 1 Q. B. 809. And the action is maintainable, notwithstanding a mortgage, if the deed contain no covenant to repay (*Yates v. Aston*, 4 Q. B. 182); but if it do, then the action must be upon the deed. *Brown v. Price*, 27 L. J. C. P. 290. *Matthew v. Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150.

Whenever money is lent for the express purpose of enabling the borrower to do some act prohibited by law, such as playing at a prohibited game, the lender cannot recover it back in an action for money lent. *M'Kinnell v. Robinson*, 3 Mee. & W. 434. *Cannan v. Bryce*, 3 B. & A. 179. But if the money has been lent for the purpose of enabling the defendant to pay bets lost to others, it may be recovered. *Hill v. Fox*, 4 H. & N. 359.

[3] "Money payable by the defendant to the plaintiff, for money paid by the plaintiff for the defendant at his request."

[4] The action for money paid lies when actual money (*Power v. Butcher*, 10 B. & C. 346. *Bleadon v. Charles*, 7 Bing. 246), the property of the plaintiff (*Goessel v. Swindon*, 1 D. & L. 888), has been paid by the plaintiff for the defendant, at his request, express or implied (*Alexander v. Vane*, 1 Mee. & W. 511. *Blythe v. Smith*, 5 Man. & G. 405), either by way of contribution (*Davies v. Humfrey*, 6 Mee. & W. 153. *Pitt v. Purssord*, 8 id. 538. *Prior v. Hembrow*, id. 873. *Connell v. M'Gorlick*, 12 Ir. C. L. P. 153, Q. B. *Reynold v. Wheeler*, 30 L. J. C. P. 350. *Sedgwick v. Daniell*, 6 H. & N. 319; 27 L. J. Ex. 116); or as a surety (*Kemp v. Finden*, 12 id. 421); or in consequence of any other legal authority (*Foster v. Ley*, 2 Bing. N. C. 269. *Lubbock v. Tribe*, 3 Mee. & W. 607); as by paying a note which defendant got from plaintiff, to secure for himself an illegal advantage under a composition arrangement. *Horton v. Riley*, 11 id. 492. It lies to recover back the purchase-money for shares in a projected abortive company (*Kempson v. Saunders*, 4 Bing. 5; 12 Moore, 44; 2 C. & P. 366); or for the charges in preparing a lease not carried into effect. *Gressell v. Robinson*, 3 Bing. N. C. 10; 3 Scott, 320. *Hennings v. Rothschild*, 4 Bing. 315; 12 Moore, 579; but *see* 9 B. & C. 470. So, money paid under a mistake as to a fact (*Milnes v. Duncan*, 6 B. & C. 671. *See post*, p. 493), or not voluntarily (*Catton v. Simpson*, 8 Ad. & E. 136.

III. Money Received.

(A) *Form of Count.*[1]

(B) *When it Lies.*[2]

Shaw v. Woodcock, 7 B. & C. 73), and not under process of law (*Duke de Cadaval v. Collins*, 6 Nev. & M. 324; 4 Ad. & E. 858), may be recovered back under this count; but if paid under threat of legal proceedings cannot be recovered back. *Hamlet v. Richardson*, 9 Bing. 644; 2 M. & Scott, 811. But where the plaintiff's goods, standing on the defendant's land, were seized for a tithe rent-charge, it was held that the plaintiff could not recover, because the rent was charged on the land only, and was not a personal liability of the defendant. *Griffenhoof v. Danbuz*, 5 E. & B. 746; 25 L. J. Q. 237.

Where the plaintiff drew a bill, and the defendant indorsed it as a co-surety for the acceptor, the plaintiff having paid, it was held entitled to recover contribution under this count. *Reynolds v. Wheeler*, 30 L. J. C. P. 350. See *Bulard v. Hawes*, 2 E. & B. 287.

The rule that a tort-feasor cannot recover upon a promise to indemnify, made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an obviously illegal character. *Betts v. Gibbins*, 4 Nev. & M. 64; 2 Ad. & E. 57. *Shackell v. Rosier*, 2 Bing N. C. 634. *Moscati v. Lawson*, 7 C. & P. 32.

Where an article is paid for, and a servant of the vendor improperly parts with it to a stranger, money paid lies against the seller. *Gingell v. Glasscock*, 8 Bing. 86; 1 M. & Scott, 125.

The action may be maintained, though the defendant has not been relieved from any legal liability in consequence of the payment; it is sufficient if it has been paid at the defendant's request. *Lewis v. Campbell*, 19 L. J. C. P. 130. *Brittain v. Lloyd*, 14 Mee. & W. 762. *Smith v. Lindo*, 5 C. B. (N. S.) 587.

A request or authority may be implied by the general course of dealing, or by the nature of the particular transaction; thus, a person who employs a broker on the Stock Exchange impliedly authorises the broker to pay money for him according to the rules of the Stock Exchange. *Taylor v. Stray*, 2 C. B. (N. S.) 175; 26 L. J. C. P. 185, 287. *Westropp v. Solomon*, 8 C. B. 345. *Smith v. Lindo*, 27 L. J. C. P. 335. The defendant cannot avoid the effect of his request by showing that the payment was made in execution of a void contract, as on account of a wager lost by him. *Jessopp v. Lutwyche*, 10 Ex. 614. *Knight v. Cambo*, 15 C. B. 562.

Money paid will not lie where the remedy is on a special contract (*Spencer v. Parry*, 4 Nev. & M. 770; 3 Ad. & E. 331), or the payment has not been in money, but some equivalent, as the giving of a bond, or other security.

[1] The form of the count is, that the defendant was indebted for "money received by the defendant for the use of the plaintiff."

[2] The action for money received was called by *Lord Mansfield* (see *Moses v. Macferlan*, 2 Burr. 1005, 1012), "a kind of equitable action." But it has been recently observed, that "the notion about the action for money had and received being an equitable action is exploded in modern practice. *Per Pollock, C. B.*, and *Parke, B.: Miller v. Atlee*, 13 Jur. 431. Notwithstanding this, however, it would appear, that at the present day the general scope of this action is regarded as being almost as extensive as it was in Lord Mansfield's time, it being still held in conformity with the view expressed by him, that "where money is due *ex æquo et bono*, it may be recovered in an action for money had and received." *Per Tindal, C. J.: Smith v. Jones*, C. P. 6 Jur. 283. *Per Lord Mansfield: Moses v. Macferlan, supra.* And accordingly it has been decided, that if A. assign to B. a debt due from C. to A., and C. afterwards pay that debt to A., B. may recover the same from him in an action for money had and received, although the sale by A. to B. was merely that of a chose in action. *Smith v. Jones, supra.* And see *Tibbits v. George*, 5 Ad. & E. 107, 116. This action, however, "does not lie for money paid by the plaintiff, which was claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law, as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play, because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, express or implied, or extortion or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances." *Per Lord Mansfield, C. J.: Moses v. Macferlan, supra;* and see *Longchamp v. Kenny*, 1 Dougl. 138. *Straton v. Rastall*, 2 T. R. 370. *Boyter v. Dodsworth*, 6 T. R. 681. *See* 2 Pothier by Evans, 369, 378–9. In *Johnson v. Johnson*, 3 B. & P. 169, *Lord Alvanley, C. J.*, observed, "that in the case of *Moses v. Macferlan*, some principles were laid down which are certainly too large, and which he did not mean to rely on; such as, that wherever a man has money which another ought to have, an action for money had and received may be maintained." To support this count it is, as a general rule, necessary to prove that the defendant himself, or his agent, actually received money for the benefit of the plaintiff, under such circumstances as to create a privity of contract between him and

the plaintiff. See *Barlowe v. Browne*, 16 Mee. & W. 128. *Jones v. Carter*, 8 Q. B. 134. *Cobb v. Becke*, 6 Q.B. 930. *Per Parke, J.: Baron v. Husband*, 4 B. & Adol. 611, 612.

Where the defendant, not being a mere servant of another (*Stephens v. Badcock*, 3 B. & Adol. 354. *Barford v. Shuttleworth*, 1 Ad. & E. 926), has received actual money (*Marsh v. Keating*, 1 Bing. N. C. 198), belonging to the plaintiff (*Scarfe v. Hallifax*, 7 Mee. & W. 288), but not to a mere trust, in which the plaintiff is interested (*Edwards v. Bates*, 7 Man. & G. 590), either paid to him by the plaintiff himself under a mistake or forgetfulness of facts (*Kelly v. Solari*, 9 Mee. & W. 54), or which had been extorted from him by oppression of law (*Standish v. Ross*, 19 L. J. Ex. 185. *Duke de Cadaval v. Collins*, 4 Ad. & E. 858. *Close v. Phillips*, 7 Man. & G. 586. *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J. Ex. 362), or by a refusal to do something which it was the defendant's duty to do (*Parker v. G. W. R. Co.* 7 Man. & G. 252), or by other fraudulent practices (*Ashmole v. Wainwright*, 2 Q. B. 837), or by duress of goods (*Wakefield v. Newbon*, 6 Q. B. 276), or other legal duress. *Close v. Phillips, supra. Valpy v. Manby*, 1 C. B. 594. *Fraser v. Pendlebury*, 31 L. J. C. P. 1.

The count will also lie to recover back money paid in discharge of a demand illegally made under colour of an office (*Steele v. Williams*, 8 Ex. 625), as excessive fees paid to a broker under a distress. *Hills v. Street*, 5 Bing. 37. Excessive fees paid to the steward of a manor for admission to copyholds. *Traherne v. Gardner*, 5 E. & B. 913; 25 L. J. Q. B. 201. An excessive charge of an arbitrator, necessarily paid for taking up the award. *Re Coombs*, 4 Ex. 839. *Barnes v. Braithwatte*, 2 H. & N. 569. Overcharges demanded by and paid to a carrier for the carriage of goods. *Ashmole v. Wainwright*, 2 Q. B. 837. *Piddington v. S. E. R. Co.* 27 L. J. C. P. 295. *Parker v. G. W. R. Co.* 7 Man. 253. *Garton v. Bristol and Exeter Railway Co.* 4 H. & N. 33; 28 L. J. Ex. 169. *Baxendale v. E. C. R. Co.* 4 C. B. (N. S.) 63. But the count will not lie for money levied under a judgment signed on a fraudulent warrant of attorney (*De Medina v. Groves*, 15 L. J. Q. B. 287); or where the defendant has tortiously taken property of the plaintiff, which may be, and possibly has, been converted into money (Stark. *Evid.* 3d ed. 83, 84); or has received money on a consideration, which has afterwards failed. *Stray v. Russell*, El. & El. 888. *Remfry v. Butler*, El. Bl. & El. 887; 29 L.J.Q.B. 115, Ex. So for a bonus paid for a lease, which defendant was afterwards unable to make. *Wright v. Colls*, 19 L. J. C. P. 60), and for money overpaid on goods where, on the goods coming to hand after the payment, a deficiency is discovered in weight. *Devaux and another v. Conolly*, 19 L. J. C. P. 71. *Young v. Cole*, 3 Bing. N. C. 724. But there must be an actual failure of consideration, as a breach of warranty, &c. (*Chapman v. Speller*, 19 L. J. Q. B. 239), such as on a deposit for a bargain, which has afterwards entirely (*Hunt v. Silk*, 5 East, 449) gone off (*Titt v. Casanett*, 4 Man. & G. 898; Roscoe, *Evid.* 290); or on a deposit paid for shares in an abortive railway scheme. *Walstab v. Spottiswoode*, 15 Mee. & W. 501. *Clarke v. Dickson*, 27 L. J. Q. B. 223. So money given for a forged bill or worthless cheque (*Woodland v. Fear*, 7 E. & B. 519; 26 L. J. Q. B. 202. *Turner v. Stones*, 1 D. & L. 122); or a forced bill (*Gurney v. Womersley*, 4 E. & B. 133); or a deposit on a contract of sale which has been rescinded (*Blackburn v. Smith*, 2 Ex. 783. *Ashworth v. Mounsey*, 9 id. 175. *Simmons v. Heseltine*, 28 L. J. C. P. 129); or a deposit on scrip for shares in an abortive railway scheme (*Watson v. Earl Charlemont*, 12 Q. B. 856. *Moore v. Garwood*, 4 Ex. 681. *Ward v. Londesborough*, 12 C. B. 252. *Mowatt v. Londesborough*, 4 E. & B. 1. *Walstab v. Spottiswoode, supra*); or cost-book mine (*Johnson v. Goslett*, 3 C. B. (N. S.) 569; 27 L. J. C. P. 122); or as the price of an annuity which had ceased. *Strickland v. Turner*, 7 Ex. 208. See *Huggins v. Coates*, 5 Q. B. 432. And so the money may be recovered back where the purpose has become impossible (*Brown v. Overbury*, 11 Ex. 715; 25 L. J. Ex. 169): or has not arisen. Thus, conduct-money may be recovered back where the attendance of the witness to whom it was given was countermanded, and he incurred no expense. *Martin v. Andrews*, 7 E & B. 1; 26 L. J. Q. B. 39.

The failure of consideration must be complete (*Blackburn v. Smith, supra. Nicholson v. Ricketts*, 29 L. J. Q. B. 55); but there may be a complete failure of consideration as to part where the transaction is severable. *Hirst v. Tolson*, 19 id. 441. *Devaux v. Conolly*, 8 C.B. 640. *Astle v. Wright*, 25 L.J.C.P. 864.

Money paid in discharge of a disputed claim, which afterwards turns out to be unfounded, may be recovered back in this form. *Gibbs v. Charleton*, 26 L. J. Ex. 321. *Gibbs v. Gray*, 2 H. & N. 22; 26 L. J. Ex. 286. But if the plaintiff might have at the time successfully resisted the claim, and it was paid voluntarily, and with a knowledge of all the facts, it cannot be recovered back. *Spragg v. Hammond*, 2 B. & B. 59. *Wilson v. Wray*, 10 Ad. & E. 82. *Barber v. Pott*, 4 H. & N. 759; 28 L. J. Ex. 381.

Money paid by reason of ignorance of fact, or excusable forgetfulness of fact, may be recovered back. *Kelly v. Solari*, 9 Mee. & W. 54. *Mills v. Alderbury Union*, 3 Ex. 590. *Aiken v. Short*, 1 H. & N. 210; 25 L. J. Ex. 321. *Holland v. Russell*, 30 L. J. Q. B. 308. *Barber v. Brown*, 1 C. B. (N. S.) 121; 26 L. J. C. P. 41. *Townsend v. Crowdy*, 8 C. B. (N. S.) 477; 29 L. J. C. P. 300. *See post*, p. 493, n.

To support the action, the defendant must have received the money. *Scott v. Miller*, 3 Bing. N. S. 811. And the party must be legally entitled to the amount. *Mileham v. Eicke*, 3 Mee. & W. 407. And there must be a privity. *Stevens v. Badcock*, 3 B. & Adol. 354. *Howell v. Batt*, 2 Nev. & M. 381; 5 B. & Adol. 504. And there is not such privity between an agent and his principal

as to enable the latter to sue the former in an action for money had, &c. *Sims v. Britten*, 1 Nev. & M. 594; 4 B. & Adol. 375. *Barron v. Husband*, 4 B. & Adol. 611. The mere fact that the money belonged to the plaintiff is not sufficient, if the defendant is accountable for it to another. *Bluck v. Siddaway*, 15 L.J.Q.B.359. *Cobb v. Becke*, 6 Q.B.930.

Where the purchaser of a ticket in a Derby lottery sold it to the plaintiff, and the horse named in such ticket proved to be the winner, whereby the holder thereof became entitled to a prize in money, it was held that the plaintiff could not maintain an action for money had and received, to recover the amount of the prize from the treasurer of the lottery, for although he held the money for the benefit of the plaintiff, yet there was no privity between them. *Jones v. Carter*, p. 491. And so if money in litigation between two parties is paid over by mutual consent to a trustee or stakeholder, in trust for the party entitled, it can be recovered by the party entitled to it from the stakeholder only, and not from the other party by whom it was claimed. *Ker v. Osborne*, 9 East, 378.

Where the defendant, an overseer, had agreed with the plaintiff and the pauper, his tenant, to pay over part of the parochial relief:—*Held*, that the plaintiff could not maintain an action for money had and received for the parish money in his hands, the money not being expressly received for the pauper. *Blackledge v. Harman*, 1 M. & Rob. 344. But where money was paid to a party acting as agent for an assignee, become insane at the time, and afterwards removed:—*Held*, that, as a mere stranger, the party receiving it was liable. *Stead v. Thornton*, 3 B. & Adol. 357, n.

Where a clerk to magistrates, at their instance, assented to a proposal that the plaintiff should receive a portion of the fees, and he did part of the duties:—*Held*, that there was a sufficient consideration to support an action for them, as money had, &c. *Rowland v. Hall*, 1 Scott, 539. If a party gives another what may be readily turned into money, and is treated as such by the parties, it may render him liable as for money had and received. *Spratt v. Hobhouse*, 4 Bing. 173; S. C. 12 Moore, 395.

If there be a condition, it must have been performed. *Wilkinson v. Godefroy*, 3 Per. & D. 411; 9 Ad. & E. 536. If a party takes upon himself to pay part of the expense of a conveyance, he will be liable to an action for money had and received. *Noy v. Reynolds*, 1 Ad. & E. 159. But it will not lie by one partner against a banker in whose name the account is not kept. *Sims v. Bond*, 2 Nev. & M. 608; 5 B. & Adol. 389. *Sims v. Britten*, 4 B. & Adol. 375; 1 Nev. & M. 594. So money had and received will not lie for a deposit after asking time to complete. *Rothschild v. Hemmings*, 4 M. & R. 411; 12 Moore, 559. Or where money has been paid over pursuant to an act of parliament. *Atlee v. Backhouse*, 3 Mee. & W. 633.

Upon an admission that an account is right, money had and received lies. *Lorymer v. Stephens*, 1 C., M. & R. 62.

A defendant who wrongfully holds money as an appropriation, is liable to an action for money had and received. *Frushling v. Schroder*, 2 Scott, 135; 7 C. & P. 103. But not at the instance of the party directing the appropriation. *Eignell v. Ellis*, 5 M. & R. 165. He must, however, assent. *Wedlake v. Hurley*, 1 C. & J. 83.

Defendant being indebted to plaintiff in 150*l.*, and being employed by T. to perform works for which he was receiving a percentage, wrote an order to T. to pay plaintiff 150*l.* out of the first monies due to the defendant. Afterwards, being indebted to B. in 997*l.*, he executed a deed, reciting the above facts, assigning to B. such sums as there were or should become due to him (defendant) from T., in trust, first to pay plaintiff, and secondly to pay the 997*l.*; defendant afterwards received 150*l.* from T., and plaintiff sued him for money had and received, and on an account stated:—*Held*, that the action lay for the 150*l.*, though no proof was given of T.'s assent to the order, and though, at the time of making the deed, there was not 150*l.* due from T. *Pooley v. Goodwin*, 4 Ad. & E. 94.

If the defendant has acknowledged to the plaintiff the receipt of money from a debtor of the plaintiff to pay over to him, money received will lie, if unconditional (*Moore v. Bushell*, 27 L. J. Ex. 3); or if conditional, then after fulfilment of the condition. *Malcolm v. Scott*, 5 Ex. 601. *Hudson v. Bilton*, 6 E. & B. 565; 26 L. J. Q. B. 27.

An agent receiving money on account of his principal, and paying it over to the principal without notice to the contrary, is protected against any claim which the party from whom it was received would have had if the money had still remained in his hands. *Holland v. Russell*, 30 L. J. Q. B. 308.

A promise to pay over a remittance is sufficient. *Lilly v. Hays*, 1 Nev. & P. 26.

Where the debtor of the plaintiff, having goods at the defendant's wharfs, gave an authority to the defendant to sell them, and out of the proceeds to pay the plaintiff the balance of freight due to him, and the defendant accordingly sold the goods and received the proceeds:—*Held*, that the authority did not require a stamp, as an order for payment or money; and that after the sale and receipt of the money, the plaintiff was entitled to sue for money had and received. *Humphreys v. Bryant*, 4 C. & P. 157.

One tenant in common cannot recover against another who has received more than his share of the profits in this form of action. *Thomas v. Thomas*, 5 Ex. 28.

Money deposited on account of a bastard child may be recovered back as money had and received. *Clark v. Johnson*, 3 Bing. 424. *Chappell v. Poles*, 2 Mee. & W. 867.

After a contract is rescinded, money had and received will lie, but to constitute a rescinding of the contract the parties must be in the same situation as before it was entered into. *Beed v. Blandford*, 2 Y. & J. 278.

Money had and received will not lie where

there is a right to sue on a covenant. *English v. Blundell*, 8 C. & P. 332. Money paid for charitable purposes not properly applied may be recovered back. *Jefferys v. Gurr*, 2 B. & Adol. 833. Money had and received lies where extorsively obtained to sign a composition deed. *Smith v. Cuff*, 6 M. & S. 160. *Atkinson v. Denby*, 30 L. J. Ex. 361; 31 id. 362.

An excessive charge under legal authority may be recovered back. *Hills v. Street*, 5 Bing. 37; 2 M. & P. 96. But it does not lie to recover back money paid under authority of a competent jurisdiction (*Reynolds v. Wedd*, 6 Dowl. P. C. 728; 4 Bing. N. S. 694; 6 Scott, 699), unless the compulsion be only under colourable legal process. *The Duke de Cadaval v. Collins*, 6 Nev. & M. 324; 4 Ad. & E. 858.

If a party avails himself of an order of court, he cannot maintain the action because money was improperly retained. *Kendall v. Allen*, 2 Dowl. P. C. 783; 10 Bing. 438; 4 M. & Scott, 319.

Money paid under a mistake of facts may be recovered back. *Lucas v. Worsick*, 1 M. & Rob. 293. As where C., an agent, indorsed a bill (in ignorance of his authority being determined by the death of his principal in India) to A. and B., who received the amount from the plaintiffs, the acceptors:—*Held*, that the latter were entitled to recover back the amount, either as money had and received by A. and B. to their use, or as money paid by them to C.'s use. *East India Co. v. Prince*, 1 R. & M. 407. A. accepted a bill of exchange for 15*l.* drawn on him by B., which B. indorsed to C., and which was dishonoured. B. owed A. a balance of 102*l.*, and several months after, on B. and C. balancing their accounts, a small balance was found to be in favour of B., which was paid by C. to B., and the bill given back to B.; after this M. desired Messrs. E. & W. to bring an action on the bill in the name of C., and gave them the bill and a letter from A. to C. on the subject of it. Messrs. E. & W. commenced an action against A. at the suit of C., and A. paid them the amount of the bill and interest, and also the costs. It was proved by C. that he had never given any authority for the bringing of this action:—*Held*, that A. might recover back the amount of the bill, and interest and costs, from Messrs. E. & W., in an action for money had and received; and that their having acted *bonâ fide* on the belief that they had the authority of C., and the fact of their having paid over the amount of the bill and interest to M., were no grounds of defence to such an action. *Carman v. Edwards*, 9 C. & P. 596. A. gave a sum of money into the hands of B. to pay to C.; B. had not paid it over to C.:—*Held*, that if C. had not consented to receive this sum of B., A. might countermand the authority and recover it back from B. *Owen v. Bowen*, 4 C. & P. 93.

Money deposited with a stakeholder on a wager, may be claimed at any time before it is paid over, according to the event. *Martin v. Hewson*, 10 Ex. 737. *Gally v. Field*, 9 Q. B. 431. *Varney v. Hickman*, 5 C. B. 271. *Hodson v. Terrill*, 1 C. & M. 797. *Haslelow v. Jackson*, 8 B. & C. 221. See *Mearing v. Hellings*, 14 Mee. & W. 711.

If money has been paid to the plaintiff's agent in execution of an illegal contract, the plaintiff may recover it as money received to his use, although he could not enforce the contract. *Bousfield v. Wilson*, 16 Mee. & W. 185. *Nicholson v. Gooch*, 5 E. & B. 999; 25 L. J. Q. B. 137. *Johnson v. Lansley*, 12 C. B. 468.

The action lies where stock has been transferred under a forged power. *Marsh v. Keating*, 1 Bing. N. S. 198.

A broker who sells for another that which is unmarketable may maintain this action. *Young v. Cole*, 3 id. 724.

A. agreed with B. that he should receive a certain sum from C., his tenant. There was no communication between B. and C.:—*Held*, that money received did not lie by B. against C. *Wharton v. Walker*, 4 B. & C. 163. So, it will not lie by one on a joint retainer (*Hatsall v. Griffith*, 2 C. & M. 679); nor against an attorney for money received as such. *Clark v. Dignum*, 3 Mee. & W. 478.

Where the defendant took away the plaintiff's money under a mistaken claim, it was held that the plaintiff might waive the tort, and recover it as money recovered to his use. *Neate v. Harding*, 6 Ex. 349. *Holt v. Ely*, 1 E. & B. 795. And where the defendant has wrongfully obtained the plaintiff's money from a third party, as by a false pretence, it may be recovered under this count. *Sitt v. Martindale*, 18 C. B. 314. *Andrews v. Hawley*, 26 L. J. Ex. 323. And if the defendant has received fees pertaining to an office under any assertion of his right to the office, or to the fees, the plaintiff really entitled to the office and the fees may recover the amount under this count. *King v. Alston*, 12 Q. B. 971. *Aulton v. Roberts*, 2 H. & N. 432; 26 L. J. Ex. 380. *Pinder v. Barr*, 8 E. & B. 105.

The plaintiff cannot waive the wrong in part only. If he has received part of the proceeds of the sale of goods wrongfully sold, he is bound to treat the balance also as a debt. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 L. J. Ex. 164.

No action can in general be maintained against a trustee, at the suit of the *cestui que trust*, for money which the former has received as such trustee. *Pardoe v. Price*, 16 Mee. & W. 451. *Phillips v. Hewston*, 11 Ex. 629; 25 L. J. Ex. 133. But if he admit to the *cestui que trust* that he holds such a sum of money for him, an action will lie. *Roper v. Holland*, 3 Ad. & E. 99. *Edwards v. Lowndes*, 1 E. & B. 89. *London and North-Western Railway Co. v. Glyn*, 28 L. J. Q. B. 188. See *Bird v. Pegrim*, 13 C. B. 639. *Sloper v. Cottrell*, 6 E. & B. 497; 26 L. J. Q. B. 7. So, after an executor has admitted to a legatee that he has received the money, and holds it to his use, the legatee may sue for it. *Topham v. Morecraft*, 8 E. & B. 972.

Money received to the use of the plain-

MONOPOLIES.[1]

MORAL Obligation. *See* Contract, vol. iii. p. 196.

MORTMAIN.[2] *See* Charitable Uses, vol. iii. p. 75.

MORTGAGE. *See* Bill of Sale, vol. ii. p. 494.

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I. What it is.[3]

tiff's wife, may be recovered as money received to the use of the plaintiff, although it was originally the wife's separate property in equity. *Sloper v. Cottrell*, 6 E. & B. 497; 26 L. J. Q. B. 7. And where a wife after her marriage lent the defendant money which had been settled to her separate use, it was held that her husband was entitled to recover it as money received to his use. *Bird v. Peagrim*, 13 C. B. 639.

Bank-notes (*Pickard v. Bankes*, 13 East, 20. See *Timmis v. Gibbins*, 21 L. J. Q. B. 403), a cheque (*Pratt v. Hobhouse*, 4 Bing. 173), or foreign money (*Ehrensperger v. Anderson*, 3 Ex. 148), are money within the meaning of the count. So, money allowed on a settlement of accounts by a set-off of mutual debts, may be treated as money received. *Standish v. Ross*, 3 Ex. 527. *Gingell v. Parkins*, 4 id. 720.

In an action for money had and received to the plaintiff's use, the defendant cannot, under a plea of the general issue, give in evidence that the money was received in respect of an illegal wager (*Martin v. Smith*, 6 Dowl. P. C. 639; S. C. 4 Bing. N. S. 436); but it is open to the defendant under this plea to show that, although the money in question was received by him, it was not received by him for the use of the plaintiff, but for the use of another person. *Clark v. Dignam*, 3 Mee. & W. 478.

[1] The 21 Jac. 1, c. 3, declares grants of exclusive trading illegal, but contains an exception in favour of new and original inventions in manufacture, enacting that the declaration against monopolies shall not extend to letters patent and grants of privilege for the term of fourteen years or under of the sole working of any manner of new manufactures within the realm, to the true and first inventor thereof, provided such manufactures were not in use by others at the time of granting the letters patent. *See* Copyright, vol. iii. p. 245; and *post*, Patents.

[2] Mortmain, *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. 2 Bl. Com. 268; Smith's R. & P. 502. Any such corporations may purchase lands, yet unless they have a license to hold in mortmain they cannot retain such purchase, but it shall be forfeited to the lord of the fee. 2 Bl. Com. 290, 291; Co Litt. 2, b.

It is provided by the stat. 7 & 8 Wm. 3, c. 37, that the Crown may grant licenses to aliens, or take in mortmain. 2 Bl. Com. 373; 1 Cruise, c. 1, s. 37; Co. Litt. 99, a, n. 1. And by various statutes exemptions have been created in favour of the church, and of certain charities, &c.

Mortmain acts, *see* 9 Geo. 2, c. 36; 9 Geo. 4, c. 85; 7 & 8 Vic. c. 97; 13 & 14 id. c. 94. As to charitable uses, *see* 23 & 24 Vic. cc. 134, 136; and 24 id. c. 9.

[3] A legal mortgage is a security created by means of a transfer by a debtor to his creditor of the legal ownership of real or personal estate, subject to be defeated on the discharge of the debt. A deed, if really intended as only a security for money, will be treated as a mortgage, although in form it purports to be an absolute conveyance or assignment, and even parol evidence is admissible to show the intention of the parties. *Gardner v. Cazenove*, 1 H. & N. 423. Coote on Mort. p. 12, 3d ed.

II. Stamp-Duty on.[1]

III. What may be the Subject of Mortgage.[2]

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[1] By 13 & 14 Vic. c. 97, mortgages are subject to an *ad valorem* duty of one-eighth per cent, or half-a-crown per hundred pounds, on the amount of the mortgage-money, according to the following table:—

					s.	d.
Not exceeding £50					1	3
Exceeding £50	and not exceeding £100				2	6
100		150			3	9
150		200			5	0
200		250			6	3
250		300			7	6
And where the same shall exceed 300*l.*, then for every 100*l.*, and also for every fractional part of 100*l.*					2	6

And where the same shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be (other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage against damage by fire, or to be advanced for the insurance of any life or lives, or for the renewal of any grant or lease upon the dropping of any life or lives, pursuant to any agreement in any deed, whereby any estate or interest held upon such life or lives shall be granted, assigned, or assured, or whereby any annuity shall be granted or secured for such life or lives), if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum, the same duty shall be payable as on a mortgage for such limited sum; and if the total amount secured, or to be ultimately recoverable, shall be uncertain, and without any limit, the deed will be available as a security or charge for such an amount only as the *ad valorem* duty, denoted by any stamp or stamps thereon, shall extend to cover.

The progressive duty is the same as on purchase-deeds.

One stamp is sufficient, though the mortgage be to secure the debt of several persons. *Reed v. Wilmot*, 7 Bing. 577; 5 M. & P. 553.

On a further advance, where not included in the original stamp, the stamp is on that sum. *Doe d. Bartley v. Gray*, 4 Nev. & M. 719; 3 Ad. & E. 719.

The stamp need not cover the rates and taxes. *Doe v. Bragg*, 3 Nev. & P. 644. *Doe v. Snaith*, 146. *Pruessing v. Ing*, 4 B. & Ald. 204.

[2] *An Advowson*, as it produces no profit, is not an eligible subject for mortgage; and on the living becoming vacant the mortgagor has a right to nominate, and may compel the mortgagee to present his nominee, although there be an express agreement between them to the contrary (3 Atk. 558); and this doctrine applies, whether the advowson be appendant or in gross. Id. *See* 2 P. Wms. 404; Cowp. 129; 57 Geo. 3, c. 99. Rectories impropriate, and tithes in lay hands, are subject to the same mode of mortgage as any other species of real estate. And the 1 & 2 Vic. c. 106, authorises the bishop, on the avoidance of a benefice not having a fit house of residence, to raise money for building a residence by mortgage of the glebe, tithes, rents, and profits, and prescribes a form of mortgage.

Mortgages of Copyholds, on account of the peculiar nature of the tenure, retain in general their primitive form. They usually consist of a conditional surrender in the manor court by the mortgagor to the mortgagee and his heirs. By the condition, the surrender is made void on payment by the mortgagor, &c., of principal and interest to the mortgagee, &c., on a given day; the condition is entered on the rolls, and immediately follows the surrender. The condition may, however, be contained in a separate deed of defeasance of even date with the surrender; but, as remarked by Mr. Watkins, this mode should never be resorted to when it can be avoided, for the defeasance may be lost, and then, as the surrender is absolute on the rolls, the proof of the condition may be difficult; and, besides, the title to the lands should always appear on the record of the manor; and, therefore, if a separate deed of defeasance be executed, it should be always entered on the rolls. On performance of the condition, by payment of the money, the surrender is at an end, and the surrendor is in possession *in statu quo*, without any re-admission or fine. *See* Cro. Eliz. 239.

An Equity of Redemption being the ancient estate in the land, may be itself the subject of mortgage *toties quoties* until equity debars the mortgagor of his equitable estate. To prevent the abuses attending this practice, by the 4 & 5 Wm. & M. c. 16, the making of any subsequent mortgage, without giving notice to the intended mortgagee, by writing under the mortgagor's hand, of every mortgage already made by him of the same land, is punished by forfeiture of the equity of redemption to the person thus defrauded; and the neglect to give previous notice in like manner of any prior judgment, statute, or recognisance incurred by him, subjects the mortgagor to the like penalty, unless he pay off the judgment, &c., within six months after a requisition for that purpose made by the mortgagee.

Of several equities, equally valid in other respects, if those which have the priority in point of time are not made predominant by notice (afforded in time to prevent the completion of the subsequent contract), the advantage of possessing the legal estate shall outweigh that of seniority. Coote, 417.

Mortgages of Freeholds are either in fee or

IV. Who may Mortgage.[1]

V. Of the Mode of Creating Mortgages.

(A) *By Deed.*[2]

for such other interest as the mortgagor has in the lands, or by demise for a long term of years, attended with a condition in the same deed, that if the principal and interest be paid within a given time, the lands shall be reconveyed, or the deeds of mortgage shall be void, or the term shall cease and determine.

When *Leaseholds* are made a mortgage security it is usual, in order to avoid liability for the rent and covenants of the original lease, to take an under-lease at a pepper-corn rent, reserving the last day, or a few days of the original term; and the mortgagor covenants to pay the rent and perform the covenants in the original lease. This precaution of an under-lease should never be neglected, if the rent be heavy, or the covenants burthensome; for otherwise, if the mortgagee enters into possession, he will become liable to all the covenants which run with the land; and even if he does not take possession, the better opinion is, that he will equally become liable. *See* Covenant, vol. iii. p. 443; Platt on Covenants, 489.

When a renewable lease is made the subject of mortgage, a covenant should be introduced, on the part of the mortgagor, for concurring at his own expense in all lawful acts for obtaining a renewal, for otherwise the mortgagee cannot compel him to do it. And there should be added an agreement, that if he refuses, it shall be lawful for the mortgagee to renew and charge the estate with the costs and interest; which additional charge certainly did not, prior to the last stamp act, and it is considered does not, require an increased mortgage duty, notwithstanding the precise case is omitted in the exemptions to the act: but it may be proper to guard against the consequences of the omission of the act, by confining the additional charge to a certain amount. *See* 3 Atk. 4.

[1] All parties who are capable of contracting in general, may mortgage their estates to the extent of their legal or equitable interest in the property incumbered.

As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no satisfactory reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets. The mortgage in such case may be either of legal or equitable assets (*see* Atk. 463); or of mere choses in action, and may be by actual assignment, or by deposit; and a dealing with one of many executors will be valid, for each is competent. The deed of mortgage need not state that the money is wanted for the purposes of the will; for, in order to vitiate for security, it must be shown the money was not for the payment of debts. Nor is the mortgagee bound to see to its application (*see* Barnard, 78); although *Lord Kenyon* has expressed an opinion, that a trust might be so framed as to call on a purchaser from an executor to see to the application of the money; but this observation must also, it is conceived, be supposed to apply to a sale made under very peculiar circumstances, and not for the purpose of the payment of debts generally. 4 Bro. C. C. 130. The results of the cases seem to be that, if a purchaser or mortgagee advances money to an executor (even though the executor be also residuary legatee) for purposes which he knows to be foreign to the will, or if he takes as a security for the executor's private debt part of the testator's assets, he does it at his own risk, and is liable to a suit for relief, on bill filed either by a creditor, or by a pecuniary, specific, or residuary legatee, if such legatee pursue his remedy within a reasonable time.

A mortgage by a joint tenant for a term of years will operate as a severance of the joint tenancy. *York v. Stone*, 1 Salk. 158; 1 Ab. Eq. 293.

Trustees. — A mortgage is a partial sale, and therefore a trust for sale will, generally speaking, include a mortgage. It must depend upon the nature of the trust and the intention of the parties, as shown on the instrument, whether a mortgage is authorised.

Tenants in Tail. — In the case of a mortgage by a tenant in tail, the mortgagee obtains a term determinable by entry of the issue, if the mortgage is by demise, and a lease fee determinable in like manner if the mortgage is in fee, whether there is a covenant for further assurance or not.

Since the 3 & 4 Wm. 4, c. 74, the mortgagee of tenant in tail will not be let in by his deed, duly enrolled in pursuance of the statute, except as against a *bonâ fide* purchaser, without express notice. Coote, Mortg. 335, 3d ed.

[2] Courts of equity, after their jurisdiction became firmly established, put mortgages in fee upon the right footing, maintaining the power of redemption as an equitable right inherent in the land, and binding all persons whomsoever, whether claiming in the *per se*, by the act of the mortgagee, as tenant in dower, by statute staple, *elegit*, &c.; or in the *post*, by the act of the law, as tenant by by the courtesy, and lord by escheat; and the principle upon which they proceeded was, that the payment of the money does, in the consideration of equity, put the mortgagor *in statu quo*, since the lands were originally

(B) *By Deposit of Title-Deeds.*[1]

VI. Of the Equity of Redemption.[2]

only a pledge for the money lent (Cro. Car. 191; Hardw. 465, 469; 5 Bac. Abr. 4); and since the right or power of redemption has been so understood, mortgages in fee have become usual.

Mortgages of lands in the county of Middlesex, and equitable charges thereon, must be registered. *Moor v. Culverhouse*, 29 L. J. Ch. 419. *Wright v. Stansfield*, 28 id. 183.

[1] With respect to equitable mortgages by deposit of title-deeds it has been decided, notwithstanding the Statute of Frauds, 29 Car. 2, c. 3, s. 4, that a mere deposit of title-deeds, upon an advance of money, without a word passing, gives an equitable lien (17 Ves. 227; 2 Ves. & B. 83), even against a subsequent purchaser, without notice; and such deposit will cover subsequent advances, if it appear by clear evidence that they were made upon the faith of that security: but it seems not to have been decided how far it is necessary to deliver all the title-deeds, or whether that would not be taken to be a sufficient deposit which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security (11 Ves. 401. *Roberts v. Croft*, 24 Beav. 223; 27 L. J. Ch. 220. *Unity Bank v. King*, id. 585); but it has been held that the delivery of deeds for the purpose, or having a mortgage drawn, will not amount to an equitable mortgage. *See* 30 L. J. Ch. 255.

The meaning and object of a deposit may, it seems, be explained by parol evidence, a circumstance which has often been lamented (*see* 9 Ves. 43; 12 id. 199); and verbal deposits are not favoured, especially when contradicting a written instrument. *See* 17 id. 360. It were well, perhaps, if no such mortgages were permitted. *See* 11 id. 403; 12 id. 1906; 14 id. 600; 19 id. 203. They seem contrary to the spirit and the letter of the Statute of Frauds, which requires all trusts, except implied trusts, to be in writing. If there are false and contradictory accounts as to what was the nature of the deposit, it will create no lien. *Lloyd v. Attwood*, 5 Jur. N. S.; 29 L. J. Ch. 97, 1322. *Espin v. Pemberton*, 28 L. J. Ch. 308–311. *See* 29 L. J. Ch. 319.

If the deposit is in the hands of a third person, it may be considered as a deposit for the creditor, provided such is proved to be the intention. 19 Ves. 212. *See* 29 L. J. Ch. 677. It is very difficult to establish a case when the deposit remains in the hands of the mortgagor himself; and it seems questionable whether a mere memorandum, kept in his own possession, and not parted with to the man in whose favour it is expressed, or if deeds were put into the hands of the wife of the mortgagor, it would be available. *Matthews v. Goodday*, 31 L. J. Ch. 282. The deposit of a mere agreement gives an equitable lien, and so does the deposit of the copy of a court-roll. (Id. 403.) *Ferguson v. Hudson*, 31 L. J. Ch. 577. A transfer by a husband of title-deeds, of which his wife was equitable mortgagee, to secure a debt of his, is not a reduction into possession so as to defeat the right of the wife by survivorship. 29 L. J. Ch. 609. As to when fraudulent, *see* 29 L. J. Ch. 373.

[2] An equity of redemption is considered a title in equity, and not merely as a trust, from which, in many respects, it materially differs. *Tucker v. Thurston*, 17 id. 133. A power of redemption, says Sir Matthew Hale, is an equitable right inherent in the land, and binds all persons in the *post* or otherwise, because it is an ancient right which the party is entitled to in equity. *Reeve v. Attorney-General*, 2 Atk. 223. *Paulet v. Attorney-General*, Hardw. 465. An equity of redemption may be alienied, entailed, and devised (*Rettall v. Ellis*, 9 Ves. 563), and is descendible in the same manner as a trust estate. *Boscarrick v. Barton*, 1 Ch. Ca. 217. *Phillips v. Heale*, 1 Rep. in Ch. 190. An equity of redemption may also be mortgaged, in which case it is called a second mortgage. But this kind of mortgage is liable to two objections:—1st. That a third mortgagee, without notice, may, by paying off the first mortgage, acquire a preference over the second. 2d. That great difficulties may arise in calling in the money; for a second mortgagee has no legal remedy, but is driven to a suit in Chancery to recover even his interest; but where a person who has advanced money upon an equitable mortgage, without having any notice at the time of his mortgage of any previous incumbrance, can procure a conveyance of an outstanding term of years prior to the first mortgage, he will acquire a legal estate, and equity will not interfere. *Marsh v. Lee*, 2 Vent. 337; 1 Ch. Ca. 162. *Churchill v. Grove*, 1 Ch. C. 36. *Higgon v. Siddal*, id. 149. *Wortley v. Birkhead*, 2 Ves. 571. *Edwards v. Povey*, 1 Vern. 187. *Bruce v. Duchess of Marlborough*, 3 P. Wms. 492. See *Head v. Egerton*, id. 279. But the court could not take away the deeds from a subsequent incumbrancer, allowing all the benefit he could have from those deeds, but giving him no interest in the estate. And see *Evans v. Bicknell*, 6 Ves. 183. *Ex-parte Kensington*, 2 Ves. & B. 83.

An equity of redemption is subject to courtesy (*Cashborne v. Inglis*, 1 Atk. 603); but before the statute 3 & 4 Wm. 4, c. 105, s. 2, it was not liable to dower. Coote, Mortg. 26, 3d ed.

When a mortgagee has been in possession twenty years, without any impediment in the mortgagor to assert his title, such as imprisonment, infancy, coverture, being beyond sea, &c. (where it is not by having absconded); or if such impediment has been removed ten years, it is a bar to a redemption. *Jenner v. Tracey*, 3 P. Wms. 287, n. *Bonney v. Ridgard*, 17 Ves. 99. *Trash v. White*, 3 Bro. C. C. 289. *Hoyer v. Loving-*

VII. Rights of Mortgagor and Mortgagee.[1]

ton, 1 P. Wms. 268. *Anon.* 3 Atk. 313. *Corbett v. Parker*, 1 Aust. 33. But see *Hoole v. Healey*, 1 Ves. & B. 569. *See* Adverse Possession, vol. i. p. 208.

[1] By 23 & 24 Vic. c. 145, s. 2, a power of sale, a power to insure against fire, and a power to require the appointment of a receiver of the rents, or in default to appoint any person as such receiver, have been rendered incident to every mortgage or charge by deed, affecting any hereditaments of any tenure. These powers, however, do not arise until after the expiration of one year from the time when the principal money shall have become payable according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the person entitled to the property, subject to the charge. (Sect. 11.) And no sale is to be made until after six months' notice in writing. (Sect. 13.) But none of these powers are to be exercisable if it be declared in the mortgage-deed that they shall not take effect; and where there is no such declaration, then, if any variations or limitations of any of the powers are contained in the deed, such powers shall be exercisable only, subject to such variations or limitations. (Sect. 32.) *See* Wms. *Real Prop.* 389, 6th ed.

So long as the mortgagor remains in possession, the mortgagee's estate is not absolute, even at law. *See* 15 & 16 Vic. c. 76, ss. 219, 220; *ante*, vol. iv. p. 188. But when the mortgagor has ceased to be in possession, and there has been a default in payment of the money at the stipulated time, the estate of the mortgagee becomes absolute at law, yet his estate is in equity treated as a mere security for the principal and interest, and costs, properly incurred in relation to the mortgage, and follows the nature of the debt. And although, where the mortgage is in fee, the legal estate descends to the heir of the mortgagee, yet in equity it is deemed a chattel interest and personal estate, and belongs to the personal representatives as assets. Coote, Mort. 539, 3d ed. Smith, R. & P. 501.

With respect to interest, *see* Interest, *ante*, p. 222.

With regard to the rights of the mortgagee in the lands mortgaged, as soon as the conveyance is executed he becomes seised or possessed of the legal estate, and may enter into possession, unless prevented by the express terms of the contract; and if the interest is not paid, he acquires, after giving notice of the mortgage to the tenant in possession, a right to the rent in arrear at the time of such notice, as well as to what accrues afterwards (*Moss v. Gallimore*, 1 Doug. 279; 2 Ves. & B. 252. *See* authorities, 1 Smith, L. C. 310); but he cannot entitle himself to rents and profits received by the mortgagor whilst he is permitted to retain possession. *Coleman v. Duke of St. Albans*, 3 Ves. 25. *Ex-parte Wilson*, 2 Ves. & B. 252. A mortgagee cannot present to a living which becomes vacant. See *Galley v. Selby*, Com. 343; S. C. Stra. 403. And he and the mortgagor should concur in leasing. As to leases by mortgagor or mortgagee alone, *see* 1 Platt on Leases, 163. *Doe d. Gibbons v. Pott*, Dougl. 710. In general, as soon as the day of payment is past, the legal estate is absolutely vested in the mortgagee. See *Marks v. Marks*, 10 Mod. 424.

In the case of a mortgage for a term of years, the mortgagee cannot, until he has entered upon and become possessed of the land, maintain an action of trespass in respect thereof, as before entry he has only an *interesse termini*. *Rogers v. Grazebrook*, 8 Q. B. 907.

If the mortgage-deed contains no covenant for the repayment of the money, an action for money lent will lie. *Yates v. Aston*, 4 Q. B. 182. *Mathew v. Blackmore*, 1 H. & N. 762.

It depends entirely upon the construction of the deed whether the mortgagor has or has not a right to remain in the occupation of the premises until default. See *Wheeler v. Montessor*, 2 Q. B. 142. *Doe v. Lightfoot*, 8 Mee. & W. 564. *Rogers v. Grazebrook*, 8 Q. B. 895. *Doe v. Day*, 2 id. 147.

If by the terms of the contract the mortgagor is to remain in possession of the property, and receive the rents and profits thereof until the day of payment, or until any determined period, he becomes tenant to the mortgagee, and there is a demise of the premises for the intervening period. *Doe v. Goldwin*, 2 Q. B. 143. *Wilkinson v. Hall*, 3 Bing. N. C. 508; 4 Scott, 301. *Partridge v. Bere*, 5 B. & A. 604; 1 D. & R. 272. But if there is no term or stipulation in the contract clothing the mortgagor with the right of possession until the time of payment has arrived, the mortgagee has the right of possession, as well as the right of property, the instant the mortgage is executed. *Rogers v. Grazebrook*, *supra*. *Doe v. Day*, id. *Doe v. Lightfoot*, 8 Mee. & W. 553. *Doe v. Maisey*, 8 B. & C. 767.

If the mortgagor is permitted, without any title to the possession, to occupy or receive the rents of the mortgaged premises, he is merely a tenant at sufferance, and is not entitled to notice to quit. See *Doe v. Goodier*, 16 L. J. Q. B. 435.

A power to distrain for interest in the same way as for rent is a mere personal license, and is not assignable over. *Brown v. Metropolitan County Life Assurance Co.* 28 L. J. Q. B. 236.

Should the mortgagor, by the terms of the deed, become tenant to the mortgagee, at a specified rent, the former may distrain for it, even although he did not execute the deed (*West v. Fritche*, 3 Ex. 216. See *Doe v. Tom*, 4 Q. B. 615); but unless a term is specified the mortgagor will be tenant at will only. *Doe v. Davies*, 7 Ex. 89; 21 L. J. Ex. 60. *Doe v. Goldwin*, *supra*. *Pinhorn v. Sonster*, 8 Ex. 763; 22 L. J. Ex. 266.

If the mortgaged premises are under lease, and the mortgagee permits the mortgagor to collect the rents, and does not give the tenants any notice, the mortgagor is deemed in law to have the authority of the mortgagee, and may distrain in the mortgagee's name as his bailiff. *Trent v. Hunt*, 9 Ex. 14; 22 L. J. Ex. 320.

The mortgagee, after notice of the mortgage given by him to the tenants of the mortgaged premises, may sue them for rent accrued subsequently to the receipt of the notice. *Waddilove v. Barnett*, 2 Bing. N. C. 543. *Carpenter v. Parker*, 3 C. B. (N. S.) 237. *Turner v. Cameron's Coal Co.* 5 Ex. 944. *Litchfield v. Ready*, 5 Ex. 944. See *Doe v. Bucknell*, 8 C. & P. 566. *Brown v. Storey*, 1 Scott, N. R. 16.

Where a mortgagor has been ejected, and the lessor granted a new lease, it enures to the benefit of the mortgagee. *Doe d. Old v. Vickers*, 6 Nev. & M. 437; 4 Ad. & E. 782.

A lease of the mortgagor is valid as between himself and the lessee, the latter being estopped from setting up the title of the mortgagee until he has attorned to him. See *Hickman v. Machin*, 4 H. & N. 720. *Cuthbertson v. Irving*, 29 L. J. Ex. 485. *Wheeler v. Branscombe*, 5 Q. B. 373. *Wilton v. Dunn*, 17 id. 294; 21 L. J. Q. B. 63.

If a person who has an estate borrows money on it upon mortgage, and the mortgagor afterwards grants a lease of the property to a tenant, E. G., for twenty-one years, that lease, being made after the mortgage, cannot be set up by the tenant to prevent the mortgagee from recovering the possession of the property, and the mortgagee may put the tenant out of possession by an ejectment, and the only remedy the tenant has for being thus put out of possession is against the mortgagor: but, if instead of the mortgagee driving the tenant out of possession, he consents to take the tenant as his tenant, the mortgagor will not thereby set up the twenty-one years' lease, but will make the tenant his tenant from year to year only. *Doe d. Hughes v. Bucknell, supra.*

Where the occupier of the soil agreed to make certain payments for a license to dig earth for bricks: — *Held*, that the mortgagee, after notice, was entitled to such payments as in the nature of rent. *Ex-parte Hawker*, Mont. & Mac. 247.

A tenant is bound to pay his rent to the first mortgagee (*Doe d. Higginbotham v. Barton*, 3 Per. & D. 194. *Rogers v. Humphreys*, 4 Ad. & E. 299); but a notice from a subsequent mortgagee to a prior not to deliver up the deeds is not binding. *Dixon v. Wigram*, 2 C. & J. 613.

A notice by mortgagee to tenants applies to bygone rent (*Pope v. Biggs*, 9 B. & C. 245; 4 M. & R. 193); but a mortgagee has no right to distrain for rent antecedently due. *Evans v. Elliott*, 1 Per. & D. 256.

Although under a covenant to make further assurance the mortgagee is entitled to an absolute assurance, yet he is not entitled to the equity of redemption. *Atkin v. Urton*, Comb. 318; 1 Ld. Raym. 36.

A mortgagee, by leaving title-deeds in the mortgagor's possession, enables him to commit a fraud, and must therefore suffer for his neglect against a subsequent mortgagee, without notice. *Norris v. Morgan*, 7 T. R. 755.

A mortgagor is never permitted to dispute the title of his mortgagee. *Goodtitle d. Edwards v. Bailey*, Cowp. 597.

A proviso, that if interest be not paid it shall be taken as principal, and bear interest, is void. *Ossulston v. Lord Yarmouth*, 2 Salk. 449.

The mortgagee may proceed to foreclose and bring an action of ejectment and covenant at the same time. *Colby v. Gibson*, 3 Smith, 516; 2 Dougl. 417.

The mortgagee may assign without the mortgagor being a party, and the latter is a tenant at will to the assignee. *Newport's case*, Skin. 423; Holt, 477.

Where there is no power of sale in the deed, a bill for a foreclosure is in common cases deemed the appropriate and exclusive remedy (Storey, *Eq. Jur.* s. 1026); but by 15 & 16 Vic. c. 86, s. 48, on a foreclosure suit being instituted, the court may now direct a sale.

The mortgagee's right against the mortgagor extends to the latter's assignee. *Sumpter v. Cooper*, 2 B. & Adol. 223.

Under a power of sale on default of payment of interest, on that default the principal becomes due. *Goodtitle v. Notitle*, 11 Moore, 491.

As to Tacking. — When lands are mortgaged to several persons, each ignorant of the security granted to the other, the general rule is that the several mortgages rank as charges on the lands, in the order of time in which they were made. *Jones v. Jones*, 8 Sim. 633. *Wiltshire v. Rabbits*, 14 id. 76. *Wilmot v. Pike*, 5 Hare, 14. But as the first mortgagee alone obtains the legal estate, he has this advantage over the others, that if he takes a further charge on a subsequent advance to the mortgagor, without notice of any intermediate second mortgage, he will be preferred to an intervening second mortgagee. *Goddard v. Complin*, 1 Ch. Ca. 119. And if a third mortgagee, who has made his advance without notice of a second mortgage, can procure a transfer to himself of the first mortgage, he may *tack*, as it is said, his third mortgage to the first, and so postpone the intermediate incumbrancer. *Bates v. Johnson*, 1 Johns. 304. *See* 30 L. J. Chan. 70; id. 467. For, in a contest between innocent parties, each having equal right to the assistance of a court of equity, the one who happens to have the legal estate is preferred to the others; the maxim being, that when the equities are equal the law shall prevail. Wms. *Real Prop.* 397, 6th ed; *see* Coote, *Morty.* 389, 3d ed.

Where Mortgagee dies without having entered on Possession. — By the 13 & 14 Vic. c. 60, s. 19, it is enacted, that "when any person, to whom any lands have been conveyed by way of mortgage, shall have died without having entered into the possession, or the receipt of the rents and profits thereof, and the money due in respect of such mortgage

VIII. Order of Payment and Priority of Mortgages.[1]

IX. Ejectment by Mortgagee against Mortgagor.[2] *See* also Ejectment, vol. iv. p. 188.

shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then, in any of the following cases, it shall be lawful for the Court of Chancery to make an order, vesting such lands in such person or persons, in such manner and for such estate, as the court shall direct; (that is to say,) 1. When a heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found. 2. When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person. 3. When it shall be uncertain which of several devisees of such mortgagee was the survivor. 4. When it shall be uncertain as to the survivor of several devisees of such mortgagee; or as to the heir of such mortgagee, whether he be living or dead. 5. When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died, and it shall not be known who is his heir or devisee; and the order of the said Court of Chancery, made in any one of the foregoing cases, shall have the same effect as if the heir or devisee, or surviving devisee (as the case may be), had duly executed a conveyance or assignment of the lands, in the same manner and for the same estate." (Sect. 20.)

[1] Upon the decease of the mortgagor the mortgage-debt was, until the statute 17 & 18 Vic. c. 113, payable in the first place, like all other debts, out of the personal estate of the mortgagor (see *Yates v. Aston*, 4 Q. B. 182. *Mathew v. Blackmore*, 1 H. & N. 762. *See* 30 L. J. Ch. 263; 3 L. T. (N. S.) 686); and as in equity the lands are only a security to the mortgagee, in case the mortgagor should not pay him, so also in equity the lands still devolved as the real estate of the mortgagor, subject only to be resorted to for payment of the debt in the event of his personal estate being insufficient for the purpose. Wms. *Real Prop.* 396. But by the 17 & 18 Vic. c. 113, it is enacted, that "when any person shall, after the 31st December, 1854, die seised of, or entitled to, any estate or interest in any land or other hereditaments which shall, at the time of his death, be charged with the payment of any sum of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised shall not be entitled to have the mortgage-debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage-debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage-debts charged on the whole thereof: Provided that nothing therein contained shall affect or diminish any right of the mortgagee to obtain full payment of his mortgage-debt, either out of the personal estate of the person so dying as aforesaid, or otherwise: Provided also, that nothing therein contained shall affect the rights of any person claiming under any deed, will, or document made before the 1st of January, 1855." The effect of this statute was discussed in *Rolfe v. Perry*, E. T. 1863, Ch. L. C.

Where there are several mortgages on an estate, they must be paid according to the priority of their respective dates, in pursuance of a rule adopted from the civil law: *Qui prior est in tempore potior est in jure.* Where a clause is inserted in a mortgage-deed, by which the lands mortgaged are made a security for any further sums which shall be advanced by the mortgagee, a subsequent loan will be considered as part of the original transaction, and will have a priority over a second mortgage, though subsequent to such second mortgage, and, it has been been said, though the first mortgagee had notice of the second mortgage at the time when he made the subsequent loan. But where a mortgage extends to future advances, the mortgagee cannot safely make such advances if he have notice of an intervening second mortgage. *Rolt v. Hopkinson*, 3 De Gex & J. 117; 4 Jur. N. S. 1119; 9 W. R. 900. *Logg v. Jones*, 6 L. T. (N. S.) 675. *Willes v. Greenhill*, 29 Bea. 387. *Cook v. Wilton*, 30 L. J. Ch. 467. *Wright v. Stonfield*, 28 id. 183. *More v. Culverhouse*, 29 id. 419. *Herrick v. Attwood*, 27 id. 121.

Where there are several equitable interests affecting the same estate, they will also attach upon it according to the respective times at which they commenced, it being a rule of the Court of Chancery that equity follows the law. Mortgages are, however, not preferred in a court of equity to statutes, judgments, or recognisances; but each of these securities takes place according to the priority of its date, in the same manner as in a court of law.

Where incumbrances are all merely equitable, a mortgage of the legal estate to a person who has no notice of such incumbrances will give such mortgagee a priority over them; but if any of the equitable incumbrances are excepted, that circumstance will give them a priority of those that are not excepted.

[2] After forfeiture, the mortgagee may main-

MORTUARY.[1]

MOTION. *See post*, Rules, Motions, and Orders.

MULTIPLEPOINDING.[2]

MURDER and **MANSLAUGHTER.** *See* also Indictments, *ante*, p. 105.

I. Of the Distinction between Murder, Manslaughter, and Justifiable Homicide, p. 502.

(A) *Of Murder*, p. 502.

(B) „ *Manslaughter*, p. 503.

(C) „ *Justifiable Homicide*, p. 504.

II. Of Cases in which the Death is occasioned by Particular Means, or upon a Particular Occasion, p. 504.

(A) *By Fighting*, p. 504.

(B) „ *Neglect or Ill-Treatment*, p. 505.

(C) *With Instrument not likely to cause serious Injury*, p. 505.

(D) *In the course of Correction*, p. 506.

(E) *Upon Provocation*, p. 506.

(F) *By the Negligent or Improper Performance of a Lawful Act*, p. 507.

(G) *In Making or Attempting an Arrest*, p. 507.

(H) „ *Defence of Property, &c.* p. 509.

III. Of Child Murder, p. 509.

IV. „ Conspiracy to Murder, p. 509.

V. „ Attempts to Murder, p. 510.

VI. Sending Letter Threatening to Murder, p. 510.

tain ejectment against the mortgagor, without notice to quit (*Doe d. Fisher v. Giles*, 5 Bing. 421; 2 M. & P. 749), unless he has acknowledged another party in possession. *Doe d. Rogers v. Cadwallader*, 2 B. & Adol. 473. *Doe v. Hales*, 7 Bing. 322.

To entitle the mortgagor to notice, the relation of landlord and tenant must be created. *Doe d. Garrod v. Olly*, 4 Per. & D. 275.

The party having the legal estate must bring the action. *Doe d. Barney v. Adams*, 2 C. & J. 232; 2 Tyr. 289.

In ejectment by mortgagee, a defendant who defends for the mortgagor cannot set up a superior mortgage. *Doe d. Hunt v. Clifton*, 4 Ad. & E. 813. But A., having mortgaged to B., demises to C., reserving a power of re-entry, and afterwards mortgages to D. all his interest; C. may set up the title of D. as an answer to an ejectment brought by A. under the clause of re-entry. *Doe d. Marriott v. Edwards*, 3 Nev. & M. 193; S. C. 5 B. & Adol. 1065.

As to the right of the mortgagor to relief upon ejectment brought, *see* Ejectment, vol. iv. p. 188.

[1] *Mortuarium, mortarium*, a gift left by a man, at his death, to his parish church, for the recompense of his personal tithes and offerings not duly paid in his lifetime. A mortuary is not properly and originally due to an ecclesiastical incumbent from any but those only of his own parish, to whom he ministers spiritual instruction, and hath right to their tithes. But by custom, in some places, they are paid to the parsons of other parishes, as the corpse passes through them.

Mortuaries can only be claimed under special local customs. *Proud v. Piper*, 3 Mod. 268. See *Torrent v. Burley*, 2 Stra. 715. *Johnson v. Wrightson*, 2 Lutw. 443.

Mortuaries are not within the provisions of 7 & 8 Wm. 3, c. 6. *Ayrton v. Abbott*, 14 Q. B. 1.

[2] The action of multiplepoinding is analogous in the Scottish law to our interpleader suit. It is the remedy to which the holder of a fund to which there are two or more claimants may resort, for the purpose of having the title to the same determined by the court.

VII. Of Accessories, p. 511.
VIII. „ the Indictment, p. 511.
(A) *Form of*, p. 511.
(B) *Venue*, p. 511.
(C) *Plea of* Auterfois Acquit, p. 512.
IX. Sentence and Execution, p. 512.

I. Of the Distinction between Murder, Manslaughter, and Justifiable Homicide.

(A) *Of Murder.*[1]

[1] Murder is thus defined by Lord Coke (3 Inst. 47): "Where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, of malice aforethought, either express or implied."

The words "the king's peace," in the definition of murder, mean merely that it is not murder to kill an alien-enemy in the exercise of war. 3 Inst. 50; 1 Hale, 433. The killing of a foreigner by a British subject out of the queen's dominions is murder, for which the defendant was held liable in this country under the 9 Geo. 4, c. 31, s. 7 (*Reg. v. Azzopaidi*, 2 Moo. C. C. 288; 1 C. & Kir. 203). But where the defendant is a foreigner, who inflicts a blow upon another foreigner in a foreign vessel on the high seas, and the person so struck afterwards lands in England and dies there, the offence is not cognisable by our law. *Reg. v. Lewis*, 1 Dears. & B. 182. *See* sect. 10, 24 & 25 Vic. c. 100, as to the trial of murder and manslaughter, where the death or cause of death only happens in England or Ireland. *See post*, p. 512.

To constitute murder, there must be an actual killing. But it is not necessary that death should be caused by direct violence; it is sufficient if the act done apparently endangers life, and eventually proves fatal (Hawk. b. i. c. 31, s. 4); and if the wound itself be not mortal, but by improper applications becomes so, and terminates fatally, and it can be clearly shown that the medicine, and not the wound, was the cause of the death, the party who inflicted the latter will not be criminal (1 Gale, 428). But where the wound was adequate to produce death, it will be no excuse to show that, had proper care been taken, a recovery might have been effected. 1 Hale, 428.

The killing must be unlawful, and not justifiable or excusable. If it be so, it is not murder (*see* 1 Hale, P. C. 431); but manslaughter.

The killing must be committed by malice aforethought. Malice is either express or implied. Express malice is, when one with a sedate and deliberate mind, and formed design, does kill another; which formed design is evidenced by external circumstances, discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes, to do him some bodily harm (1 Hale, 451). Neither shall he be guilty of a less crime who kills another in consequence of such a wilful act as shows him to be an enemy to mankind in general, as going deliberately with a horse, used to strike, or discharging a gun among a multitude of people (1 Hawk. c. 29, s. 12); so, if a man resolve to kill the next person he meets and do kill him, it is murder, although he knew him not, for it is universal malice (4 Bl. Com. 200). And it may be necessary here to observe, that no provocation, however great, will extenuate or justify a homicide, where there is evidence of express malice (*Lee v. Mason*, Fost. 132). So, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him, upon which B. did strike A., and thereupon killed him, this was holden to be murder (1 Hawk. c. 31, s. 24). And in many cases where no malice is expressed, or openly indicated, the law will imply it. Thus, where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved (1 Hale, 455). So, if a man kill another suddenly, without any, or without a considerable provocation; or if he kill an officer of justice in the legal execution of his duty; if intending to do another felony, he undesignedly kill a man; in all these cases the law implies malice, and the offence will be deemed murder.

The law presumes every homicide to be murder until the contrary appears. Fost. 255. It is not, therefore, necessary that the prosecutor should prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable or excusable, or that, at most, it amounted to manslaughter. Arch. C. L. by Welsby, 535, 15th ed. It must be shown that the deceased died of the wound or other injury given him by the defendant within a year and a day after he received it, for if he died

(B) *Of Manslaughter.*[1]

after that time the law would presume that his death had proceeded from some other cause (1 Hawk. c. 23, s. 90). And the death will not be attributable to the wound if it arose from improper applications to the wound. 1 Hale, 421. See *Reg. v. Holland*, 2 M. & Rob. 351.

If a man have a beast that is used to do mischief, and he, knowing it, suffer it to go abroad and it kill a man, this, it seems, is manslaughter in the owner; but if he had purposely turned it loose, though merely to frighten people, and to make what is called sport, it is as much murder as if he had incited a bear or a dog to worry them. 1 Hale, 431; 4 Bl. Com. 197.

If a physician or surgeon give a medicine to a patient with an intent to cure him of any disorder under which he labours, which kills him, he will not be guilty of any criminal homicide (1 Hale, 429). And though it has been said, that persons not regularly practising the art of physic will be chargeable of manslaughter, if they kill under the pretence of curing, the notion is justly questioned, and is most probably erroneous. (Id.; 4 Bl. Com. 197; Hawk. b. 1, c. 32, s. 62. *Reg. v. Van Butchell*, 3 C. & P. 629). *See post*, Negligence, p. 517. But if he, whether he be a qualified medical practitioner or not, be guilty of criminal misconduct, arising from gross ignorance or criminal inattention, then he will be guilty of manslaughter. *R. v. Williamson*, 3 C. & P. 635. *R. v. Spiller*, 5 id. 333. *R. v. St. John Long*, 3 id. 4, 398, 423. *R. v. Senior*, 1 Moo. C. C. 346. *Reg. v. Ellis*, 2 C. & Kir. 470. *R. v. Webb*, 1 M. & Rob. 405. *Reg. v. Spilling*, 2 id. 107. *Reg. v. Crick*, 1 F. & F. 519. *Reg. v. Crook*, id. 521. *Rex v. Ball*, 2 id. 201. It is not competent to go into evidence of former cases treated by the defendant. *Reg. v. Whitehead*, 3 C. & Kir. 202. See *Reg. v. Winslow*, 8 Cox, C. C. 307.

If two persons mutually agree to commit suicide together, and accordingly take poison, or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. *R. v. Dyson*, R. & R. 523. *Reg. v. Alison*, 8 C. & P. 418. See *Reg. v. Gaylor*, 1 Dears. & B. 288. But suicide is not murder within 24 & 25 Vic. c. 100, ss. 11–15; the attempt to commit the offence is only a misdemeanor. 7 L. T. (N. S.) 472.

Whether death caused by committing a rape is murder is unsettled. *Rex v. Lad*, 1 Leach, 96. Falsely swearing so as to procure the execution of an innocent person is not murder. *Rex v. Macdaniel*, id. 44.

If a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act intended or attempted were a felony, the killing is murder; if unlawful (*malum in se*), but not amounting to felony, the killing is manslaughter; if lawful (that is, not being *malum in se*), homicide by misadventure merely; if a man deliberately shoot at A. and miss him, and kill B., this is murder. Fost. 261; 1 Hale, 441, 438. If a man lay poison for A., and B., against whom he had no malicious intent, take it, and it kills him, this is likewise murder. 1 Hale, 436. *Rex v. Saunders*, Plowd. 474. *Rex v. Gore*, 9 Co. 81. But if, when engaged in an unlawful or dangerous sport, a man kill another by accident, it is manslaughter (Fost. 259, 260, 261; 1 Hale, 472, 473; 1 Hawk. c. 29, s. 5); if the sport were lawful, and not dangerous, it would be homicide by misadventure merely (Fost. 260); so it is homicide by misadventure merely. *See* Cro. Car. 538. Where a man is at work with a hatchet, and the head of it flies off, and kills a bystander, this is homicide by misadventure. 1 Hawk. c. 29, s. 2. If a man shooting at game, by accident kill another, it is homicide by misadventure merely, even although the party be unqualified (Fost. 259); for the use of firearms by an unqualified person is merely a prohibited act, and not *malum in se*. There are two seeming exceptions, however, to the above rule: 1st. If two persons be fighting, under such circumstances that if one were killed it would be manslaughter only in the other, if in such case an innocent party be unintentionally killed by one of them, it is manslaughter only. Fost. 262. *Rex v. Brown*, 1 Leach, 148. This, perhaps, is not strictly an exception, for the act in which the parties are engaged, namely, the fighting, is not in itself felonious, although the result of it may be so. 2. Where an act in itself is lawful, and at the same time dangerous, in order to render an unintentional homicide from it excusable, it must appear that the party, whilst doing the act, used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least.

If a person knowingly give poison to A. to administer as a medicine to B., but A. neglecting to do so, it is accidentally given to B. by a child or other unconscious agent, this is in law a poisoning by the party himself, as much as if he had administered it by his own hands. *Reg. v. Michael*, 2 Moo. C. C. 120; 9 C. & P. 356.

"Every offence which, before the commencement of the act 9 Geo. 4, c. 31, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence, and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder." 24 & 25 Vic. c. 100, s. 8.

[1] Manslaughter is the unlawful and feloniously killing of another, without any malice, either express or implied. It is of two kinds: 1. Involuntary manslaughter, where a man, doing an unlawful act, not amounting to felony, by accident kills another; 2. Voluntary manslaughter, where, upon a sudden quarrel, two persons fight, and one of them kills the other; or, where a man

(C) *Of Justifiable Homicide.*[1]

II. Of Cases in which the Death is occasioned by Particular Means or upon a Particular Occasion.

(A) *By Fighting.*[2]

greatly provokes another by some personal violence, &c., and the other immediately kills him, this manslaughter is a felony.

If malice exists, the offence is murder, and not manslaughter. *See* 1 Hale, P. C. 438.

If A. and B. be riding fast along a highway, as if racing, and A. ride by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A. *Rex v. Mastin*, 6 C. & P. 396. Nor where the prisoner pushed off the boat of the deceased from his ship, and the latter, in attempting to catch hold of a barge to prevent his own boat drifting, fell into the water, and was drowned. *Rex v. Waters*, id. 328. But where the prisoner, in anger with her child, threw a piece of iron, which accidentally struck another, and caused death:—*Held* to amount to manslaughter. *Rex v. Connor*, 7 id. 438. So, where a lad, as a frolic, without any intention to do any harm to any one, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the carman who was in it, putting in a sack of potatoes, was pitched backward on the stones, and killed:—*Held*, that the lad was guilty of manslaughter. *Rex v. Sullivan*, id. 641. So, where an ironfounder having furnished cannons, one of which, being imperfect and returned, he had filled the flaw with lead, and returned it, and upon being fired it burst and killed a man:—*Held* to be manslaughter. *Reg. v. Carr*, 8 id. 163.

The evidence against a prisoner charged with manslaughter was an admission on his part that, unfortunately, he was the man who shot the deceased, and the fact that, on their coming together, apparently not in ill humour, from the South Metropolitan Cemetery, where the prisoner was a watchman, but with which the deceased had no connexion, the prisoner said to the deceased, "Now, you mind, don't let me see you on my premises any more." At the time this was said the wound had been given of which the deceased eventually died:—*Held* that, in point of law, the evidence was sufficient to sustain the charge. *Rex v. Morrison*, id. 22.

The offence is not triable at any sessions. 5 & 6 Vic. c. 38, s. 1. As to the punishment, *see post*, p. 512.

[1] *Justifiable Homicide* is—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime. Hale, 488; Bract. 145. *Excusable Homicide* is—1. Where a man, doing a lawful act without any intention of hurt, by accident kills another; as, for instance, where a man is working with a hatchet, and the head, by accident, flies off and kills another standing by, this is called homicide *per infortunium*, or by misadventure. 2. Where a man kills another upon a sudden encounter merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling; and this is termed homicide *se defendendo*.

No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. 24 & 25 Vic. c. 100, s. 7.

[2] If two persons quarrel, and afterwards fight, and one of them kill the other, it will be murder if there intervened between the quarrel and the fight sufficient cooling time for passion to subside and reason to interpose (Fost. 296; 1 Hale, 453); therefore, if a person be killed in a duel it is murder (1 Hale, 442; 1 Hawk. c. 31, s. 81; 3 East, 581. See *R. v. Oneby*, 2 Stra. 766; *R. v. Murphy*, 6 C. & P. 103. *Reg. v. Young*, 8 id. 645. *Reg. v. Cuddy*, 1 C. & Kir. 210); but if such a time has not intervened, if the parties in their passion fought immediately, or even if immediately upon the quarrel they went out and fought in a field (for this is deemed a continued act of passion), the killing in such a case would be manslaughter only, whether the party killing struck the first blow or not (Fost. 295; 1 Hale, 456; 1 Hawk. c. 31, s. 29). But if there are circumstances which indicate malice it will be murder, notwithstanding there was a sudden quarrel (Fost. 295. *R. v. Mawgridge*, Kel. 128. See *R. v. Snow*, 1 Leach, 151; 1 East, P. C. 245; 1 Hale, 451). If, however, the parties at the commencement attack each other upon equal terms, and afterwards in the course of the fight one of them in his passion snatch up a deadly weapon and kill the other with it, this would be manslaughter only. 1 East, P. C. 242. *R. v. Taylor*, 5 Burr. 2793. *R. v. Anderson*, 1 Russ. 531. *R. v. Kessal*, 1 C. & P. 437. *R. v. Ayes*, R. & R. 166. *R. v. Rankin*, id. 43. All struggles in anger, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. *Reg. v. Canniff*, 9 C. & P. 359. If, when two persons are fighting, a third come up and take the part of one of them and kill the other, this will be manslaughter in the third party (1 Hawk. c. 31, s. 35), and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. Id. s. 55. If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he inter-

(B) *By Neglect or Ill-Treatment.*[1]

(C) *With Instrument not likely to cause serious Injury.*[2]

fered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted (1 East, P. C. 291); if, on the other hand, the third party who thus interferes be killed, it is but manslaughter. Id.; *see* 12 Co. 87; Kel. 59.

All persons who, by their presence, encourage a fight from which death ensues to one of the combatants, are guilty of manslaughter, although they neither say nor do anything; but if the death be caused, not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable. *R. v. Murphy*, 6 C. & P. 103. So, all struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. *R. v. Canniff*, 9 id. 359. If a person, being in possession of a deadly weapon, enter into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it, and kill the other, it will be murder; but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he use it to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far back as he can, it will be justifiable homicide. *Reg. v. Smith*, 8 id. 160. *See* Challenge to Fight, vol. iii. p. 71.

[1] Where an indictment charged the death of a child to have been caused by its mother casting it on a heap of ashes, and leaving it there in the open air exposed to the cold, whereby it died, this was held to contain a sufficient charge of murder, inasmuch as it charged a misfeasance; but if it had charged the death to have been occasioned by a mere nonfeasance, or the neglect of the defendant's maternal duties, it would have been bad, unless it also showed that the child was of so tender an age, or was placed in such a situation, as to be unable to take care of itself. *Reg. v. Waters*, 1 Den. C. C. 356; 2 C. & Kir. 864. See *Reg. v. Cooper*, 1 Den. C. C. 459; 2 C. & Kir. 876. *Reg. v. Hogan*, 2 Den. C. C. 277. *Reg. v. Philpott*, Dears. C. C. 179. And where an apprentice died from harsh treatment and want of care upon the part of his master whilst he was labouring under disease, it was held to be murder in the master. *R. v. Squire*, 1 Russ. 426. See *R. v. Cheeseman*, 7 C. & P. 455. *R. v. Smith*, 8 id. 153. *R. v. Saunders*, 7 id. 277. *R. v. Marriott*, 8 id. 425. *Reg. v. Edwards*, id. 611; 1 Russ. 426. But if the charge be of nonfeasance, as in neglecting to supply food, the prosecutor must not only show a duty in the defendant to supply food, but also that the apprentice or child was of tender years, and unable to provide for himself (*R. v. Friend*, R. & R. 20), and that the defendant was in the actual possession of means to provide for him. *Reg. v. Chandler*, Dears. C. C. 453; Arch. C. L. 438, 15th ed.

Where the prisoner undertook the care of an aged and imbecile person, and by keeping her in a confined and unhealthy place, and by neglect to provide proper food, &c., occasioned her death:—*Held*, that if the jury were satisfied, from the gross and wilful neglect, that the prisoner contemplated the death of the party, he would be guilty of murder; and if guilty of such neglect, although he did not contemplate death, he would be guilty of manslaughter. *Rex v. Marriott*, *supra*. See *Reg. v. Shepherd*, 31 L. J. M. C. 102; 8 Jur. N. S. 418. *Reg. v. Ledger*, 2 F. & F. 857.

Where the prisoner, a married woman, was charged with the murder of her illegitimate child, by neglecting to supply it with food:—*Held*, that she, being the servant of the husband, was not chargeable for acts of omission, unless she omitted to give such food as had been provided for it by the husband. *Rex v. Saunders*, *supra*.

In a case of manslaughter against the captain and mate of a vessel, by accelerating the death of a seaman really in ill-health, but whom, they allege, they believed to be a skulker, the question will be, in determining whether it is a slight or aggravated case, whether the phenomena of the disease were such as would excite the attention of reasonable and humane men; and in such a case, if the deceased be taken on board after he was discharged from an hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. *Reg. v. Leggett*, 8 C. & P. 191.

On an indictment against husband and wife, for violently beating a child with intent to murder:—*Held*, that the jury must be satisfied of an actual intent; and it is not sufficient that, if death had ensued, the offence would have been murder; and where a party is charged with aiding and abetting, the jury must find that the latter was aware of the intent of the principal to commit the offence of murder:—*Held*, also, the jury convicting only of the assault, the wife was not protected from the presumption of having acted under coercion. *Reg. v. Cruse*, 8 C. & P. 541.

[2] If the instrument be not likely to endanger life, and there be no intention to kill, it will be manslaughter. *Rex v. Hazel*, 1 Leach, C. L. 368. Thus, where a man, who was sitting drinking in an ale-house, being called by a woman "a son of a whore," took up a broom-staff and threw it at her

(D) *In the course of Correction.*[1]

(E) *Upon Provocation.*[2]

from a distance, and killed her, the judges were not unanimous, and a pardon was advised; and the doubt appears to have arisen upon the ground that the instrument was not such as could probably, at the given distance, have occasioned death or great bodily harm. 1 Hale, 455, 456; 1 East, P. C. c. 5, s. 22, p. 236. So, where a master struck his servant with a clog, because it was not properly cleaned, and the servant was killed, it was held manslaughter. *R. v. Turner*, Comb. 407, 408: cited 1 Ld. Raym. 142. See *R. v. Leggett*, 8 C. & P. 191.

What is an instrument likely to endanger life is a question for the jury. *Rex v. Higgs*, 1 Leach, C. L. 378, n.

[1] Where a parent is moderately correcting his child, a master his servant or scholar, and he happens to occasion his death, it is only misadventure; but if he exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at the least, and in some cases murder. 1 Hale, 473. In all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. Fost. 262. See *Reg. v. Hopley*, 2 F. & F. 201. *R. v. Conner*, 7 C. & P. 438.

[2] The plea of provocation is not available in any case where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice; and that, even where there may have been previous struggling or blows, such plea cannot be admitted where there is evidence or express malice. It has been observed, that in every case of homicide upon provocation, how great soever that provocation may have been, if there were sufficient time for passion to subside and reason to interpose, such homicide will be murder; and it should always be remembered that, where a party relies upon the plea of provocation, it must appear that, when he did the fact, he acted upon such provocation, and not upon an old grudge. *See* 1 Hale, 451; 1 East, P. C. c. 5, s. 23, p. 239.

Where an assault is made with violence or circumstances of indignity upon a man's person, as pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. *See* Keb. 135; 4 Bl. Com. 191; 1 East, P. C. c. 5, s. 20, p. 233. *Rex v. Steadman*, Fost. C. L. 292. So if A. passing along the street, and B. meeting him (there being convenient distance between A. and the wall) take the wall of him and jostle him, and thereupon A. kill B., it is said that such jostling would amount to a provocation, which would make the killing only manslaughter; and again it appears to have been considered that where A., riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter.

Words will not authorise the killing of another: even the most irritating language of reproach, contemptuous and insulting actions, or gestures, or trespass against lands or goods; for they will not free the party killing from the guilt of murder, unless upon such provocation a deadly weapon was made use of, or an intention to kill or to do some great bodily harm was otherwise manifested (*see* 1 Hale, 453; Keb. 55); but if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear, or strike him with a stick or other weapon, not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. *See* Fost. 291. And if a man illegally restrained of his liberty kills another, it is manslaughter. *Rex v. Withers*, 2 East, P. C. 233.

If a husband kill another in the act of adultery with his wife it is manslaughter. *Rex v. Manning*, T. Raym. 212; S. C. 1 Vent. 259. *Reg. v. Kelly*, 2 C. & Kir. 814.

A father who takes up the quarrel of his son in the heat of passion, and with one blow kills another, it is manslaughter, and not murder. 12 Rep. 87; Fost. C. L. 294.

To reduce the offence to that of manslaughter, by showing previous provocation, the jury must be satisfied that the act was done in consequence of such provocation, and not of previous malice. *Reg. v. Kirkham*, 8 C. & P. 115.

If two persons quarrel, and begin to fight on equal terms, when one, finding himself not equal to his adversary, runs away, and, being pursued, draws his knife, and when overtaken by his adversary stabs him, if death ensue, this would be only manslaughter; but if, before the conflict began, the party had drawn his knife in cold blood, in case death had ensued the offence would have been murder. *Rex v. Kessal*, 1 C. & P. 437.

Where the prisoner on applying for money was refused until he had finished his work, which he then left, and, on his master threatening to send for a constable, armed himself with a knife, and declared that no constable should stop him, and on a constable being desired to take charge of him he stabbed him:—*Held*, by a majority of the judges, that, as the arrest would have been illegal, as the prisoner was in a place where he could not escape, and the waiting to give notice might have enabled the constable to arrest him, it amounted to such provocation as would have made the offence only manslaughter if death had ensued: a

(F) *By the Negligent or Improper Performance of a Lawful Act.*[1]

(G) *In Making or Attempting an Arrest.*[2]

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conviction for stabbing under Lord Ellenborough's Act was, therefore, wrong. *Rex v. Thompson*, 1 Moo. C. C. 80. See *R. v. Curzon*, id. 132.

[1] Where persons, employed about such of their lawful occupations from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, on account of such negligence. *See* Old Bailey, Feb. 1784, Sess. Pap. So if a person, driving a cart or other carriage, happen to kill another, and it appears that he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. *See* Fost. 263. So if it be by furious driving. *R.v. Walker*, 1 C. & P. 320. *R. v. Mastin*, 6 id. 396. *R. v. Grout*, 6 id. 629. *R. v. Timmins*, 7 id. 499. *Reg. v. Swindall*, 2 C. & Kir. 230. *See* 24 & 25 Vic. c. 100, s. 35. And if the driver, by racing with another carriage, loses the control of his own horses, and a party is killed by the upsetting of his own carriage, it is manslaughter in the driver. *Rex v. Timmins, supra.* So a party near-sighted, sitting at the bottom of his cart, and driving at the rate of eight or nine miles an hour, in the evening, and going over a person walking in the road:—*Held*, guilty of such carelessness as to make the offence amount to manslaughter. *Rex v. Grout, supra.*

To make the captain of a vessel liable for manslaughter in causing a person to be drowned by running down a boat in which he was, it was held that it must be shown that the captain did some act which conduced to the death, and that a mere omission to do the whole of his duty was not sufficient. *R. v. Green*, 7 C. & P. 156. *R. v. Allen*, id. 153. See *Reg. v. Barrett*, 2 C. & Kir. 343. *Reg. v. Haines*, id. 368. But where it appeared that the deceased was employed with others in walling the inside shaft of a colliery, and that it was the duty of the defendant to place a stage on the mouth of the shaft, and the death of the deceased was the direct consequence of the negligent omission on the part of the defendant to perform that duty, he was held to have been properly convicted of manslaughter. *Reg. v. Hughes*, 1 Dears. & B. 248. See *Reg. v. Gregory*, 2 F. & F. 153.

Where an explosion happened at the house of a firework-maker, who neglected to observe the requirements of the 9 & 10 Wm. 3, c. 7, and a rocket flew across the street, set fire to a house there, and caused the death of a person therein, this was held not to amount to manslaughter. *Reg. v. Bennett*, 1 Bell, C. C. 1.

When the killing arises from officers acting improperly, it is manslaughter. *R. v. Goffe*, 1 Vent. 216. And the court held it so where the circumstances were extremely aggravated. *R. v. Reason*, 1 Stra. 499. So a person may be guilty of manslaughter by a constant system of privation and ill-treatment. *R. v. Selfe*, 1 East, P. C. 226.

If an act, unlawful in itself, be done deliberately, and with mischievous intention, and death ensues, though against or beside the original intention of the party, it will be murder; but that if such deliberation and mischievous intention do not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter. *See* Fost. 261. There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief; and the party committing them, and causing death by such conduct, will be guilty of manslaughter; as, if a person breaking in an unruly horse ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter. (Id.)

Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is guilty of manslaughter. *See* Fost. 259, 260; 1 East, P. C. c. 5, s. 41, p. 268. Though the sports be not in their nature unlawful, yet, if the weapons used be of an improper and deadly nature, the party killing will be guilty of manslaughter.

In all these cases it must appear that the death was the direct and immediate result of the personal neglect or default of the defendant. For instance, where trustees appointed under a local act for the purpose of repairing roads in a particular locality, with a power to contract for executing such repairs, neglected so to contract, and, by reason of such neglect, one of such roads became out of repair, and a person using it was accidentally killed in consequence of its being out of repair, it was held that the trustees were not chargeable with manslaughter. *Reg. v. Pocock*, 17 Q. B. 34.

[2] A felon, by killing a person who is endeavouring to arrest him, is guilty of murder. *R. v. Jenkson*, 1 Hale, P. C. 464.

Any person is justified in detaining without a warrant a party attempting to commit a felony. *R. v. Hunt*, 1 R. & M. C. C. 93. If a private individual, there must have been an attempt; if an officer, a reasonable suspicion will suffice. *Samuel v. Payne*, Dougl. 359. And the same rule applies to an officer if he be killed, even although there be only a charge of felony, and that not perfectly expressed. *R. v. Ford*, 1 R. & B. 320.

If a constable take a man without warrant upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who is with the constable

all the time, and charged by him to assist, and the man kill J. S., it is held manslaughter only, because the arrest was illegal, and J. S. ought to have known it, and, therefore, the attempt to take the prisoner was illegal also. *R. v. Curvan*, 1 Moo. C.C. 132. See *R. v. Thompson*, id. 80. *Reg. v. Phelps*, Car. & M. 180. But if a constable having a charge of felony against the defendant, take him without a warrant, and the defendant, knowing the constable, kill him, it will be murder, even although the constable do not tell him of the charge, and the defendant, in fact, has done nothing for which he is liable to be arrested. *R. v. Woolmer*, 1 Moo. C. C. 334.

Where a man seen attempting to commit a felony, on fresh pursuit, kills his pursuer, it is as much murder as if the party were killed while attempting to take the defendant in the act. *R. v. Howarth*, id. 207. See *Beckwith v. Philby*, 6 B. & C. 638. And if a person be taken before a magistrate, and whilst the warrant is being made up for his commitment escape, a constable may, by verbal directions from the magistrate, pursue and apprehend him, and if in so doing the constable is killed, it is murder. *R. v. Williams*, 1 Moo. C. C. 387. *Reg. v. Light*, 1 Dears. & B. 332. *R. v. Gardener*, 1 Moo. 390.

If a keeper, attempting lawfully to apprehend a poacher, be met with violence, and in opposition to such violence, and in self-defence, strike the poacher, and then be killed by the poacher, it will be murder. *R. v. Bell*, 1 Moo. C. C. 333. See *R. v. Warner*, id. 380.

Where the gamekeeper was appointed by a person who had only permission to shoot over the land, it was held that he had no authority to apprehend a poacher in pursuit of game on such land, or to take a gun from him, and that it was manslaughter only where, in a struggle to retain possession of the gun, it went off and killed the gamekeeper. *Reg. v. Wesley*, 1 F. & F. 528. See *R. v. Wood*, id. 470.

If the arrest, even though by a constable, be clearly illegal, the party killing such officer is only guilty of manslaughter. *R. v. Thompson*, 1 R. & M. C. C. 80. *R. v. Adey*, 1 Leach, C. L. 206.

An officer is not entitled to arrest for a misdemeanor, unless there be strong grounds for suspicion. *R. v. Tooley*, 2 Ld. Raym. 1296.

To make a party killing one of a press-gang guilty of murder, the attempt must be with authority. *R. v. Broadfoot*, Fost. C. L. 154. And if he be unauthorised, and one of the gang kill a party impressed, it is murder. *R. v. Dixon*, 1 East, P. C. 316. To make it legal, the officer to whom the commission is directed should be present. *R. v. Borthwick*, 1 Dougl. 207.

A sentinel has no right to shoot another, unless great danger is apprehended. *R. v. Thomas*, cited 1 Russ. C. & M. 510.

The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all; or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law; and, therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter. *See* 1 Hale, 457, 458, 459; 1 East, P. C. c. 5, s. 80, p. 312, 314; 2 Stark. 205; 1 Leach, 112; Fost. 301. Though, even in civil cases, an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity, in cases of reasonable necessity; yet, if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or escape out of custody in executing for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means. *See* 1 Hale, 481; Fost. 271.

An arrest under a warrant in blank protects the officer. *R. v. Stockley*, cited 1 Russ. C. & M. 513. And where a justice of the peace kept blank warrants, and delivered one to an officer who was killed, it was deemed murder. *R. v. Inhabitants of Newark*, 8 T. R. 454.

If the arrest be illegal, and a private person interferes, and in so doing is killed, it is manslaughter, and not murder. *R. v. Tooley*, 2 Ld. Raym. 1296.

The parties whose liberty is interfered with, must have due notice of the officer's object and character, otherwise the killing of such officer will amount only to manslaughter. *See* 1 Hale, 458, *et seq.*; 1 Hawk. P. C. c. 31, ss. 49, 50; Fost. 310. *Reg. v. Thompson*, *ante*, p. 507. Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning, in order to arrest him, but did not tell his business, nor use words of arrest, and the party, not knowing that the other was an officer, in the first surprise snatched down a sword which hung in his room and killed the bailiff, it was ruled to be manslaughter. *See* 1 Hale, 470; Keb. 136. But it will be otherwise if the officer and his business be known (*see* 9 Co. 69); as where a man said to a bailiff who came to arrest him, "Stand off, I know you well enough; come at your peril;" and upon the bailiff taking hold of him, ran the bailiff through the body and killed him, it was held to be murder. *See* Cro. Car. 183; 1 Hale, 458. This will apply as well to a special bailiff as to a known officer. It is laid down in one case, if, upon an affray, the constable, or others in his assistance, come to suppress it and preserve the peace, and be killed in executing their office, it is murder in law, although the murderer knew not the party killed, and though the affray were sudden, because he set himself against the justice of the realm. *See* 4 Co. 40, b.; 3 Inst. 52. It is said, however, that in order to reconcile this with other authorities, it seems that the party killing must have had implied notice

(H) *In Defence of Property, &c.*[1]

III. Of Child Murder.[2]

IV. „ Conspiracy to Murder.[3]

of the character in which the peace-officer and his assistants interfered, though not a personal knowledge of them. *See* 1 East, P. C. c. 5, s. 82.

Whether in criminal or civil cases, notice should be given previous to forcing open doors, &c. *Lawnock v. Brown*, 2 B. & A. 592. To constitute such notice, no particular words are required. *R. v. Curtis*, Fost. C. L. 136, 137.

An indictment for manslaughter charged that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him, whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed:—*Held*, that this evidence sufficiently supported the indictment. *R. v. Hickman*, 5 C. & P. 151.

If a servant of A. (who is not lord of the manor) find a night-poacher on the lands of B., and pursue him with intent to take him, this is such an attempt at an illegal arrest, that if the poacher shoot the servant with the gun he has in his hand, and kill him, this will be manslaughter only. *R. v. Davis*, 7 C. & P. 785. *See* Arrest, vol. i. p. 519.

[1] If any person attempt to rob or murder another, in or near the highway, or in a dwelling-house, or attempt burglariously to break into any dwelling-house in the night time, and be killed in the attempt, the slayer shall be acquitted and discharged, for the homicide is justifiable, and the killing is without felony. 1 Hale, 481; *see* 24 & 25 Vic. c. 100, s. 7. And so if a man be killed in attempting to burn a house (1 Hale, 488); or to break open a house in the daytime with intent to rob (Id.); or to commit any other forcible or atrocious crime. Fost. 273; Bract. 155; Kel. 129; 1 Hale, 484. *R. v. Levett*, Cro. Car. 538; Fost. 299. *R. v. Ford*, Kel. 51. So a woman will be justified in killing a man who attempts to ravish her. Bac. Elem. 34; 1 Hawk. c. 28, s. 22. And in these not only the party whose person or property is thus attached, but his servants or other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 Hale, 481; Fost. 274. But this rule does not apply to felonies without force, as picking pockets (1 Hale, 488); nor to misdemeanors of any kind; and the forcible and atrocious crime must be clearly manifested. Id. 484; *R. v. Scully*, 1 C. & P. 319. *Reg. v. Dodson*, 2 Den. C. C. 35; 3 C. & Kir. 148.

[2] The person killed must be "a reasonable creature in being, and under the king's peace." Therefore, to kill a child in its mother's womb is no murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. 3 Inst. 50. *Reg. v. West*, 2 C. & Kir. 784. See *Reg. v. Knight*, 2 F. & F. 46. And if a mortal wound be given to a child whilst in the act of being born (for instance, upon the head, as soon as the head appears, and before the child has breathed), it may be murder, if the child is afterwards born alive and dies thereof. *R. v. Senior*, 1 Moo. C. C. 346. The entire child must have been born into the world in a living state to support a charge of murder. *R. v. Poulton*, 5 C. & P. 329. And it is not conclusive evidence of this that it is shown the child must have breathed. *R. v. Sellis*, 1 Moo. C. C. 850. *R. v. Crutchley*, 7 C. & P. 814. There must be an independent circulation in the child before it can be accounted alive. *Reg. v. Wright*, 9 C. & P. 754. *R. v. Enoch*, 5 id. 539. But the fact of the child's being still connected with the mother by the umbilical cord, will not prevent the killing from being murder. *Reg. v. Reeves*, 9 id. 25. *Reg. v. Trilloe*, 2 Moo. C. C. 260; Car. & M. 650. *R. v. Crutchley*, *supra*.

By 24 & 25 Vic. c. 100, s. 60, "if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had been recently born, and that such person did by some secret disposition of the dead body of such child endeavour to conceal the birth thereof; and thereupon the court may pass sentence as if such person had been convicted upon an indictment for the concealment of the birth."

As to concealment of birth, *see* Child, vol. iii. p. 96.

[3] "All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her majesty or not, and whether he be within the queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years, or be imprisoned for any term not exceeding two years, with or without hard labour." 24 & 25 Vic. c. 100, s. 4.

V. Of Attempts to Murder.[1]

VI. Sending Letter Threatening to Murder.[2]

[1] "Whosoever shall administer to, or cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." 24 & 25 Vic. c. 100, s. 11.

"Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." (Sect. 12.)

"Whosoever shall set fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." (Sect. 13.)

"Whosoever shall attempt to administer to, or shall attempt to cause to be administered to, or be taken by, any person, any poison or other destructive thing, or shall shoot at any person, or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." (Sect. 14.)

"Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." (Sect. 15.)

As to administering Poison.—The indictment must allege the thing administered to be poisonous or destructive. *R. v. Powles*, 4 C. & P. 571. A count laying the intent to commit murder generally, may be joined with a count laying it as an intent to murder a particular individual. *Reg. v. Ryan*, 2 M. & Rob. 213. Although the poison be offered by the hands of an innocent agent, that will be an administering by the prisoner, if he intended that it should be taken by some one (*R. v. Harley*, 4 C. & P. 369. *Reg. v. Michael*, 2 Moo. C. C. 120; 9 C. & P. 356. *R. v. Lewis*, 6 C. & P. 161. *Reg. v. Ryan*, *supra*. *Reg. v. Smith*, Dears. C. C. 559). And the indictment will be sustained if poison were administered with the intent, notwithstanding it was given in such a form as to be innocuous; as, for example, cocculus indicus berries in the pod. *Reg. v. Cluderay*, 1 Den. C. C. 514; 2 C. & Kir. 907. Evidence of administering at different times may be given to show the intent. *R. v. Mogg*, 4 C. & P. 364.

As to Wounding with intent.—It is not necessary that the prosecutor should have been wounded in a vital part to support the indictment. *R. v. Hunt*, 1 Moo. C. C. 93. *R. v. Griffith*, 1 C. & P. 298. If the intent be not proved, the defendant may be convicted of unlawfully wounding, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawfully wounding; that is, by penal servitude for three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vic. c. 100, s. 20.

As to attempts to Shoot.—Where the gun could not be fired, not being primed (*R. v. Carr*, R. & R. 377. See *Reg. v. Baker*, 1 C. & Kir. 254. *Reg. v. James*, id. 530), or the touch-hole being plugged (*R. v. Harris*, 5 C. & P. 159), it was held not to be loaded arms within a similar enactment.

[2] "Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping." 24 & 25 Vic. c. 100, s. 16.

VII. Of Accessories.[1]

VIII. „ the Indictment.[2]

(A) *Form of Indictment.*[3]

(B) *Venue.*[4]

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[1] An accessory before the fact is a party who counsels, commands, or directs the killing of any person, and is himself absent at the time of the fact being done, and though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact; so that if A. bids his servant hire somebody, no matter whom, to murder B., and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw or heard of, to do it, A. is an accessory before the fact. An accessory after the fact in murder is where a person, knowing a murder to have been committed, receives, relieves, comforts, or assists the offender. It may be here observed, however, that if one wound another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make such person accessory to the homicide; for till death ensues there is no felony committed.

Where a party is indicted as an accessory after the fact with the principal in a case of murder:—*Held*, that if the latter is found guilty of manslaughter only, the former may be found guilty as accessory to the lesser offence: the question for the jury in such cases is, whether the prisoner, knowing the offence to have been committed, was assisting in concealing the offence, or in any way aiding the offender to escape justice. *Rex v. Greenacre*, 8 C. & P. 32. Where the parties were charged as accessories to murder, the principal being insane:—*Held*, that if aware of the malignant purpose of such insane party, they entertain it and share in that purpose with him, and are present, aiding and abetting, and assisting him in the commission of acts fatal to life, they are principals for what is done by his hand. *Reg. v. Tyler*, id. 616.

In order to make an abettor to a manslaughter a principal in the felony, he must be present, aiding and abetting the fact committed. *See* 1 Hale, 438, 439. But there cannot be any accessories before the fact in manslaughter, because it is presumed to be altogether sudden and without premeditation. Id. 437; 1 Hawk. P. C. c. 30, s. 2.

[2] "In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased, and it shall be sufficient in any indictment against any accessory to any murder or manslaughter, to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed." 24 & 25 Vic. c. 100, s. 6.

A. was indicted for the wilful murder of B., and C. was indicted for receiving, harbouring, and assisting A., well knowing that he had committed the felony and murder aforethought:—*Held*, that if the offence of A. was reduced to manslaughter, C. might, notwithstanding, be found guilty as accessory after the fact. Where it appears that one person's death is occasioned by the hand of another, it is for that other to show, either by evidence or by inference from the circumstances of the case, that his offence is of a mitigated character, and does not amount to the crime of murder. *Rex v. Greenacre*, 8 C. & P. 35.

[3] Central Criminal Court } The jurors of
to wit. } our Lady the Queen present that J. S., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the first day of June, in the year of our Lord feloniously, wilfully, and of his malice aforethought, did kill and murder one J. N., against the peace of our Lady the Queen, her crown and dignity.

Formerly great particularity was necessary in the statement in the indictment of the manner in which the death was caused, and in the proof relating thereto. It was necessary to state the instrument or means by which the mortal injury was inflicted, and to prove that the deceased was killed by the same instrument or means, or by some other instrument or means capable of producing the same kind of death. 2 Hale, 125. The inconveniences arising out of this are now obviated by the abolition of the necessity of stating the means of death in the indictment. 24 & 25 Vic. *supra.*

[4] "Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the queen's dominions or without, and whether the person killed were a subject of her majesty or not, every offence committed by any subject of her majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished, in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in

(C) *Plea of* Autrefois Acquit.[1]

IX. Sentence and Execution.[2]

MUSIC, Copyright in. *See* Copyright, vol. iii. p. 251.

MUTINY Act. *See* 24 Vic. c. 7; *post*, Soldier.

N.

NAME.[3] *See* also Bills and Notes, vol. ii. p. 400; Indictments, *ante*, pp. 112, 113; Marriage, *ante*, p. 443; Misnomer, *ante*, p. 488.

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the same manner in all respects as if such offence had been actually committed in that county or place: Provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland, for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this act." 24 & 25 Vic. c. 100, s. 9.

"Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt, in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt, at any place in England or Ireland, shall die of such stroke, poisoning, or hurt, upon the sea or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished, in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place." (Sect. 10.)

Upon a prosecution for a murder committed abroad by one subject upon another under 9 Geo. 4, c. 31, s. 7:—*Held* that, in order to convict, the jury must be satisfied that the prisoner was a British-born subject; but that the declaration of the prisoner as to where he was born, unexplained, was as against himself evidence to go to the jury. *Rex v. Helsham*, 4 C. & P. 394. *See ante*, Indictments, p. 105.

[1] Where a man has been acquitted generally upon an indictment for murder, *autrefois acquit* is a good plea to an indictment for the manslaughter of the same person; and, *è converso*, where a man has been acquitted on an indictment for manslaughter, he shall not be indicted for the same death as murder, the fact being the same, and the difference only in the degree; and upon similar grounds it should seem that one who has been convicted upon an indictment for manslaughter, and had his clergy allowed, may plead *autrefois convict* to an indictment charging the same death upon him as murder; and it is clear that *autrefois convict* of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder (*see* 4 Co. 45); and *autrefois acquit*, or *autrefois attaint*, upon an indictment for murder, is a good plea to an indictment charging the same death as petit treason. *See* 2 Hale, 246, 252; Fost. 329.

[2] "Whosoever shall be convicted of murder shall suffer death as a felon." 24 & 25 Vic. c. 100, s. 1.

"Upon every conviction of murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence, and in respect thereof, may be had and taken in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken before the passing of this act upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon." (Sect. 2.)

"The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct." (Sect. 3.)

"Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, or to pay such fine as the court shall award, in addition to or without any other discretionary punishment as aforesaid." (S. 5.)

[3] Names of persons not christened are surnames only. *Rex v. Bishop of Chester*, 1 Ld. Raym. 305.

The true name of a person or place is that which precedes, and not that which follows an *alias dictus*. *Rex v. Severn*, Say. 279. A statute requiring a Christian name is complied with if the usual abbreviations be used. *Reg. v. Bradley*, 7 Jur. N. S. 757; 3 L. T. (N. S.) 853

A dignity is parcel of a name, as well as the name of baptism. *Rex v. Bishop of Chester*, Carth. 440; 1 Ld. Raym. 292.

In an Indictment. — The Christian name of the defendant must be such as he obtained at baptism or confirmation. *See* 2 Roll. Abr. 145; Co. Litt. 3; or both. *Walden v. Holmas*, 6 Mod. 115, 116. It is said that a man can have but one Christian name (2 Hale, 175), but that must be understood to mean merely that he cannot be named "John *alias* James," or the like; that is, that a second Christian name cannot be given to him after an *alias dictus*. See *R. v. Newham*, 1 Ld. Raym. 562. *Scott v. Soans*, 3 East, 111. But it is quite clear that if a man has acquired two names at baptism, or one at baptism and another at confirmation, he may be indicted by both. Arch. C. P. 32.

The Christian name and surname of the party injured must be stated, if the party injured be known. 2 Hawk. c. 25, 71, 72. The name so stated must be either the real name of the party injured, or that by which he is usually known. *R. v. Norton*, R. & R. 510. *R. v. Berriman*, 5 C. & P. 601. *Anon.* 6 C. & P. 408. *R. v. J. Williams*, 7 C. & P. 298. *See ante*, Larceny, p. 311. As, for instance, upon an indictment for the murder of a bastard child, it cannot be described by the name of its mother, unless that name have been gained by reputation. *R. v. Clark*, R. & R. 358. *R. v. Ellen Waters*, 1 Moo. C. C. 45. *Reg. v. Mary Evans*, 8 C. & P. 765. *Reg. v. Stroud*, 2 Moo. C. C. 270; 1 C. & Kir. 187. Arch. C. P. 33.

A bastard is *quasi nullius filius*, and can have no name or reputation as soon as he is born. Co. Litt. 36. Where, therefore, upon an indictment for the murder of a female bastard child, whose name was to the jurors unknown, it appeared that the child had not been baptized, but that the mother, the prisoner, had said she should like to have it called Mary Ann, and had herself called it Mary Ann, and Little Mary; it was held that the child had not acquired a name by reputation. *R. v. Mary Smith*, 1 Moo. C. C. 402.

A child cannot be described as "a certain male infant of tender age: to wit, of the age of, &c., and not baptized." The indictment must either state its name, or (if it have no name, either by baptism or reputation; see *Reg. v. Stroud, supra*), state it to be to the jurors unknown. *Reg v. Biss*, 2 Moo. C. C. 93; 8 C. & P. 773. *Reg. v. Hicks*, 2 M. & Rob. 302. But the absence of a name was held to be sufficiently accounted for by the child being described as "then lately before born of the body of A. B." *Reg. v. Hogg*, 2 M. & Rob. 380. See *Reg. v. Willis*, 1 Den. C. C. 80; 1 C. & Kir. 722.

In Bills and Notes. — See vol. ii. p. 408, and *infra*; also Abbreviations, vol. i. p. 43.

In Bill of Sale. — See vol. ii. p. 500.

In a Deed. — The parties ought to be described by their proper Christian and surnames. An imperfect designation, however, will not vitiate, provided it is sufficient to distinguish the party from all others; and where a person is named by different Christian names in different parts of an instrument, parol evidence is admissible to show who was intended, and by whom it was executed. *The Queen v. Inhabitants of Wooldale*, 6 Ad. & E. 549.

In a Will. — Any words that are sufficient to denote the persons meant by the testator, and to distinguish them from all others, operate as a good description. 6 Cruise, D. 38, c. 10, s. 23; 1 Jarm. Wills, 2d ed. 310, 311; 1 Powell on Devises, 337, 342; Wigr. Ev.

When there is a mistake in the Christian or surname, or in both names, it will be corrected if the intention clearly appears in any other part of the will, or by parol evidence. 1 Rop. Leg. by White, 164, 166. Burton's *Compendium*, s. 605. *Mostyn v. Mostyn*, 5 H. of L. 155; Wigram on Wills, 51. *Blundell v. Gladstone*, 2 Phil. 279. *Bermasumini v. Atkinson*, 17 Jur. 128. *In re Blackman*, 16 Beav. 377; 1 Jarm. Wills, 2d ed. 312, 368.

Parol evidence will be admitted to supply a blank for a Christian name, but not a blank for an entire name. 1 Rop. Leg. by White, 186.

If, however, a legatee is described by the initials of his name only, parol evidence may be given to prove his identity. Id. 187. But if a testator devises to certain persons by no other name or description than by certain letters of the alphabet, arbitrarily chosen for the purpose, and refers to another paper signed by him but not attested, as explaining who were intended by those letters, such a devise is void. *Clayton v. Lord Nugent*, 13 Mee. & W. 200.

Where the bequest is to relations of a particular name, as "my nearest relations of the *name* of Pyot," the word "name" has been considered equivalent to the expression "stock;" so that where a female relation was one of the nearest of kin, and entitled to the described name by birth, her claim was sustained to a share of the legacy, although she had lost the name of Pyot by her marriage. *Pyot v. Pyot*, 1 Ves. sen. 336.

Where the bequest was, "to the first and nearest of my kindred being male, and of my name and blood," it was held that a person who was first and nearest of blood to the testator, and a male, but not originally of the testator's name, though he assumed it by the king's license, could not succeed in his claim. *Leigh v. Leigh*, 15 Ves. 92. *See* also *Barlow v. Bateman*, 2 Bro. C. C. 272. Toml. edit.

Assumption and Alteration of Surnames. — Surnames were unknown in England before the Conquest, and were not in common use till the twelfth century. They were originally derived from birthplaces, stations in life, callings, exploits, or personal characteristics, and were written above and not after baptismal name. Lord Coke says: "It is requisite that a purchaser be known by the name of baptism and his surname, and

NATURALISATION[1] and Denization.[2] *See* also Alien, vol. i. p. 285; Allegiance, id. p. 305.

that especial heed be taken of the name of baptism, for that a man cannot have two names of baptism, though he may *have divers surnames*. And again, it is holden in our ancient books that a man may have divers names at divers times, but not divers Christian names." *Barlow v. Bateman*, 2 Bro. C. C. 170.

Jekyll, M. R., observed: "I am satisfied the usage of passing acts of parliament for the taking upon one a surname is but modern, and that any one may *take upon him whatever surname*, and as many surnames as he pleases, without an act of parliament." The law on the subject in a recent discussion (16th March, 1863), in parliament was stated to be, "that any person may take any surname, the law recognising new names when assumed publicly and *bonâ fide*. No act or royal license is needed to sanction the change of names. A name assumed by the voluntary act of a young man at his outset in life, adopted by all who know him, and by which he is constantly called, becomes as much and effectually his name as if he had obtained an act of parliament. The royal license does not actually confer the name, but merely gives it publicity or notoriety. To ask for the license of the Crown is a modern practice and an innovation."

Mr. Falconer, in his work on Surnames, states:—"That in the year 1735, when the question of the manner in which surnames could be changed was before the House of Lords, no notice was taken of any supposed privilege of the Crown to grant licenses on such occasions. 2. That any person may take any surname, and that the law recognises the new name when assumed publicly and *bonâ fide*. (Chief Justice Tindal, Lord Stowell, &c.) 3. That a man may assume what surname and as many surnames as he pleases. (Sir Joseph Jekyll, M. R.) 4. That where both Christian and surname have been changed, the law will recognise the assumed names. (Lord Ellenborough, Chief Justice.) 5. That no act of parliament or royal license is needed in order to sanction a change of name, unless a new name is directed by a donor of land or money to be assumed by the donee, with such or some other particular sanction, and subject to the forfeiture of the donation if the name should not be assumed in the manner directed by the terms of such conditional donation. (Lord Chief Justice Tenterden and the Court of King's Bench.) 6. That when a name is assumed by royal license, it is so assumed by the act of the person taking the name, and the name is not conferred by the license. (Lord Chancellor Eldon.) 7. That the effect of a royal license is merely to give publicity or notoriety to the change of name. (Chief Justice Tindal.) 8. That when, by any act of parliament, judges have the control of a particular roll of names, they will, on a change of name, when the change is publicly and *bonâ fide* made, direct the new name to be added to the roll, though such name has been assumed without a royal license, and by the mere act of the person whose name is on the roll. 9. That when any person has legally assumed a name by his own act, it is compulsory on courts of law to recognise the legal act. *The King v. the Inhabitants of Billinghurst*, 3 N. & S. 250. *See ante*, Marriage, p. 443.

Hence a signature of the name of another, in order to render it criminal, must not only be false in fact, but false to the knowledge of the party making it; and therefore, if A. attach B.'s name to a bill as acceptor, with a *bonâ fide* belief derived from their course of dealing that he had the liberty to do so, it is no felonious forgery. *Rex v. Forbes*, 7 C. & P. 224. But it must clearly appear that A. had good cause to believe himself authorised to attach it, and did so believe himself, and did not intend to defraud any one. *Reg. v. Parish*, 8 C. & P. 94. And proof that he had on two or three previous occasions acted in similar manner without B. making any objection, would constitute such good cause of belief on A.'s part. *Reg. v. Beard*, id. 143. *R. v. Bontien*, R. & R. 260. *Peacock's case*, id. 278. *See* Forgery, vol. iv. p. 502.

[1] Till the year 1844, naturalisation could not have been effected but by act of parliament. In that year not only were important restrictions removed in the case of parliamentary naturalisation, but naturalisation itself may be accomplished in a far less troublesome and expensive manner, viz. by obtaining the certificate of a secretary of state.

By stat. 7 & 8 Vic. c. 66, an alien coming to settle in any part of the United Kingdom may memorialise a secretary of state for the purpose of obtaining a certificate of naturalisation, which, on proving the truth of his memorial, will be granted to him.

By means of this certificate, on taking the oath specified in the act, he will be invested with all the rights of a natural-born British subject, except that of becoming a privy councillor or member of parliament, and also with such other exceptions as may be specified in the certificate. Any foreign woman, moreover, married to a natural-born or naturalised subject, shall be taken to be herself naturalised, and have all the rights and privileges of a natural-born subject. Aliens may also be naturalised in any of the British colonies or possessions (10 & 11 Vic. c. 83), subject to confirmation or disallowance by the queen.

[2] A denizen is an alien born, but who has obtained, *ex donatione regiæ*, letters patent to make him an English subject—a high incommunicable branch of the royal prerogative. A denizen is a kind of middle state

NAVIGATION. *See* Canals, vol. iii. p. 20; *post*, Negligence, p. 517; Rivers; Ship and Shipping; Tolls.

NAVIGATION Acts.[1]

Negligence in. *See post*, Negligence, p. 517.

NAVY.[2] *See* Mutiny Act, 25 Vic. c. 5; *post*, Office and Officer.

I. Relative to the Officers, p. 515.
(A) *Appointment of*, p. 515.
(B) *Duties of*, p. 515.
(C) *Rights of*, p. 515.
(D) *Liabilities of*, p. 516.
II. Relative to Seamen, p. 516.
III. „ Agents to, p. 516.
IV. „ the Stores of, p. 516.

I. Relative to the Officers.

(A) *Appointment of.*[3]
(B) *Duties of.*[4]
(C) *Rights of.*[5]

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between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son; and upon a like defect of hereditary blood the issue of a denizen born before denization cannot inherit to him, but his issue born after may. And no denizen can be of the privy council or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of land, &c. from the Crown; but if an alien purchase lands, and before office found the sovereign make him a denizen by letters patent, and confirm his estate, the confirmation will be good. Sug. Concise View, 540; Smith, R. & P. P. 1032.

[1] These constituted a protective privilege for British shipping and commerce as against those of foreign countries. They have been very recently repealed, and both foreign and British shipping are now placed on the same footing, down even to the coasting-trade of the United Kingdom. It is, however, sought to secure a reciprocity by arming the queen with retaliatory powers, by order in council, against those countries who do not follow the example of England. *See* 16 & 17 Vic. c. 107, ss. 325, 326, and 17 & 18 Vic. c. 5. *See post*, Ship and Shipping.

[2] The system of government and discipline established in the navy is directed by certain express rules and articles enacted by the authority of parliament. In these articles almost every possible offence is enumerated. It is to be found in stat. 22 Geo. 2, c. 22, amended by subsequent acts.

[3] The appointment of, and authority given to naval officers, is vested in the Admiralty. *Waterhouse v. King*, 2 East, 507.

[4] It is the duty of an officer to obey orders, if physically possible. *Johnstone v. Sutton*, 1 T. R. 546, 784.

[5] The captain of a king's ship may lawfully carry bullion. *Semble contra*, for in *Brisbane v. Daws*, 5 Taunt. 145, it was held, the captain of a king's ship cannot lawfully carry bullion privately as freight; and in *Montague v. Janverin*, 3 id. 442, it was held, that a flag-officer had no right to share in the gratuity given to a captain, even when he has orders for carrying treasure: nor is a flag-officer commanding on a foreign station entitled to any share of the freight of a merchant ship, given to the captain of a ship of war for the conveyance of private treasure on board the said ship to this country, in pursuance of orders issued to the captain by the flag-officer, under the authority of the Admiralty. *Warren v. Shirreff*, 5 M. & S. 32.

No action lies against a superior officer for discipline, however severe, if incident to his power; nor does it lie for delay in bringing an officer under arrest to a court-martial (*Sutton v. Johnstone*, 1 T. R. 493, 548, 784); or where A., being a captain in the navy, is accused by his commander-in-chief of neglect of duty, disobedience to orders,

(D) *Liabilities of.*[1]

II. Relative to Seamen.[2]
III. „ Agents to.[3]
IV. „ the Stores of.[4]

NAVY Bill.[5]

NECESSITAS facit licitum quod alias non est licitum. *Necessity makes that lawful which otherwise is not lawful.* 10 Co. 61 a.

NECESSITAS inducit privilegium quoad jura privata. *Necessity carries with it a privilege as to private rights.* Bacon's *Max.* 28, reg. 5.[6]

NECESSITAS quod cogit defendit. *Necessity defends or justifies what it compels.* 1 Hale, P. C. 54. Applied to the acts of a sheriff or ministerial officer in the execution of his office. Broom's *Max.* 7, 8 [10].

NE exeat Regno.[7]

NEGATIO destruit negationem, et ambæ faciunt affirmationem. *A negative destroys a negative, and both make an affirmative.* Co. Litt. 146 b. Lord Coke cites this as a rule of grammatical construction not always applying in law.

&c., and being tried by a court-martial is honourably acquitted. A. then brings an action at law against his commander for a malicious prosecution:—*Held*, that no such action will lie. *Sutton v. Johnstone* (in error), 1 Bro. P. C. 76; 1 T. R. 493, 784.

[1] The commanding officer is not answerable for the negligence of an inferior officer on duty (*Nicholson v. Mouncey*, 15 East, 384); nor for necessaries supplied to the crew at his instance, unless an intention on his part to be responsible clearly appears. *Keate v. Temple*, 1 B. & P. 158.

A captain who earns freight for carrying bullion is answerable if it be lost. *Hatchwell v. Cooke*, 2 Marsh. 293; 6 Taunt. 577.

[2] The power of impressing seafaring men into the royal navy is of ancient and long-continued exercise, and its legality has been repeatedly recognised by the legislature. Very recently, however, such inducements to volunteer for the royal navy have been held out as will virtually supersede impressment. *See* 5 & 6 Wm. 4, c. 24; 16 & 17 Vic. c. 69.

The word "officers" in the 44 Geo. 3, relative to the arrest of seamen, means those to whom execution of the process has been delegated by the court whence it emanated. *Sturmy v. Smith*, 11 East, 25.

[3] It seems, to discharge a navy agent, it ought to be a power of attorney, as directed by the 26 Geo. 3, where he pays money to third persons. *Macdonald v. Pasley*, 1 B. & P. 161. And by the 31 Geo. 2, c. 10, s. 30, no person receiving wages, &c. for the service of any officer, seaman, or other person in the royal navy, shall take or retain any more than sixpence in the pound, &c. under a penalty of 50*l.* *Walsh v. Toulman*, 6 East, 541.

[4] *See* 9 & 10 Wm. 3, c. 41, s. 9; 40 Geo. 3, c. 89; 18 & 19 Vic. c. 117; Arch. C. & Ev. 682, 150, n.; 25 & 26 Vic. c. 64; and 30 L. J. (N. C.); 16 id. 170.

[5] A navy bill, it has been held, does not pass without assignment. *Maclish v. Ekins*, Say. 73. *M'Lynch v. Ekins*, 13 East, 515, n. *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157. This decision seems inconsistent with *Goldsmyd v. Goaden*, cited 1 B. & P. 649. In that case the plaintiffs, who were brokers, advanced money on three navy bills and a deposit of scrip; and though it afterwards appeared that both the navy bills and scrip were left by the defendant in the hands of the party depositing for a particular purpose, and were not his property, but the property of the defendants, yet, on a bill filed in equity, it was referred to the master, to take an account of what was due to the plaintiffs; and an issue at law was refused by the Chancellor, who thought the question too clear to be disputed. *Jones v. Ryde*, 1 Marsh. 157.

[6] "The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; and therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself." Broom's *Max.* 6, 11 [8, 14]. "But necessity privileges only *quoad jura privata;* for in all cases, if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuses not." Bac. *Max.* 32.

[7] This is a prerogative writ, available

NEGATIVE Pregnant.[1]

NEGLIGENCE. *See* also Accident, vol. i. p. 82; Bank of England, vol. ii. p. 133; Building Acts, id. p. 536; Distress, vol. iv. p. 28; Easements, id. p. 150. *See post*, Nuisance, vol. vi. p. 1.

I. As to the General Principles applicable to, p. 518.

II. „ Particular Persons, p. 518.

(A) *Agents.* *See post*, Principal and Agent.
(B) *Agisters of Cattle, &c.*, p. 520.
(C) *Apothecary.* *See* Medical Practitioners, *infra.*
(D) *Attorney.* *See* vol. ii. p. 5.
(E) *Bailee.* *See* Bailment, vol. ii. p. 98.
(F) *Banker.* *See* Banker, id. p. 119.
(G) *Builders.* *See* Div. VII. p. 527.
(H) *Carriers.* *See* Bailment, vol. ii. p. 98.
(I) *Corporations*, p. 520; and vol. iii. p. 266.
(J) *Drivers.* *See* Div. IV. p. 523.
(K) *Drovers*, p. 520.
(L) *Fellow-Servant.* *See ante*, Master and Servant, p. 461.
(M) *Ferrymen*, p. 520.
(N) *Guests*, p. 521.
(O) *Infants*, p. 521.
(P) *Lender of Goods*, p. 521.
(Q) *Master and Servant.* *See ante*, p. 461.
(R) *Medical Practitioners*, p. 521.
(S) *Principal and Agent.* *See post*, Principal and Agent.
(T) *Principal and Surety.* *See post*, Surety.
(U) *Public Officers, Trustees, &c.*, p. 522.

III. As to Animals. *See* vol. i. p. 352.

IV. „ Management of Horses and Carriages, p. 523.

(A) *Breaking in Horses on Highways*, p. 523.
(B) *Driving*, p. 523.

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through the Court of Chancery, which is issued to prevent a person from leaving the realm, even though his usual residence is in foreign parts. It will not be granted except in cases of *equitable* debts and claims, for in regard to civil rights it is treated in the nature of an equitable bail.

The equitable demand for which the writ will be issued must be certain in its nature, of a pecuniary character, and actually payable, and not contingent. *See* 1 Madd. 278; Smith's *Equity*, 349; 2 Spence's *Equity*, 122.

[1] "In pleading, a negative implying also an affirmative." Cowell. "Such a form of negative expression as may imply or carry within it an affirmative." Steph. Pl. 381. It is considered as a defect, because the meaning of such a form of expression is ambiguous. Serjeant Stephens illustrates it thus: "In trespass for entering a plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so, and that he entered by that license. The plaintiff replied that he did not enter by her license. This was considered as a negative pregnant, and it was held that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together." Cro. Jac. 87. It will be observed, that this traverse might imply or carry within it that the license was given, though the defendant did not enter by that license. It is therefore, in the language of pleading, said to be pregnant with that admission; viz. that a license were given. Steph. Pl. 381.

V. As to Navigation of Vessels, p. 524.

(A) *Admiralty Regulations as to Lights, &c.*, p. 525.

(B) *Nature and Extent of Liability*, p. 525.

VI. As to Management of Docks, p. 526.

VII. „ Negligence in Management of Real Property, and Acts of Parties connected therewith, p. 527.

(A) *Builders, Contractors, Surveyors, &c.*, p. 527.

(B) *As to Drains, &c. See post*, Nuisance, vol. vi. p. 1.

(C) *Leaving open Apertures, Areas, &c., or Heaps, &c. adjacent to Highways, Commons, &c.*, p. 529.

(D) *Removing adjoining Houses or Land. See post*, Nuisance.

(E) *Sewers, Drains, &c. See post*, Nuisance.

(F) *Overloading Upper Part of Buildings*, p. 531.

(G) *Railways, Railway Stations, Bridges, and Works. See post*, Nuisance; Railways.

(H) *Leaving open Apertures or Obstructions in Shops, &c.*, p. 531.

(I) *Negligence in using Cranes, Tackle, &c. on Highways, Wharves, &c.*, p. 532.

VIII. As to Compensations to Representatives of Deceased Parties under Lord Campbell's Act, p. 532.

IX. Remedy by Action, p. 533.

X. „ Indictment. *See ante*, Murder and Manslaughter, p. 501.

I. As to the General Principles applicable to.[1]

[1] Negligence consists in omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case causing unintentionally mischief to a third party. A party who takes reasonable care to guard against accidents arising from ordinary causes is not liable for accidents arising from extraordinary ones. *Withers v. North Kent Railway Co.* 27 L. J. Ex. 417. *Briddon v. Great Northern Railway Co.* 28 id. 51.

Ordinary diligence is not the proper legal phrase to express the degree of care which a party is bound to use. It should be such diligence as a prudent man in such a situation, and under the circumstances, would have observed to prevent accident to others. But although the defendant may seem to have exercised ordinary care, and the injury occurred in part from natural causes which he could not control, yet a verdict for the plaintiff will not be set aside. *Siordet v. Hall*, 1 M. & P. 561. *Templeman v. Haydon*, 12 C. B. 507.

A much stricter standard than ordinary care, testing the word "ordinary" by the mere local or limited custom and usage in like cases, has been often applied. Thus, the law requires of persons having in their custody instruments of danger, that they shall keep them with the utmost care. Therefore, where the defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage occurred to the plaintiff's son, in consequence of the girl presenting the gun at him and drawing the trigger, when the gun went off:—*Held*, that the defendant was liable. *Dixon v. Bell*, 5 M. & S. 198. And even the greatest care has been sometimes held to be no defence. As where a druggist, requested to compound a certain medicine, grinds the different ingredients in a mill used to grind poisonous drugs, without properly cleaning it, the rule as to the degree of care and diligence necessary to exempt a party from liability does not apply: for a druggist is bound to know the properties of the medicine he vends; and he and his servants are liable to a person injured by a prescription improperly prepared, even though he used extraordinary care and diligence in compounding the medicine. 1 Hill on Torts, 128. And in some cases want of ordinary care, and gross negligence, have been treated as alike, cre-

ating a liability for an injury arising therefrom. Thus, an action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house is burnt down; and upon plea of not guilty, and that there was no negligence:—*Held*, that it was properly left to the jury to say whether the defendant had been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would have observed. *Vaughan v. Menlove*, 3 Bing. N. S. 468.

The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. *Davies v. Mann*, 10 Mee. & W. 546; 6 Jur. 954; 12 L. J. Ex. 10. *Witherby v. Regent's Canal*, 12 C. B. 2; 3 F. & F. 61; 6 L. T. (N. S.) 253.

The principle, that a plaintiff who has contributed to an injury occasioned by the negligence of the defendant cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. *Lynch v. Nurdin*, 4 Per. & D. 672; 1 Q. B. 29; 5 Jur. 797. See *Lygo v. Newbold*, 9 Ex. 302. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and the plaintiff, a child under seven years of age, during the servant's absence climbed on the wheel, and other children urged forward the horse, whereby the plaintiff was thrown on the ground and the wheel fractured his leg:—*Held*, that the jury were justified in finding a verdict for the plaintiff, if they were of opinion that there was negligence on the part of the servant (Id.):—*Held*, also, that the co-operation of third parties in the injury was not a ground of defence, if the means of injury were negligently left, where it was extremely probable that they would be set in motion. See *Illidge v. Goodwin*, 5 C. & P. 192.

A person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence. *Greenland v. Chaplin*, 5 Ex. 243; 19 L. J. Ex. 293. Therefore, where the plaintiff, a passenger on board a steamboat, was injured by the falling of an anchor, caused by the defendant's steamboat striking the other steamboat:—*Held*, that it was improper to direct the jury, that if they thought the collision was owing to the bad navigation of the defendant's steamboat they should find for the plaintiff, unless there was negligence either in the stowage of the anchor, or in the plaintiff putting himself in the place where he was, so as to lead or contribute to the mischief, in which case the plaintiff could not recover. *Quære, per Pollock, C. B.*, whether a person guilty of negligence is responsible for all possible consequences of it, although they could not have been reasonably foreseen or expected?

In an action for damages occasioned by the defendant's negligence, a material question is whether or not the plaintiff might not have escaped the damage by ordinary care on his own part; but the defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury. *Clagants v. Dethuk*, 12 Q. B. 439.

Mere negligence, or want of ordinary care or caution, will not disentitle a plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. *Tuff v. Warman*, 5 C. B. (N. S.) 573; 27 L. J. C. P. 322, Ex. Ch.

Where there was antecedent negligence on the part of a defendant operating up to the time of the accident, and then contributing negligence on the part of the plaintiff, without which the accident would not have happened:—*Held*, that the judge was not bound to tell the jury that the defendant was not liable, unless the defendant could, by a new physical act, irrespective of such antecedent and continuing negligence, have avoided the consequences of the plaintiff's neglect. *Scott v. Dublin and Wicklow Railway Co.* 11 Ir. Com. Rep. 377.

To enable the plaintiff to maintain an action for negligence, it is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendant. *Collett v. London and North-Western Railway Co.* 16 Q. B. 984; 15 Jur. 1053; 20 L. J. Q. B. 411. However the duty may arise, if it exist and be neglected to the injury of the plaintiff, he has a right to sue for damages in an action on the case. (Id.) Where a duty was cast by the 1 & 2 Vic. c. 98 upon a railway company, to carry any officer of the post-office whom the postmaster-general might elect, for which service the company was to be remunerated by the postmaster-general, and the plaintiff was the officer elected, and the plaintiff was injured by the negligence in carrying him of the defendants:—*Held*, upon demurrer, that it was the duty of the defendants to carry the plaintiff with proper care and diligence, and that for a breach of such duty to the injury of the plaintiff, he might well sue the company in an action on the case, though there was no contract between him and the company, but the duty arose only from the obligation imposed upon the defendants by the act of parliament. (Id.)

Persons forming themselves into a society for the protection of trade, and issuing prospectuses, in which they represented that they instituted inquiries for subscribers with reference to the respectability of proposed customers:—*Held*, liable to sub-

II. As to Particular Persons.

(B) *Agisters of Cattle, &c.*[1]

(H) *Corporations.*[2]

(J) *Drovers.*[3]

(M) *Ferrymen.*[4]

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scribers for neglect to take due and reasonable care to make such inquiries. *Wood v. Woods*, 3 F. & F. 244: *Mellor, J.*

Torts which, in various points of view, we have been considering, consist wholly or chiefly of misfeasances. With regard to the right of action for a tort or wrong, which consists in the omission or refusal to do a particular act or a nonfeasance, it is said, if one undertakes to do a thing without hire or reward, no action lies for the nonfeasance. But otherwise when he enters upon the doing it, and any mischief happens through his neglect or mismanagement. As, where one assumes to take up a hogshead of wine in one cellar and lay it down in another, and lays it down so negligently that it is staved. *Coggs v. Bernard*, 1 Salk. 26. *See* Bailment, vol. ii. p. 98. But one who gratuitously accepts the office of steward of a horse-race is not responsible for a loss resulting to one who enters a horse for the race, from his mere nonfeasance in omitting to appoint a judge; at all events, unless it appears that he has actually entered upon the duties of his office. *Balfe v. West*, 13 C. B. 466. *Davis v. Black*, 1 Ad. & E. (N. S.) 900.

Under some circumstances, a loss affirmatively proved will be presumed to have resulted from the negligence of the defendant, throwing upon him the burden of disproving such negligence. In general, however, a different principle prevails, and the burden of proving negligence devolves upon the plaintiff.

[1] It is obligatory in a person who receives animals to keep for reward, to take the utmost care of them. Slight evidence of neglect suffices to obtain a verdict for compensation. Hence, where a defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order; but it did not appear that the horse had strayed through any defect in the fences, or through any of the gates having been left open: the jury, nevertheless, returned a verdict against the defendant for the full value of the horse. *Broadwater v. Blot*, Holt, 547. If the bailee suffers his fences to be defective, or puts the horse into a dangerous pasture, and the animal by reason thereof is lost or injured, this is a degree of neglect for which he is undoubtedly responsible. *Mosley v. Fosset*, 1 Roll. Abr. 4. Add. Torts, 275.

[2] An action for negligence will lie against a corporation whenever it would lie against an individual. Hence it may be supported for negligently managing the fire of a locomotive engine, whereby the plaintiff's property was burnt (*Piggott v. Eastern Counties Railway Co.* 3 C. B. 229); for not repairing a creek of the sea (*Mayor, &c. of Lynn v. Turner*, Cowp. 86); for negligence in other duties. *Matthews v. West London, &c. Co.* 3 Camp. 603. Case lies against the Bank of England for refusing to pay dividends on stock. *Partridge v. Governor, &c. of Bank of England*, 15 L. J. (N. S.) Q. B. 395. *R. v. Bank of England*, Dougl. 524. *R. v. London Assurance Co.* 5 B. & A. 899. *Anon.* Stra. 696. Against railway companies for injuries caused to houses near the lines, &c. *Turner v. Sheffield Railway Co.* 10 Mee. & W. 435. Case for distraining for toll not due. 1 Com. Dig. 128. When an action lies for neglect of duty to the public imposed by their charter. See *Mayor, &c. of Lyme v. Henby*, 2 Clark & Fin. 331. Case against mayor and aldermen of London for falsely certifying a custom to the damage of the plaintiff. *Day v. Savage*, Hob. 87.

[3] Where a butcher bought a bullock in Smithfield Market, and employed a licensed drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured the plaintiff's property, it was held that the butcher was not liable, as the drover exercised a distinct calling, and the boy who caused the mischief was his servant, not the servant of the butcher. *Milligan v. Wedge*, 12 Ad. & E. 737.

Where the defendant's bull, which was being driven along the public streets, ran at a man with a red handkerchief round his neck and gored him, and the defendant, after the accident, was heard to say that the red handkerchief caused the mischief, as a bull would run at anything red: it was held, that this was some evidence to go to a jury to show that the defendant knew that his bull was a dangerous animal. "As the circumstance of persons carrying red handkerchiefs is not uncommon," observes *Pollock, C. B.*, "and it is reasonable to expect that in every public street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing, as he did, the knowledge that if it met a person with a red garment it was likely to run at and injure him. *Hudson v. Roberts*, 6 Ex. 699; 20 L. J. Ex. 299.

[4] A lessee of a ferry hired from the defendant for one day a steam-tug and crew to assist in carrying his passengers across.

(N) *Guests.*[1]

(O) *Infants.*[2]

(P) *Lender of Goods.*[3] *See* Bailment, vol. ii. p. 108.

(R) *Medical Practitioners.*[4]

He received the fares, and the defendant was paid by him for the hire of the tug; the defendant sent and paid the crew. The plaintiff, who had contracted with and paid A. for being carried across the ferry at all times during one year, went on board the tug from A.'s pier as a passenger, for the purpose of crossing. By the negligence of the crew some tackle broke, and the plaintiff whilst on board was injured:—*Held*, that he was entitled to recover against the defendant for such negligence. *Dalyell v. Tyrer*, El. Bl. & El. 899; 28 L. J. Q. B. 52.

[1] A man who invites and receives visitors at his house is under the same obligation and liability as regards them, in respect of unusual and unsuspected dangers on his premises, as he is towards his own servants and members of his family, and he is not responsible for injuries arising from doors badly hung, and which are dangerous and unfit to be opened, unless he was himself aware of the dangerous state of the door, and the guest was wholly ignorant of it. *Roberts v. Smith*, 26 L. J. Ex. 319; 2 H. & N. 213. *Senior v. Ward*, 28 L. J. Q. B. 139; and in *Southcote v. Stanley*, 25 L. J. Ex. 339, where the declaration alleged that the plaintiff was lawfully in the defendant's house as a visitor by his invitation, and that, for the purpose of leaving the house, the plaintiff, with the defendant's permission and knowledge, opened a glass door of the defendant's which it was necessary to open, and that by the carelessness, negligence, and default of the defendant, the door was in an insecure and dangerous condition, and unfit to be opened; by reason whereof, and of the carelessness, negligence, default, and improper conduct of the defendant, a piece of glass fell from the door upon the plaintiff and injured him:—*Held*, on demurrer, that the declaration disclosed no cause of action.

[2] A. had charge of a child too young to take care of itself, and took two tickets at a railway station for the purpose of the two being conveyed on the railway. While A. and the child were on the railway after A. had taken the tickets, the child was injured by an accident, which was caused by the joint negligence of A. and the company's servants:—*Held*, that the child could not maintain an action against the company. *Waite v. North-Eastern Railway Co.* El. Bl. & El. 719; 28 L. J. Q. B. 258, Ex. Ch. See *Lynch v. Nurdin*, *ante*, p. 519.

If a horse strays on to a highway and there kicks a child, the owner is not liable unless he knew the horse was of a vicious temper. For the vicious acts of an animal of an ordinarily quiet nature the owner is, generally speaking, not liable, but for such acts as are in accordance with his ordinary nature he is liable; and he is also liable for his vicious acts if he knew that the animal was accustomed, or was likely to commit any such act. For the acts of an animal ordinarily vicious the owner is liable. *Cox v. Burbidge*, 32 L. J. C. P. 89.

[3] A railway company carried goods on their rail at mileage rates, stipulating that the owners should unload them at the station. The company kept a crane at the station, the use of which they allowed gratuitously to such owners using it themselves when they unloaded goods there. While an owner of goods carried at mileage rates was so using the crane, the crane, owing to its being in an unsafe condition, as the company knew, broke. In a declaration against the company for mischief done, the plaintiff alleged that the company had, for the purpose of enabling the owner to deliver goods, provided the crane which was necessary, and that the company professed to the public that the crane was placed at the station for the purpose, and it was intended by them to be used for the purpose. The company having traversed this allegation:—*Held*, that the finding should be in the affirmative. *Blakemore v. Bristol and Exeter Railway Co.* 8 E. & B. 1035; 4 Jur. N. S. 657; 27 L. J. Q. B. 167:—*Held*, secondly, that the company could not resist the action on the ground that the company was merely a gratuitous lender for use, inasmuch as such lender is, between himself and the party to whom he lends, liable for mischief directly resulting from the unsafe condition of the article, if that be known to the lender.

[4] A surgeon is responsible only for ordinary care and skill, and the exercise of his best judgment in matters of doubt, not for a want of the highest degree of skill. It is the duty of a patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or under the pressure of pain cannot, he has no right to hold his surgeon responsible for his own neglect. The implied contract of a surgeon is not to cure, but to possess and employ in the treatment of a case such reasonable skill and diligence as are ordinarily exercised in his profession by thoroughly educated surgeons; and in judging of the degree of skill required, regard is to be had to the advanced state of the profession at the time. So the law requires of a dentist a reasonable degree of skill and care in his professional operations, and he

(T) *Public Officers, Trustees, &c.*[1]

will not be held answerable for injuries arising from his want of the highest attainments in his profession. 1 Hilliard on Torts, 239. See *Seare v. Prentice*, 8 East, 348. *Slater v. Baker*, 2 Wils. 359. *Lanphier v. Phipos*, 8 C. & P. 479. *Hancke v. Hooper*, 7 id. 81. Either an action in tort or on the contract may be sustained. It is not necessary to aver that the defendant was retained for reward: it suffices to allege that he was retained and entered upon the employment. *Peppers v. Shepherd*, 11 Price, 400. *See ante*, Medical Practitioners, p. 483.

[1] Although where statutable powers are conferred and exercised merely for the public benefit, and in the discharge of public duties, the persons so exercising them being in the position of trustees for the public interest, may not be liable for injuries thereby occasioned; yet where such powers are conferred on parties partly for their own benefit, and exercised for their own profit, such parties are answerable for injuries occasioned by their careless exercise of the powers so conferred. *Manley v. St. Helen's Canal and Railway Co.* 2 H. & N. 840; 27 L. J. Ex. 159. Hence, commissioners acting under statutable powers may be liable for injuries arising from the execution of works which they order, and which are defective in proper precautions against danger. *Buck v. Williams*, 3 H. & N. 308; 27 L. J. Ex. 357.

Trustees of a turnpike-road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits, with gratings thereon, to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water in very wet seasons, instead of running down the ditch, as it formerly did before the alteration by the trustees, overflowed the road, and made its way into the adjoining land, and injured a colliery:—*Held*, that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings and catchpits. *Whitehouse v. Fellowes*, 30 L. J. C. P. 306; 9 W. R. 557; 4 L. T. (N. S.) 177.

The defendants were, under the 18 & 19 Vic. c. 120, overseers of the highways in the parish of Shoreditch. They employed a surveyor to repair the roads, with instructions to do the necessary repairs. The surveyor employed workmen to carry out the repairs, who were paid by the vestry. The plaintiff, whilst driving in one of the streets in the parish, was injured, in consequence of the workmen having negligently left stones in the road. The defendants did not directly order the particular act which caused the accident:—*Held*, that they were not liable to the plaintiff for the injury. *Holliday v. Shoreditch (Vestry)*, 30 L. J. C. P. 361; 11 C. B. (N. S.) 192; 8 Jur. N. S. 79; 9 W. R. 694; 4 L. T. (N. S.) 406. This subject is under the consideration of the Court of Exchequer, in *Bramley v. St. Mary-lebone*, in which a rule has been granted to show cause why a nonsuit should not be entered, no authority being shown from the vestry to the party guilty of the alleged negligence.

A corporation erected baths and washhouses under 9 & 10 Vic. c. 74. While using a drying machine, moved by steam, a person who paid a small sum for the use of it was, by reason of its improper construction, dragged against the machinery, and injured:—*Held*, that an action was maintainable, and that the corporation was the proper party to be sued, notwithstanding the affairs of the washhouses were managed by a committee consisting of some only of the members of the corporation. *Cowley v. Sunderland (Mayor)*, 6 H. & N. 565; 30 L. J. Ex. 127; 9 W. R. 668; 4 L. T. (N. S.) 720.

In an action for negligence against trustees of a harbour, it was proved that some rubbish had been shot into a berth in the harbour without the privity of the trustees, who directed their clerk to cause it to be removed, and interfered no further, and had no further knowledge in the matter; that the removal was insufficiently done at their expense, leaving the harbour unsafe; that afterwards the harbour-master, not knowing that the berth was unsafe, but knowing its original state, and what had and what had not been done, directed the vessel alleged to have been damaged by negligence to be placed in the berth, where she was placed accordingly, and suffered injury:—*Held*, that there was no evidence of negligence on the part of the trustees. *Metcalf v. Hetherington*, 5 H. & N. 719; 8 W. R. 475, Ex. Ch.

In an action against lessees as owners and possessors of a place of public exhibition, for not properly constructing and maintaining it, whereby a staircase fell, and the plaintiff, a visitor, was injured:—*Held*, that they were not responsible for latent defects in the staircase (whether in construction or material) at the time they took the building, but were only responsible for any want of due care to keep it in a reasonably safe condition, and were liable for repair of it in an improper manner, tending to weaken its strength. *Pike v. Polytechnic Institution*, 1 F. & F. 712: *Earle, J.*

Trustees incorporated for the purpose of constructing a dock, and who receive rates, and have funds which they are bound to apply in maintaining and cleansing the dock, so that it may be in a fit state for vessels to enter, are liable for injury to a vessel caused by an accumulation of mud in the dock, of which, through their servants, they had the means of knowing, and were negligently ignorant. *Mersey Docks and Harbour Board v.*

IV. As to Management of Horses and Carriages.

(A) *Breaking in Horses on Highways.*[1]

(B) *Driving.*[2]

Penhallow, 7 H. & N. 329; 8 Jur. N. S. 486, Ex. Ch. *See post*, p. 527.

[1] In *Michael v. Alestree*, 2 Lev. 173, an action was brought both against a master and his servant. The plaintiff set forth that the defendants brought a coach with two ungovernable horses into Lincoln's Inn Fields, where people were always going to and fro upon their business, and there, *improvide et absque debitâ consideratione ineptitudinis loci*, drove them to make them tractable and fit for a coach, and that the horses, being unmanageable, ran upon and injured the plaintiff. It was urged that the master, being absent, the action was not maintainable against him; that no knowledge of the horses being unruly, nor any negligence, was alleged: but judgment was given for the plaintiff.

[2] A person driving a carriage is not bound to keep on the regular side of the road; but if he does not he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road. *Pluckwell v. Wilson*, 5 C. & P. 375.

A foot-passenger is not obliged to keep on the foot pavement: he has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. *Boss v. Litton*, id. 407.

It is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing, so as not recklessly to get among the carriages. *Pollock, C. B.: Williams v. Richards*, 3 F. & F. 82.

It being equally the duty of persons crossing a street or road to look out for vehicles coming along, as it is for the drivers of those vehicles to be vigilant in not running against persons crossing. *Cotton v. Wood*, 8 C. B. (N. S.) 568; 7 Jur. N. S. 168. Therefore, a person suing an owner of a vehicle for negligence by and through the misconduct of his servant in running over him while crossing a thoroughfare, must, in order to succeed, give affirmative and preponderant evidence of neglect of duty on the driver's part. It is established, that where the evidence on each side in cases of this kind is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way. (Id.)

If a person driving his own carriage takes another person into it as a passenger, such person cannot be subjected to an action in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, both will be answerable for any accident arising from the misconduct of either in the driving of the carriage while it was so in their joint care. *Davey v. Chamberlain*, 4 Esp. 229.

The plaintiff was driving a waggon with three horses along a highway, walking in the usual way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding by at a foot pace (meeting the waggon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, and the horse kicked out and struck the plaintiff:—*Held*, that the using the spur when so near to the plaintiff was such an improper act on the part of the groom as to justify the jury in finding the defendant to have been guilty of negligence. *North v. Smith*, 10 C. B. (N. S.) 572.

Responsibility of Masters.—If the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hand, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does, in order to give effect to his master's will, may be treated by others as the act of the master. "*Qui facit per alium facit per se.*" *Alderson, B.: Hutchinson v. York, &c.* 5 Ex. 350.

Where the defendant's coachman was driving the defendant's carriage through a narrow street, which was blocked up by a luggage-van containing goods of the plaintiff's, which were being unladen and taken into the plaintiff's house, and behind the van stood the plaintiff's gig, and the defendant's coachman (there not being room for the carriage to pass) got off his box, and laid hold of the van-horse's head, and moved the van, and caused a large packing-case to tumble on the shafts of the gig and break them, it was held that the defendant was not liable for the injury, as he was not present, and the servant was not at the time executing his master's orders, or doing his master's work. *Lamb v. Palk*, 9 C. & P. 631.

If the servant, driving his master's carriage on his master's business, makes a *détour* to call on a friend, or to gratify some purpose of his own, and carelessly drives against another vehicle, the master will be answerable for the injury; but if the servant was going on a frolic of his own, without being at all on his master's business, then the master will not be liable. *Joel v. Morrison*, 6 C. & P. 503. *Mitchell v. Crassweller*,

17 Jur. 717. *See ante*, Master and Servant, p. 461.

Responsibility of Lender and Hirer. — If carriages and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage, the latter is responsible for all injury resulting from the negligent and careless driving of the vehicle, although the carriage may be in the possession and under the control of the hirer. *Laugher v. Pointer*, 5 B. & C. 572; 8 D. & R. 556. *Smith v. Lawrence*, 2 M. & R. 2. *Dean v. Branthwaite*, 5 Esp. 36. But if the latter drives himself, or appoints the coachman and furnishes the horses, the owner of the carriage cannot, of course, be made responsible for the negligence or want of skill of the coachman. *Croft v. Alison*, 4 B. & A. 590. *Hall v. Pickard*, 3 Camp. 187.

Two old ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day or drive. They gave the driver a gratuity for each day's drive; provided him with a livery hat and coat, which were kept in their house; and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage, and inflicted an injury upon the plaintiff; and it was held that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master. *Quarman v. Burnett*, 6 Mee. & W. 507. *Laugher v. Pointer*, 5 B. & C. 547. But if any directions are given by the hirer of the horses to the driver or postilion to break through a line of carriages, or to do any unusual, improper, or aggressive act; or if he interferes so as to take the actual management of the horses into his own hands, he is responsible for any damage done by the driver whilst carrying out the directions given. *M'Laughlin v. Pryor*, 4 Scott, N. R. 665. "It is undoubtedly true," observes *Parke, B.*, "that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct; as, by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of. *Quarman v. Burnett*, 6 Mee. & W. 499.

A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it driven by a friend, whom he allows to drive, is responsible for the negligence of the driver, on a declaration charging that he was possessed of and driving the horse and chaise, and that the injury was occasioned by his negligent driving. *Wheatley v. Patrick*, 2 Mee. & W. 650.

When a collision between two carriages has been caused by negligent driving on both sides, neither party can recover damages from the other; and it has been held, that every passenger who has selected the particular conveyance by which he travels is so far identified with the driver or director of its movements, that if any injury is sustained by him from collision with a rival vehicle, through the joint negligence of his own driver, and that of the driver of the rival conveyance, precluding the former from maintaining an action against the latter, the passenger is himself equally precluded, and his only remedy is against his own driver, or the employer of the latter. *Thorogood v. Bryan*, 8 C. B. 131.

Where the drivers of two rival omnibuses were competing for passengers, the one endeavoured to get before the other, and both driving at great speed, and trying to avoid a cart which got in their way, and the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured, it was held that he was not disentitled to recover damages from the proprietors of the rival omnibus, by reason of the misconduct on the part of his own driver. *Rigby v. Hewitt*, 5 Ex. 240; 19 L. J. Ex. 291. *Greenland v. Chaplin*, id. 247.

[1] *Rules to be observed.*—The rule of the river is, that if a light vessel is going free, and a loaded vessel is running close-hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Sills v. Brown*, 9 C. & P. 601: *Coleridge, J.*

The general rule of navigation, where two vessels are close-hauled and nearing one another, is, that the one on the port tack should give way, and the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision, if circumstances render them necessary. *Lady Anne*, 15 Jur. 18, Adm.

In cases of collision, the rule of the Trinity House, that where steam-vessels on different courses must unavoidably cross so near that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other, is applicable only when the vessels, by continuing their respective courses, are likely to come into collision, and when by putting their helms to port the collision may be avoided; but the rule is not applicable when either vessel, by unskilful management, is so near the shore that, by porting her helm, there would be danger of collision: in such case the vessel in her right course is justified, in spite of the rule, in putting her helm to starboard. *General Steam Navigation Co. v. Tomkin*, 4 Moore, P. C. C. 314.

(A) *Admiralty Regulations as to Exhibition of Lights, &c.*[1]

(B) *Nature and Extent of Liability.*[2]

[1] By 17 & 18 Vic. c. 104, s. 295, regulations are made by the Admiralty for the exhibition by steamboats and sailing vessels of lights at night in such places, and under such circumstances, as the Admiralty think fit, and certain rules are required (sect. 296) to be observed by vessels passing each other; and it is enacted (sect. 298), that if a collision between vessels appears to have been occasioned by the non observance of the Admiralty or statutory rules, the owner of the vessel by which any rule has been infringed shall not be entitled to recover any recompense for any damage sustained by his vessel in the collision (*Dowall v. General Steam Navigation Co.* 5 Ell. & Bl. 195; 26 L. J. Q. B. 59. *The James*, 1 Swabey, 60), unless it appear to the court that the circumstances justified a departure from the rule: the same shall be deemed (sect. 299) to have been occasioned by the default of the master, or person having charge of the vessel, unless it appear to the court that the circumstances justified a departure from the rule. The old rule of the Admiralty Court, therefore, that in case of mutual blame the damage shall be divided, has been superseded by the provisions of this statute. *Lawson v. Carr*, 10 10 Moore, P. C. C. 162. Under 25 & 26 Vic. c. 63, s. 25, on the 1st of January, 1863, a new code of regulations was issued. *See* 32 L. J.

[2] The question in what is called a running-down case is, whether the plaintiff by his negligence or improper conduct substantially contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the bye-laws of the river Thames at the time when she came in collision with a barge:—*Held*, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. One who sustains an injury from collision with a vessel cannot maintain an action against the owners of such vessel if negligence, either on his own part or on the part of those having the guidance of the vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part. *Thorogood v. Bryan*, 8 C. B. 115; 18 L. J. C. P. 336.

The owner of a barge employed M., a freeman of the Watermens' Company, and W., an apprentice of a freeman, to navigate it from the Pool to Lambeth and back, and they were to receive 7*s.* each for the voyage. By the Watermens' Act none but freemen and apprentices of freemen, or of the widows of freemen, are allowed to act as watermen or lightermen on the river Thames, within certain limits. While under the care and management of M. and W., and by their misconduct, the barge injured another barge:—*Held*, that the owner was liable, M. and W. being in point of law his servants, and that he was not protected from his *primâ facie* liability in respect of the injury occasioned by their misconduct, by the Watermens' Act restraining him to select his servants in the particular trade from a privileged class. *Martin v. Temperley*, 4 Q. B. 298; 3 Gale & D. 497; 7 Jur. 150; 12 L. J. Q. B. 129. See *In re Agricola*, 7 Jur. 157.

Case for so negligently and unskilfully navigating a vessel on the river Thames, of which the defendant had the care and management, that she struck against and damaged a wharf and jetty belonging to the plaintiff. *Plea*, amongst others, that the wharf and jetty were a construction within the flow of the tide and below low-water mark, and obstructed part of the bed and course of the river, which was a common and public navigable river and highway for all the queen's subjects to navigate over and along at their free will and pleasure; that the said wharf and jetty had been constructed by the plaintiff, and unlawfully and wrongfully obstructed the navigation over the said part of the river, to the common nuisance of the queen's subjects, and that they could not pass, &c. without damaging the said wharf and jetty, as in the declaration mentioned; that the plaintiff had notice of the premises, but wilfully continued the said nuisance; that the defendant had occasion to pass with the said vessel over the said part of the river, and in so passing did the alleged damage, and that he managed and navigated the said vessel with all the skill and care which would have been due and proper, had not the said part of the river been obstructed as aforesaid, and that he did no unnecessary damage. *Replication de injuriâ*, and a verdict for the defendant:—*Held*, that the plea, though in substance sufficiently proved at the trial, was bad for not alleging a necessity to navigate the vessel over the part of the river where the nuisance existed, nor even that the defendant's right course was over such part of the river, and that he could not have avoided the nuisance by taking any other course with reasonable convenience, and, therefore, that the plaintiff was entitled to judgment *non obstante veredicto*. *Dimes v. Petley*, 19 L. J. Rep. (N. S.) Q. B. 449; 15 Q. B. Rep. 276.

A passenger in a public conveyance, injured by the negligent management of

VI. As to Management of Docks.[1]

another conveyance, cannot maintain an action against the owner of the latter if the navigator of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury. *Thorogood v. Bryan*, 18 L. J. Rep. (N. S.) C. P. 336; 8 Com. B. Rep. 115.

We have seen it is no answer to an action for negligence that part of the injurious consequences would not have occurred had the plaintiff not been guilty of some negligence. Hence, where the plaintiff, a passenger on board a steamer, was injured by the falling of its anchor in consequence of a collision with a steamer belonging to the defendant; there was conflicting evidence as to the propriety of the mode in which the anchor was carried, and also whether the plaintiff had not placed himself in a dangerous position:— *Held*, to be a misdirection to direct the jury that the plaintiff was not entitled to recover if there was negligence in the stowage of the anchor, or in placing himself in the position he did, although the collision occurred from the negligence of the defendant's steamer.

Quære, per Pollock, C. B., Whether a man who is guilty of negligence is responsible for all the consequences of that negligence, although such consequences could not have been reasonably foreseen or expected? *Greenland v. Chaplin*, 19 L. J. Rep. (N.S.) Ex. 293; 5 Ex. Rep. 243. See *Rigby v. Hewitt*, *ante*, p. 524.

In an action against an owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of 500*l.*; the jury gave a verdict for 250*l.* only, and on being asked how they made up their verdict, replied that, in their opinion, there were faults on both sides:— *Held*, that notwithstanding this, the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering. *Raisin v. Mitchell*, 9 C. & P. 613: *Tindal.*

The 17 & 18 Vic. c. 104, s. 504, limits the liability of shipowners, and owners of shares in sea-going ships, to the value of the ship and freight, in cases where, without any actual fault or privity on their parts, any loss of life or personal injury is caused to any person being carried in such ship; also where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board any such ship; also where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ship, caused to any person carried in any other ship or boat, or is caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat. The value of the ship and freight not to be taken to be less than 15*l.* per registered ton in any case where there has been loss of life or personal injury to a passenger.

In respect of loss of life, personal injury, loss of or damage to goods arising on distinct occasions, the owner is to be liable to the same extent as if no other loss, injury, or damage, had arisen. In case of loss of life or personal injury, the Board of Trade may cause juries to be summoned to assess compensation (ss. 507, 508) of a very limited character.

Provision is made (sect. 510) for the application and distribution of these damages to the parties entitled to them, and if they are dissatisfied with the amount, they may, on procuring the amount thereof to be refunded, bring an action for the recovery of damages under various discouraging limitations and restrictions. Nothing, however, in the act is (sect. 516) to lessen or take away any liability to which any master or seaman, being also owner, or part owner, of the ship to which he belongs, is subject in his capacity of master or seaman.

[1] The liability of trustees of docks, who receive the tolls, for neglect in the management, was very fully considered in the Exchequer Chamber in *Gibbs v. the Trustees of the Liverpool Docks*, 27 L. J. Ex. 321; 8 H. & N. 164.

There the declaration alleged in the first count that the trustees, the proprietors of the docks, were entitled to receive tolls, that it was their duty to apply the tolls (among other purposes) in cleansing the dock, so that it should be in a fit state for vessels to enter; that the funds in the defendants' hands arising from the tolls were sufficient for the purpose of cleansing the dock, as well as of discharging all other liabilities and incumbrances on them; that the defendants did not take reasonable or any care about cleansing the dock, so that the plaintiff's vessel stuck in the mud at the entrance of the dock, and was injured. The second count charged that the defendants, knowing that the dock, and the entrance to it, were, by reason of the accumulated mud, in an unfit state to be used by vessels, did not take any care to put the same into a fit state, but negligently permitted the dock and the entrance to continue in such unfit state for want of reasonable cleansing, while they were, by the defendants' permission, used by vessels, and that the plaintiff's vessel, endeavouring to enter the dock, struck the mud and was damaged:—*Held*, as the defendants knew that the dock was in an unsafe state, and as they had sufficient funds to cleanse it, that probably it was their positive duty to cleanse it, and that they had no longer any discretion to allow it to remain as it was: but that, at all events, if they had a discretion to leave the dock in its dangerous condition, it was their bounden duty to have closed it to the public, and not to have invited the plaintiff's vessel to run into danger by holding out that any vessel might enter the dock on payment of tolls; and that the defendants were liable for injuries, al-

VII. As to Negligence in Management of Real Property, and Acts of Parties connected therewith.

(A) *Builders, Contractors, Surveyors, &c.*[1]

though they receive the tolls only as trustees, without any beneficial interest to them. So in *Thompson v. North-Eastern Railway Co.* 30 L. J. Q. B. 67, where the defendants, the proprietors of a dock and basin, opened them for public use on payment of tolls, advertising that they were fit for the reception of vessels of 1000 tons and upwards. The basin, which connected the dock with a tidal river, had not been uniformly excavated, and was still in the course of excavation. A channel had been excavated to about the depth of the dock site, of the width of 70 feet, from the dock to the entrance to the river (a length of about 540 feet), a bank being left on either side. At high water, the whole of the basin was covered, and no public notice of the state of the basin had been given, nor was the channel buoyed or otherwise indicated. The plaintiffs sent into the dock their vessel (which was of less than 1000 tons burthen) unladen, and being laden, she came out at high spring tide, but grounded in the basin, not far from the entrance, and became a total wreck. A pilot was in charge of the vessel, and there was no mismanagement on the part of those on board. The plaintiffs were not aware of the state of the basin, but the pilot, who had previously brought out a similar vessel safely, was aware of it. An action having been brought against the defendants for the loss of the plaintiffs' vessel:—*Held*, first, that the defendants were guilty of a negligent breach of the duty which was imposed upon them by the common law, of taking reasonable care that their dock, when kept open for public use for their profit, should be so free from obstruction as that those using it might do so without danger to their lives or property. Secondly, that assuming the plaintiffs, under the circumstances, to be so identified with the pilot as to make his knowledge that of the plaintiff's, that knowledge did not preclude the plaintiffs from recovering, as there was nothing to show that to attempt the passage with a knowledge of the state of the basin was an act inconsistent with the exercise of reasonable prudence.

The Mersey Docks and Harbour Board, incorporated for the purpose of maintaining and managing the docks in the Mersey, was empowered, for the purposes of either acts, to levy tolls on ships using the docks. Neither the members of the board, who acted gratuitously in the performance of a public duty, nor the board as a corporation, derived any benefit from the corporation funds. In one of the docks a bank of mud had accumulated, which rendered the dock dangerous for shipping. It was, nevertheless, kept open to the public, and a vessel entering, struck on the bank and was injured:—*Held*, that though the board did not know of the state of the dock, yet if they had the means of knowing it, and were negligently ignorant, they were responsible to the owner of the vessel. *Penhallow v. Mersey Docks and Harbour Board*, 30 L. J. Ex. 329; 9 W. R. 812; 5 L. T. (N. S.) 112, Ex. Ch.

[1] If a builder undertakes to build a house, and builds it out of the perpendicular, or neglects to examine the ground, and secure proper foundation for the building, and constructs the wall so carelessly and negligently that a settlement and cracks make their appearance, and the structure becomes a dangerous nuisance, the builder is responsible in damages for negligence. *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; 28 L. J. C. P. 88. *Farnsworth v. Garrard*, 1 Camp. 39. *Duncan v. Blundell*, 3 Stark. 7. *Munro v. Butt*, 8 Ell. & Bl. 738; 22 Jur. 731. *Williams v. Fitzmaurice*, 3 H. & N. 844. The degree of skill and diligence which is required from the workman depends upon the nature and extent of his particular profession.

Where work which can lawfully be done without injury to others is placed in the hands of a contractor, who selects his own workmen and servants for the performance of the work, and directs the manner of doing it, exercising his own judgment in the matter, and having the immediate control over the workmen, such contractor, and not the person who employs him, is the party responsible for injuries to strangers from the negligent execution of the work. *Steel v. South-Eastern Railway Co.* 16 C. B. 550. *Overton v. Freeman*, 11 C.B. 873; 21 L.J.C.P. 52. And if the work is done under the immediate control and superintendence of a sub-contractor, then the latter is the party responsible for any wrong done by the workman he employs in the execution of the work. And so, where a builder was employed to make certain alterations at a club-house, including the preparation and fixing of certain gas-fittings, to do which he made a sub-contract with a gas-fitter, through the negligence of whom, or his servants, the gas exploded and injured the plaintiff; the builder was held not liable, as the relation of master and servant did not exist between him and the party causing the injury. *Rapson v. Cubitt*, 9 Mee. & W. 710. So, the commissioners of a navigation, who had entered into a contract with a person to do certain works, were held not liable for an injury arising from the imperfect performance of part of those works, as the contractor was not their servant. *Allen v. Hayward*, 7 Q. B. 960. See *Chigards v. Dethick*, 12 id. 439. So, where a viaduct was being built by contractors for a railway company, under a deed by which, amongst other things, it was provided that the contractors were to do the work, but the

company had a general right of watching the progress, and if the contractors employed incompetent workmen, the company had the power of dismissing them; the company was held not liable for injuries sustained by a workman who was killed by a heavy stone, which fell from a travelling-truck through the negligence of some of the contractor's workmen, whilst building the viaduct, as the workmen who caused the injury were not the servants of the company, and the power reserved to them of dismissing incompetent workmen did not make them responsible for the consequences of the contractors employing such. And it was also held, the defendants being the owners of the land on which the accident happened, made no difference. *Reechie v. London and North-Western Railway Co.* 4 Ex. 244. And see *Glover v. North-Western Railway Co.* 5 id. 56. So, in another case, *Knight v. Fox*, id. 721, where a railway company entered into a contract with A. to construct a portion of their line; A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant and as a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for 40*l.* to erect a scaffold which had become necessary in building the bridge, but it was agreed that B. was to provide the requisite materials, and lamps and other lights. The scaffold was erected upon the footway by C.'s workmen, and a portion of it improperly projected, and owing to that, and the want of sufficient light, D. fell over it at night and was injured; but it was held that D. could not maintain an action against B. for the injury thus occasioned, even though, after the accident, B. had caused other lights to be placed near the spot to prevent a recurrence of similar accidents.

Again, where certain commissioners (*Overton v. Freeman*, 21 L.J.(N.S.)C.P. 52) contracted with A. for all the paving required in a certain district, and A. contracted with B. to lay down a certain portion of it, and B.'s workmen left some paving stones at night in such a position as to constitute a public nuisance, and the plaintiff stumbled over them whilst on foot, it was held that A. was not liable to an action at the suit of the plaintiff, as the injury was not caused by his workmen. So, where a contractor is employed, his employer may, by personal interference with the workmen, adopt their acts, and so render himself liable, where ordinarily he would not be so. As in the case of *Burgess v. Gray*, 1 C. B. 578 (see *Knight v. Fox*, 5 Ex. 721), in which it appeared that the defendant was the proprietor of some newly-built houses, which he had employed P. to build for him, and P., in forming a drain from premises belonging to the defendant at the back of the new houses to the common sewer, had, by his servants, caused a quantity of gravel to be deposited by the road-side. The drain being finished, P. employed a person to carry away the gravel, and paid him so much a load, which he charged to the defendant; but the person so employed left some on the road, and the plaintiff, whilst driving in the evening along the road, ran upon the gravel left in the road, was upset, and injured. The defendant's attention had been called to the gravel left in the road by a policeman, and he had promised to remove it as soon as he could, and after the accident said it was caused by the plaintiff's carelessness. On the part of the defendant it was, amongst other things, contended, on the principle of *Quarman v. Burnett*, that he was not liable, as he had employed a contractor; but it was nevertheless held that, under the circumstances of the case, he was liable.

A gas-company supplied a house with gas by means of a short pipe from their main, communicating with fittings within the house belonging to the owner during his occupation, and also during the subsequent occupation of his tenant. There was a meter and a stop-cock, of which the key was hung by its side within the house, but there was no stop-cock between the outside of the house and the main. Upon the tenant quitting, he sent notice to the company that he would no longer be liable for gas-rate. Ten days after he quitted an explosion took place, in consequence of the escape of the gas within the house, by which it was much injured, and a person going into the house found the gas issuing from the pipe above the meter and the stop-cock, which had not been turned so as to prevent the passage of the gas. There was ground to believe that the upper part of the pipe had been removed by some dishonest person: — *Held*, that the owner could not, on these facts, recover compensation for the damage done from the company in an action on the case for negligence, as the plaintiff was, by his omission to close the stop-cock within the house, contributary to the mischief, and as there was no obligation imposed on the company by their act of parliament or the law to place a stop-cock on the outside of the house: — *Held*, also, that this defence was admissible under the plea of not guilty. *Holden v. Liverpool New Gaslight Co.* 15 L. J. Rep. (N. S.) C. P. 301; 3 Com. B. Rep. 1.

It must not be concluded from any of the preceding cases that a contractor cannot become liable for the negligence of his subcontractor. A principal contractor, by personally interfering and giving directions to the latter, or to the workmen employed by him, would be responsible for the orders given, but he cannot be charged simply on the ground of his filling the character of contractor. *Oreston v. Freeman*, 21 L. J. C. P. 52; 11 C. B. 893.

In an action for negligently pulling down a wall of the defendant's house, adjoining the plaintiff's, evidence was given that the wall was taken down by a builder at an estimated cost, in pursuance of directions given to him by an architect employed by the defendant, and who had the general su-

(C) *Leaving open Apertures, Areas, &c., or Heaps, &c. on, adjoining, or adjacent to Highways, Commons, &c.*[1]

perintendence of the work at the defendant's house. In consequence of the removal of a beam from the wall, the front of the plaintiff's house fell down. The plaintiff's house ought, as a reasonable precaution, to have been shored up before the wall was removed:—*Held*, that on these facts there was no evidence to go to the jury of the defendant's liability. *Butler v. Hunter*, 7 H. & N. 826; 31 L. J. Ex. 214.

A railway company was authorised by act of parliament to construct a railway bridge across a navigable river. The act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals, or passengers ready to traverse, to cross the bridge, and for opening it to admit such vessel. The company employed a contractor to construct the bridge in conformity with the provisions of the act of parliament, but before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river: —*Held*, that the company was liable for the damage thereby caused. *Hole v. Sittingbourne and Sheerness Railway Co.* 6 H. & N. 488; 30 L. J. Ex. 81; 9 W. R. 274; 3 L. T. (N. S.) 750.

A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it. *M'Carthy v. Young*, 6 H. & N. 329; 30 L. J. Ex. 227; 9 W. R. 439; 3 L. T. (N. S.) 785.

A builder had purchased a house, which he pulled down, with the exception of a party-wall. For his own use he erected a scaffold. P. asked him for the job in pulling down the party-wall, and a written agreement was entered into, by which P. agreed to do it for 17*l*. No mention was made in the agreement, or otherwise, of the use of the scaffold, but the plaintiff was aware that it was afterwards used by P. P. employed the plaintiff to pull down the party-wall, and whilst doing so, one of the putlogs, which was rotten, broke, and the plaintiff was thrown to the ground and seriously injured. The builder was not aware of the defect in the putlog:—*Held*, that he was not liable. (Id.)

[1] The workmen employed in a government dockyard were permitted by the government to cross land within the dockyard premises to go to the water-closets erected for their accommodation. A government contractor, by permission of the government, had erected machinery in the yard. A revolving shaft, a portion of this machinery, was so placed as to cross the shortest and most convenient way to these water-closets. The shaft was partially covered, but not concealed, by planks, and was found by the jury to have been insufficiently covered. There were other, though not shorter or more convenient ways, to these water-closets. A workman employed in the dockyard, but not by the contractor who had erected the machinery, in going to the water-closet, accidentally fell near the shaft, which caught his arm, and severely injured him. In an action against the contractor to recover damages for the injury:—*Held*, that the workman's right to cross the yard was only the right not to be treated as a trespasser for so doing, and that the contractor was under no obligation to fence the machinery at all, and therefore not liable for insufficiently fencing it, and that the action was not maintainable. *Bolch v. Smith*, 7 H. & N. 736; 8 Jur. N. S. 197; 31 L. J. Ex. 201; 10 W. R. 387; 6 L. T. (N. S.) 158.

Where a canal had been made in land, along which ran an ancient footway, and between the canal and the footway were a towing-path nine feet wide, and a strip of grass several feet in breadth, and the public were permitted to pass over the whole intervening space, which was left unguarded and unlighted:—*Held*, that the canal was not so near to or adjoining the footway as to be a nuisance, or to impose on the company the duty to fence, light, or protect it; and a person having in the night-time gone astray and fallen into it, the canal company was not liable, under 9 & 10 Vic. c. 93, to his representatives. *Bincks v. South Yorkshire & River Dun Navigation Co.* 11 W. R. 66; 7 L. T. (N. S.) 350, Q. B.

Refreshment-rooms and a coal-cellar at a railway station were let by the company to S., the opening for putting the coals into the cellar being on the arrival platform. A train coming in whilst the servants of a coal-merchant were shooting coals into the cellar for S., a passenger, whilst passing in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal-merchant's servants had negligently left insufficiently guarded:—*Held*, that S., the occupier of the refreshment-rooms and cellar was responsible for this negligence. *Pickard v. Smith*, 10 C. B. (N. S.) 470.

An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; 6 Jur. N. S. 897; 29 L. J. C. P. 203; 8 W. R. 277. See *Bishop v. Bedford Charity*, 29 L. J. Q. B. 53.

If A., on whose land there is a private road leading from a highway up to a house, allows all persons having occasion to go to the house to use the way, and B., by permission of A., places an obstruction without lights across the way, and afterwards C., passing by night along the way to go to the

house, sustains injury by unavoidably running against the obstruction, he has a right of action against B. *Corby v. Hill*, 4 Jur. N. S. 512; 27 L. J. C. P. 318.

On the platform of a railway station there were two doors, in close proximity to each other. The one for necessary purposes had painted over it the words "For gentlemen;" the other had over it the words "Lamp-room." The plaintiff having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the lamp-room, and fell down stairs, and was injured. In an action against the company:—*Held*, that in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company. *Tooney v. London, Brighton, & South-Coast Railway Co.* 3 C. B. (N. S.) 146; 27 L. J. C. P. 39.

A swing bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road, without any fence towards the water. A., being upon the bridge whilst it was in this state, and the spot being dark, incautiously stepped back and fell into the water and was drowned. In an action by his widow and administratrix against the canal company, under 9 & 10 Vic. c. 93, the jury were told that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that if they thought the deceased had by his own negligence contributed to the accident, they must find for the company:—*Held*, a proper direction, and that upon the facts the jury were warranted in finding for the company, although they were of opinion that the bridge was not secured as it should have been. *Witherley v. Regent's Canal Co.* 12 C. B. (N. S.) 2; 6 L. T. 255.

An owner of land, having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission by placing a quantity of slates there, in such a manner that B., using the road, sustained damage:—*Held*, that A. was liable to an action. *Corby v. Hill*, 4 C. B. (N. S.) 556; 4 Jur. N. S. 512; 27 L. J. C. P. 318:—*Held*, also, that a declaration was not objectionable for not averring that the obstruction was placed on the road without permission, inasmuch as such an allegation, if traversed, would have presented an immaterial issue.

An owner of land makes upon it an excavation adjoining a public way, so that a person walking upon it might, by making a false step, or being affected with a sudden giddiness, or by a sudden starting of a horse, be thrown into the excavation; the party making the excavation is liable for the consequences: but it is otherwise when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the land of the party making the excavation before he reached it. *Hardcastle v. South Yorkshire Railway & River Dun Co.* 4 H. & N. 67; 5 Jur. N. S. 150; 28 L. J. Ex. 139; 7 W. R. 326; 32 L. T. 297.

The proper and true test of legal liability in such cases is, whether the excavation is substantially adjoining the way. These principles apply to actions brought under the 9 & 10 Vic. c. 93. *See post*, p. 532.

A private injury arising from a public nuisance is the subject-matter of an action for damages.

A husband, as administrator to his deceased wife, declared that the defendant was in occupation of a brewery and office, and a passage leading thereto from the public street, used by him for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street, yet he wrongfully and negligently permitted a trap-door in the floor of the passage to lie and remain open, without being properly guarded and lighted, and the wife, who had been to the office as a customer, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open, and not properly guarded and lighted, whereby she was killed:—*Held*, first, that the husband's right to sue as administrator under the 9 & 10 Vic. c. 93, sufficiently appeared, without express allegation of pecuniary damages. *Chapman v. Rothwell*, 1 E., B. & E. 168; 4 Jur. N. S. 1180; 27 L. J. Q. B. 315:—*Held*, secondly, that the duty of the defendant, and breach, sufficiently appeared.

B. purchased a ticket at the Paddington station of the Great Western Railway Company, and paid one fare for his conveyance thence to Milford, in Pembrokeshire. The line of the Great Western Railway Company terminates a short distance beyond Gloucester, and the line thence to Milford belongs to the South Wales Railway Company. By arrangement between the two companies, the lines are worked, and the fares paid by the passengers apportioned between them. B. was conveyed in the same carriage which he entered at Paddington, towards Milford; and after the train had passed on to the line of the South Wales Railway Company, it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train:—*Held*, that the Great Western Railway Company was responsible to B., since, under the circumstances, there was an implied contract on their part that they would use reasonable care to maintain the whole line from Paddington to Milford in a condition fit for traffic. *Blake v. Great Western Railway Co.* 7 H. & N. 987; 8 Jur. N. S. 1013; 31 L. J. Ex. 346; 10 W.R. 388; 7 L.T.(N.S.) 94, Ex. Ch.

(F) *Overloading Upper Part of Buildings.*[1]

(H) *Leaving open Apertures or Obstructions, &c. in Shops, &c.*[2]

The defendants were possessed of a canal, and the land between it and a sluice. An ancient public footpath passed through the land close to the sluice. There was a towing-path nine feet wide by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By the permission of the defendant the intervening space had been lately used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal, and was drowned:—*Held*, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the defendants the duty of fencing the canal off, and that the other facts did not render the defendants liable for the accident. *Binks v. South Yorkshire Railway Co.* 32 L. J. Q. B. 26.

The defendants, owners of a house and premises, demised them to M. for thirty years from Christmas, 1851, at a rent payable quarterly, the lease containing a covenant by M. to repair, and a proviso for reentry in case of non-observance of covenants by M., or of the rent being in arrear at any time for more than fifteen days. M., down to March, 1856, occupied the first floor of the house himself, and let out the rest of it to separate weekly lodgers. In front of the house was an area, covered with an iron grating, and in the area was a tank of water, all forming part of the premises let with the house to M. M. did not let the area to any of the weekly lodgers, but they each had an easement over it for the purpose of drawing water from the tank. In March, 1856, M. let the first floor to T., as a weekly lodger, with the same easement over the area as the other lodger had. M. then ceased to reside on the premises, and in July, 1856, became insolvent, and took the benefit of the Insolvent Act, 1 & 2 Vic. c. 110; two quarters' rent (for Lady-day and Midsummer, 1856) being then, and down to the time this action was brought, in arrear, and unpaid by him to the defendant. M. was discharged by the Insolvent Court on the 30th July, 1856, having given up the lease to the official assignee. The defendant opposed his discharge. On the 12th July, 1856, the defendant gave notice to the lodgers to pay rent in future to the defendant, instead of to M. Two of the lodgers paid rent to the defendant accordingly before the 4th August, 1856. On that day the plaintiff sustained an injury by falling through the grating into the area. On the 7th August, 1856, T. received a notice from the inspector of nuisances for the district to repair the grating. T. handed the notice to the defendants, who immediately repaired the grating at their own sole expense. In November, 1856, they obtained an order from the Insolvent Debtors' Court for delivery to them of the lease, the official assignee having repudiated it, and it was accordingly delivered to them. It was admitted that the plaintiff had sustained severe injury from the accident, and that it was caused by the negligence of some one in not keeping the grating in repair:—*Held*, that upon these facts there was no evidence to go to the jury that the defendants were responsible to the plaintiff for his negligence. *Bishop v. Bedford Charity (Trustees)*, E. & E. 697, Ex. Ch.; 28 L. J. Q. B. 215; 5 Jur. N. S. 488; 33 L. T. 27.

[1] If a man overloads the floor of a warehouse with merchandise, so that the floor breaks and crushes the goods of another man in the floor underneath, the latter is entitled to an action for damages against the former. If the floor is ruinous, the occupier must take good care that he does not put upon such ruinous floor more than it can well bear; and if it will not bear anything he ought not to put anything upon it to the prejudice of another. *Edwards v. Halinder*, Poph. 46; Add. Torts, 85.

[2] A lessee and occupier of refreshment-rooms at a railway station, and a cellar underneath, employed a coal-dealer to put coals into the cellar, who, for this purpose, by his servants, opened a trap-door in the platform of the station, over which passengers had to go on their way out. Through this a passenger leaving the station fell, and was injured:—*Held*, that though the leaving the trap-door open and unguarded was the immediate act of the coal-dealer's servant; nevertheless, the lessee of the refreshment-rooms was liable, because he employed the coal-dealer to open the trap-door, and entrusted him to guard it while open, and to close it when the coaling was over. That the act of opening the trap-door was his act, though done through the medium of the coal-dealer, and he having thereby caused the danger was bound to take all reasonable means for the prevention of accident. *Pickard v. Smith*, 4 L.T.(N.S.) 470, C. P.; S. C. *ante*, p. 529; and *Chapman v. Rothwell*, *ante*, p. 530.

The plaintiff, a carman, being sent by his employer to the defendants for some goods, was directed by a servant of the defendants to go to the counting-house. In proceeding along a dark passage of the defendants, in the direction pointed out, the plaintiff fell down a staircase and was injured:—*Held*, that the defendants were not guilty of any negligence, for if the passage was so dark that the plaintiff could not see his way, he ought not to have proceeded; and if, on the other hand, there was sufficient light, he ought to have avoided the danger. *Wilkinson v. Fairrie*, 32 L. J. Ex. 73.

(I) *Negligence in using Cranes, Tackle, &c. on Highways, Wharves, &c.*[1]

VIII. As to Compensations to Representatives of Deceased Parties under Lord Campbell's Act.[2]

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[1] An owner of a private way, passing by his warehouse, is liable for an injury to persons lawfully using the way, if caused by the negligence of his servant; *e. g.* by negligently lowering goods from the warehouses. *Gallagher v. Humphrey*, 10 W. R. 664; 6 L. T. (N. S.) 684, Q. B.

As to master's liability to servant, where tackle, machinery, &c. not reasonably fit for use, see *Roberts v. Smith*, 26 L. J. Ex. 319; 2 H. & N. 213. *Senior v. Ward*, 28 L. J. Q. B. 139. *Byden v. Stewart*, 2 Macq. H. L. C. 34. *Farwell v. Boston Railway Co.* 3 id. 316. *Williams v. Clough*, 27 L. J. Ex. 325; 3 H. & N. 258. *See ante*, Master and Servant, p. 461.

[2] By 9 & 10 Vic. c. 93, after reciting that no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, it is enacted —1. That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable (if death had not ensued) shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount at law to felony. 2. That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct. 3. That not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person. 4. That in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular to the persons for whom, and on whose behalf, such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered. 5. That the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context, or by the nature of the subject-matter: that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word person shall apply to bodies politic and corporate; and the word parent shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word child shall include son and daughter, and granddaughter, and stepson and stepdaughter.

In Scotland, France, and America, actions for causing death by negligence have long been sustainable. *See* 1 Hill. on Torts, 93.

An action on the 9 & 10 Vic. c. 93, can only be maintained in cases where the deceased could have maintained the action if alive; therefore, if in an action where the death is alleged to have been caused by the negligence of the defendant's servant, it be shown that deceased, by his own negligence or carelessness, contributed to the accident, the defendant would be entitled to a verdict. *Tuelor v. Chaplin*, 2 C. & Kir. 730: *Denman, C. J.* The rule as to actions on the statute is the same as if the injured party himself had brought the action. The jury may give such damage as they may think proportioned to the injury resulting from such death to the parties for whose benefit it is brought, and are to divide it among them by their verdict. In assessing damages under this act, the jury are confined to the pecuniary loss sustained by the family, and cannot take into consideration the mental suffering of the survivors. *Blake v. Midland Railway Co.* 18 Q. B. 93; 21 L. J. Q. B. 233. In *Armsworth v. South E. R. Co.* 11 Jur. 758, the deceased was a labourer aged thirty-three, and earning 1*l.* a week: *Parke, B.*, directed the jury not to consider the value of his existence, as if they were bargaining with an annuity-office, in which case they would have to take all possible accidents into account, but to give what they considered a reasonable compensation. They gave 100*l.*

The proper question for the jury in all such cases is, whether the circumstances are such that if the deceased, instead of meeting his death, had been only wounded, in consequence of the conduct of the defendant, he would have been entitled to da-

IX. Remedies by Action.[1]

mages for the injury. The declaration need not negative the existence of any relations entitled to compensation other than those on whose behalf the action purports to be brought. *Barnes v. Ward*, 9 C. B. 392; 2 C. & Kir. 661; 14 Jur. 334; 19 L. J. C. P. 195.

A. being possessed of land abutting on public footway, in the course of building a house on such land excavated an area, which, by the negligence of his work-people, was left unfenced; so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area and was killed:—*Held*, that A. was liable to an action by the husband as administrator for the benefit of himself and B.'s infant children. (Id.)

A company empowered by act of parliament to construct a railway, contracted under seal with persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him:—*Held*, in an action against the company by the administratrix of the deceased, that they were not liable, and that in such cases the terms of the contract in question did not make any difference. *Reedie v. London and North-Western Railway Co. and Hobbs v. Same*, 4 Ex. 244; 6 Rail. Cas. 184; 13 Jur. 659; 20 L. J. Ex. 65.

The defendant, a master-builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger-pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman:—*Held*, that no action could be maintained against the defendant under the 9 & 10 Vic. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose. *Wigmore v. Jay*, 5 Ex. 354; 14 Jur. 837; 19 L. J. Ex. 300.

The condition in sect. 1 of the 9 & 10 Vic. c. 98, that the act, neglect, or default must be such as would have entitled the deceased, had he lived, to have maintained an action in respect thereof, has reference, not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose. If the circumstances were such that, if death had not ensued, the deceased might have maintained an action in respect of any injury arising to him therefrom, his representatives may maintain an action in respect of an injury arising from a pecuniary loss occasioned by his death, although that pecuniary loss would not have resulted from the accident to the deceased had he lived. *Pym v. Great Northern Railway Co.* 8 Jur. N. S. 819; 31 L. J. Q. B. 249; 10 W. R. 737; 6 L. T. (N. S.) 537.

In the case of a widow and young children of a deceased person (who was seised in fee-tail of landed estates, passing at his death to his eldest son), the damages arising from the loss of education and the comforts and conveniences of life are not too remote, but may be made the subject of a pecuniary estimate, and are therefore within the statute. (Id.)

To an action by the husband and administrator of his deceased wife, the defendant pleaded that the plaintiff did not deliver to the defendant or to his attorney a full particular of the persons for whom and on whose behalf the action was brought, and of the nature of the claim in respect of which damages were sought to be recovered in the action, as required by the statute:—*Held*, that the plea was no answer to the action, the requirements of sect. 4 of the 9 & 10 Vic. c. 93, that the particulars therein specified shall be delivered, together with the declaration, to the defendant or his attorney, but merely in accordance with the rules and practice of the court in which the action may be depending, the right of action accruing prior to the declaration, and existing altogether independently of the fact of the declaration being delivered or not. *Murphy v. Logan*, 10 Ir. Com. Law Rep. 87, Q. B. In such case, a defendant, if he require particulars, should call upon the plaintiff to furnish them, or, in case of his refusal, apply to the court to compel him to do so.

Damages.—An action cannot be maintained by the representatives of a deceased person without proof of actual damage to the parties on whose behalf the action is brought. The mere proof, therefore, of the death by negligence does not entitle the executor or administrator to a verdict with nominal damages. *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25.

A boy aged fourteen, the son of a mason, earned four shillings a-week, which was applied by his father and mother to the general support of the family of which he was a member. No evidence was given as to whether the sum earned exceeded or was less than his actual cost of maintenance. The jury having found a verdict for the father, with 20*l.* damages (10*l.* of which they apportioned for the father, and 10*l.* to the mother), the court refused to disturb the verdict. (Id.)

[1] In many instances a party has a right, where a priority of contract exists, to view the negligence as a breach, and declare upon the express or implied agreement, or proceed as upon a breach of duty, either self-imposed or incident to the relative si-

X. Remedy by Indictment.[1] *See ante*, Murder, p. 503.

tuations or obligations of the parties. See *Langridge v. Levy*, 2 Mee. & W. 519, *ante*, vol. iii. p. 565. In most instances, however, the burden of proving negligence devolves upon the plaintiff.

In an action for injury to the plaintiff's land and fences, caused by the negligence of the defendant, in setting fire on his own land and keeping the same, the burden of proof is upon the plaintiff to show that the injury resulted from negligence. *Batchelder v. Heagan*, 1 Hill. Torts, 274. So, the defendant having interfered to part his dog and the plaintiff's, which were fighting; M., raising his stick for that purpose, accidentally struck the plaintiff and injured him:—*Held*, the parting of the dogs was a lawful and proper act, which the defendant might do by the use of proper and safe means, and if in so doing, and while using due care, and taking all proper precautions necessary to the exigency of the case, to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefore, and that the burden of proof was on the plaintiff to establish the want of due care on the part of the defendant. (Id.)

If the action is brought under the stat. 9 & 10 Vic. c. 93, for compensating the families of persons killed by accident (*ante*, p. 532), it must be proved that actual pecuniary damage has been sustained by the relatives of the deceased person, and that the plaintiff, who sues as administrator, or the person for whose benefit the action is brought, had some pecuniary interest in the life of the person killed. It was intended by the act to give compensation for damage actually sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs; but the loss of anticipated benefit, founded on a reasonable and just expectation of pecuniary advantage derivable from the continuance of the life of the deceased, may be the subject-matter of damage, and a sufficient foundation for an action.

In an action for negligently setting fire to a barn by a spark from a locomotive engine, evidence is admissible that other engines of the company emitted sparks which flew to a distance, in order to show the possibility of the fire having been caused by such a spark.

The fact of a fire having been caused by a spark from a steam-engine is *primâ facie* evidence of negligence in the owner of the engine. *Piggot v. Eastern Counties Railway Co.* 15 L. J. C. P. 235.

The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the plaintiff must give some affirmative proof of negligence on the part of the defendant. *Hammack v. White*, 11 C. B. (N. S.) 588; 8 Jur. N. S. 796; 31 L. J. C. P. 129; 10 W. R. 230; 5 L. T. (N. S.) 676. Where, therefore, it was shown that the defendant was riding a horse at a walk, when the animal became restive, and rushing on to the pavement knocked down and killed the husband of the plaintiff, but the witnesses for the plaintiff also proved that the defendant was doing his best to prevent the accident:—*Held*, that this was no evidence of negligence; that, taking the evidence of the witnesses for the plaintiff altogether, it was clear that the defendant was carried on to the pavement against his will, and that there was therefore nothing to turn the scales of evidence against the defendant, and to show that he was responsible for the consequences of the accident. *Pym v. G.N.R.Co.* 2 F. & F. 619.

A person who employs another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and reasonable manner, and therefore, unless the parties stand in the position of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the act is done. *Butler v. Hunter*, 7 H. & N. 826; 31 L. J. Ex. 214; 10 W. R. 214.

In an action against a railway company for an injury sustained through falling down some stairs at their station:—*Held*, that it is not enough to show that the stairs were of an improper condition or construction, unless the fall was caused thereby. *Davis v. London and Brighton Railway Co.* 2 F. & F. 588: *Williams, J.*

A railway company empowered by parliament to use locomotive engines along their line, if they have adopted all the precautions which science had pointed out, in order to prevent the escape of sparks from the funnels of the steam-boilers in their engines, and are guilty of no negligence in their conduct of the locomotive engine in question, are not responsible, though a spark fly out of that engine and set fire to some grass on the side of the line, and eventually cause a plantation of wood to be burned down. *Vaughan v. Taff Vale Railway Co.* 5 H. & N. 679; 6 Jur. N. S. 899; 29 L. J. Ex. 247; 8 W. R. 594, Ex. Ch.

In an action for wilful negligence the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and conveniences, the jury may give exemplary damages. *Emblen v. Myers*, 6 H. & N. 54; 30 L. J. Ex. 71. See *Bell v. Midland Railway Co.* 9 W. R. 612.

[1] A person guilty of gross negligence occasioning death, may be indicted for manslaughter, but a medical practitioner, whether he be a regular practitioner or not, who honestly and *bonâ fide* performs an operation which causes the patient's death, is not guilty of manslaughter (*R. v. Van Butchell*, 3 C. & P. 629); but if he be guilty of misconduct arising from gross ignorance or criminal inattention, then he will be guilty of man-

NEGOTIABILITY. *See* Bills and Notes, vol. ii. p. 400; Bond, id. p. 504; Chose in Action, vol. iii. p. 98.

NEUTRAL. *See* Aliens, vol. i. p. 285; Alien-Enemy, id. p. 291; Insurance, *ante*, p. 179; *post*, Ship and Shipping.

NEVER Indebted, Plea of.[1]

slaughter. *R. v. Williamson*, id. 635. *R. v. Spiller*, 5 id. 333. *Reg. v. Ball*, 2 F. & F. 201.

In a modern case, where the defendant, not a regular physician, killed a woman by an application, and the jury found that he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. See *R. v. St. John Long*, 4 C. & P. 424. *R. v. Serior*, Moo. C. C. 346. *R. v. Ellis*, 21 C. & Kir. 470.

In *R. v. Webb*, 1 M. & Rob. 405, *Lord Lyndhurst* set down the following rule:—"In these cases there is no difference between a licensed physician or surgeon without license. In either case, if a party having a competent degree of skill and knowledge make an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertain the least doubt of his position I might fortify it by referring to the opinion of *Lord Ellenborough* in *R. v. Williamson*. I shall leave it to the jury to say, first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention, or from very gross negligence. *See* also *Reg. v. Spilling*, 2 M. & Rob. 107. *Reg. v. Crick*, 1 F. & F. 519. *Reg. v. Crook*, id. 521. *See ante*, p. 503.

[1] This is substituted for the old plea of *nil debet*. The abolished plea had a much more comprehensive effect than its modern successor. Under it a judgment recovered, the Statute of Limitations, or payment, would have been available; but by r. 11, T. T. 1853, the plea of *nil debet* shall not be allowed in any action. The new rules of Wm. 4 contained a rule in precisely the same terms as the above, which was held not to apply to the plea of *nil debet* by statute given in penal actions by the 21 Jac. 1, c. 4, s. 4, because the statute 3 & 4 Wm. 4, c. 42, s. 1, giving authority to the judges to make those rules, expressly provided that no such rule should deprive any person of the power of pleading the general issue by statute. *Earl Spencer v. Swannell*, 3 Mee. & W. 154. *Jones v. Williams*, 4 id. 375. The present rules were made under the authority given by the statutes 13 & 14 Vic. c. 16, and the C. L. P. Act, 1852, s. 223, which contains no similar proviso. Hence it seems that the present rule relating to the plea of *nil debet* is universal, and abolishes such plea in all actions. B. & L. Pl. 269, n. It is inapplicable as to an action on a deed or bond, or record.

The form is given in sched. C. L. P. Act, 1852:—"And the defendant, by his attorney, says he never was indebted as alleged." It operates as a denial of the original existence of the debt; and under an issue raised upon it the plaintiff is bound to prove, by an express contract or by matters of fact, from which it may be implied that a debt existed as alleged. The *indebitatus* counts are only applicable to simple contract debts; therefore, the plaintiff cannot maintain this issue by proof of a contract made by deed. *Edwards v. Bates*, 7 Man. & G. 590; B. & L. Pl. 269, n.

It is available wherever the defendant proposes to deny, in point of fact, the existence of any express contract, to the effect alleged in the declaration, or to deny the circumstances from which such contract would by law be implied. But though under this plea he may thus contend at the trial that there was no such contract in point of fact, he cannot insist that, though made in fact, it was void in point of law, for the fact from which its invalidity is inferred must form the subject of a special plea. It is also to be observed, that where the action is on a bill of exchange or promissory note, the rules of court do not permit the plea of "never indebted" in any case. And if the plaintiff relies on an express contract, which is subject to any conditions before the absolute liability of the defendant attaches, he is bound to prove under the general issue the happening or performance of those conditions. *Alexander v. Gardener*, 1 Bing. N. C. 671. *Hudson v. Bilton*, 26 L. J. Q. B. 27; 6 E. & B. 565.

To Actions for Goods sold, &c.—Under "never indebted," the defendant may give in evidence any matter tending to alter the legal effect of the alleged sale. *Gregory v. Hartnell*, 1 Mee. & W. 183. Thus, he may show that the goods accepted, the work done, &c., were the subject of an express contract, and that, according to the terms and conditions of that contract, no present or absolute debt has accrued due. The defendant may prove that the goods were sold on terms of credit, which has not expired (*Broomfield v. Smith*, id. 542), or were delivered under a contract of barter (*Harrison v. Luke*, 14 id. 139), or were to be paid for from a particular source, out of monies passing through the plaintiff's hands, to which he has not resorted (*Garey*

NEW Assignment.[1]

v. Pyke, 10 Ad. & E. 512); that the goods were sold with a warranty, and did not agree with it, and were of no value, or of no more value than a sum already paid (*Dicken v. Neale*, 1 Mee. & W. 556); that the goods were altogether worthless, or did not accord with the contract in quality and description. *Cousins v. Paddon*, 2 C., M. & R. 547. *Dawson v. Collis*, 10 C. B. 523. And if the defendant has accepted the goods, notwithstanding their deficient quality, he may, under the general issue, give in evidence the deficiency in value in abatement of the contract price. *Mondel v. Steel*, 8 Mee. & W. 858. In an action for the price of a machine sold and delivered, the defendant was allowed to prove under the general issue that it was sold on the condition that if it did not work properly nothing should be paid for it, and that it did not (*Groundsell v. Lamb*, 1 id. 352); or the defendant may prove that the plaintiff was his partner in the transaction (*Payne v. Hales*, 5 id. 598. *Brown v. Tapscot*, 6 id. 123. *Worrall v. Grayson*, 1 id. 166); or ordered by his wife without his authority (*Symes v. Goodfellow*, 4 Dowl. 642), the defence that the plaintiff had no title to the goods at the time of the sale, where available at all, must be specially pleaded. *Walker v. Snellor*, 11 Q. B. 478. Payment of a debt actually accrued must be specially pleaded; but but where a transaction is for ready money, and the article bought is paid for *eo instanti* on the purchase being made, there is no debt, and, therefore, no occasion to plead payment. *Bussey v. Barnett*, 9 Mee. & W. 312. *Wood v. Bletcher*, Ex. W. R. 1855–6; but see *Littlechild v. Banks*, 7 Q. B. 739; and *per Lord Campbell, Timmins v. Gibbins*, 18 Q. B. 722, 726. So where there has been a prepayment, or where an antecedent debt from the defendant to the plaintiff is by the agreement taken as part of the price of the goods sold or work done. *Smith v. Winter*, 12 C. B. 487; B. & L. 269; Steph. Pl. 448.

To a Count on Accounts stated.—To a count on accounts stated, the defendant may prove under *nunquam indebitatus* that the account was incorrect (*Thomas v. Hawkes*, 8 Mee. & W. 140), or show facts explaining the account stated, and obviating its legal effect (*Jacobs v. Fisher*, 1 C. B. 178); as, that there was no legal consideration for its items (*French v. French*, 2 Man. & G. 644), or that the debt was not due from the defendant. *Petch v. Lyon*, 9 Q. B. 147. The defendant cannot prove under this issue that a subsequent account was stated, in which the balance was in his favour, but in such case must plead the payment or set off, or other transaction, by which the account has been altered. *Fidyett v. Penny*, 1 C., M. & R. 108; B. & L. 271.

To Actions for Money lent, paid, had, and received.—In an action for money lent, the defendant may show, under *nunquam indebitatus*, that it was originally lent or received on a contract under seal (*Matthew v. Blackmore*, 26 L. J. Ex. 150); if the loan was originally a simple contract-debt, which has been merged in a specialty, a plea in confession and avoidance is necessary. In actions for money paid, the defendant may, under "never indebted," rebut any facts which tend to show that the money was paid at his request, either express or implied. He has been allowed to prove that the money was paid by the plaintiff in consideration of a bill indorsed by the defendant to the plaintiff, and was not to be repaid until the bill became due. *Maude v. Meesham*, 6 Dowl. 570. He may show that the money was paid in respect of partnership transactions. *Brown v. Tapscot*, 6 Mee. & W. 123. *Worrall v. Grayson*, 1 id. 166; and see *Morgan v. Pebrer*, 3 Bing. N. C. 457. In answer to the common count for money received, the defendant may, under this plea, prove any facts tending to show that the money sought to be recovered was never received, or held by the defendant to the use of the plaintiff (*Owen v. Challis*, 6 C. B. 115. *Coupland v. Challis*, 2 Ex. 682); and he may set up any contract inconsistent with the immediate liability charged in the count as a contract, giving the defendant a lien on the money. *Williams v. Vines*, 6 Q. B. 355. *Brownrigg v. Rae*, 5 Ex. 489; B. & L. Pl. 271, n.

To Actions for Work and Materials.—Under "never indebted," defendant may prove that the work was to be gratuitously performed (*Jones v. Nanny*, 5 Dowl. P. C. 90. *Jones v. Reade*, 5 id. 216), or not to be paid for in money, but only some equivalent (*Collingbourne v. Mantell*, 5 Mee. & W. 289); or that it was done under an express contract that the defendant should be entitled to deduct for the plaintiff's negligence in the performance (*Cleworth v. Pickford*, 7 Mee. & W. 314); that the work was done in a vain endeavour to cure a chimney from smoking, on the terms that the plaintiff should not be paid unless the work was successful (*Hayselden v. Huff*, 5 Ad. & E. 153); that it was done under an express contract that the plaintiff should not be paid until the delivery of a certificate of the works being performed according to a specification (*Milner v. Field*, 5 Ex. 829. *Russell v. Bondevise*, H. T. 1863, C. P.; and see *Morgan v. Birnie*, 9 Bing. 672. *Grafton v. E. C. R. Co.* 8 Ex. 699); or that the work was done so unskilfully as to be useless. *Hill v. Allen*, 2 Mee. & W. 283. *Bracey v. Carter*, 12 Ad. & E. 373. *Symes v. Nipper*, id. 377 (n.) *Lewis v. Samuel*, 8 Q. B. 685. *Cox v. Leech*, 26 L. J. C. P. 125. *Long v. Orsi*, 26 L. J. C. P. 127.

[1] A new assignment is in the nature of a replication. Though in replying a party must not depart from any material allegation in the declaration, yet where there is an evasive plea, either as to the whole or a part of the cause of action, the plaintiff may avoid the effect of it, by restating the injury for which he meant to declare with more particularity

I. Relative to when it is, or is not, Essential.[1]

II. „ the Form and Mode of New Assigning.[2]

and certainty, consistently, however, with the more general complaint in the declaration; and this is termed a new assignment, and may be either as to time, place, or any other circumstances, when material. *See* 3 Bl. Com. 311; 2 Comb. 176, 177.

[1] It is improper to new assign where the plea covers all the facts mentioned in the declaration (*Barnes v. Hunt*, 11 East, 451); or where the matter in the plea can be traversed. *Oakley v. Davis*, 16 id. 82, 86, 87. *Dite v. Hawkes*, 1 D. & L. 189. *Moses v. Levy*, 4 Q. B. 213. *Burgess v. De Lane*, 27 L.J.Ex. 154. *Neville v. Cooper*, 2 C. & M. 329. See *Rogers v. Custance*, 1 Q. B. 77. *Bracegirdle v. Peacock*, 8 Q. B. 177. *Wheeler v. Senior*, 7 Mee. & W. 562. *Glover v. Dixon*, 9 Ex.159; Steph. Pl. 247; Forms, 2 B. & L. 265.

There may be a new assignment in actions *ex contractu*, as in *assumpsit* (*Seddon v. Tutop*, 6 T. R. 607), as where payment is pleaded (*Hale v. Middleton*, 5 Nev. & M. 410), as well as in actions *ex delicto* as in case for a libel (*Leake v. King*, 1 Saund. 133); or in an action for an escape. See *Griffin v. Eyles*, 1 H. Black. 123. *Greenhow v. Holey*, Willes, 619.

It is frequently necessary to new assign, in order that the defendant may have notice of the real ground upon which the plaintiff proceeds (1 H. Black. 560, 562); as in trespass *quare clausum fregit*, where the declaration is so framed as to be capable of covering several injuries committed at different times, or in different parts of a close, &c.; the plaintiff may frequently reply, not only denying the right of common or way, &c. stated in the plea, but also new assigning trespasses committed at different times or in different parts of the close to those mentioned in the plea. *See* 2 Camp. 175; 10 East, 73; 11 East, 451. But where the nature of the act complained of is single, or the plea does not at all meet the declaration, or the plaintiff does not mean to dispute it, as if it justify a trespass in some other place of the same name, or a different assault to that intended to be complained of, the plaintiff should in that case merely new assign without traversing any part of the plea. *Taylor v. Cole*, 1 H. Black. 560, 561.

[2] A new assignment states that the plaintiff proceeds for another cause of action than that admitted in the plea: as, for example, for another promise or debt (*Hall v. Middleton*, 4 Ad. & E. 107); for a trespass on a different spot, or upon a different occasion (*Pratt v. Groome*, 15 East, 235. *Oakley v. Davis*, 16 id. 82. *Monkman v. Shepherdson*, 11 Ad. & E. 411); or for an excess in committing an act which the defendant attempts to justify by the plea. *Worth v. Terrington*, 13 Mee. & W. 781. *Playfair v. Musgrove*, 14 id. 239. The averment that the cause of action newly assigned is other than that admitted in the plea is a material averment, which is put in issue by the general issue, or other appropriate traverse of the new assignment. The plaintiff under a new assignment is also bound to state and prove a cause of action within the terms of the declaration, for to travel out of or amplify the declaration would be a departure. *Cheasley v. Barnes*, 10 East, 80. And by the C. L. P. Act, 1852, sect. 87, the new assignment must be consistent with and confined by the particulars delivered in the action, if any; where successive new assignments occur, each must be contained within the preceding one, and all within the original declaration. *Pugh v. Griffith*, 7 Ad. & E. 827.

Where the plea altogether mistakes the cause of action, it is sufficient to new assign the true cause of action, without taking any notice of the plea, further than stating in the new assignment that the plaintiff is not suing for the cause of action admitted by it. But where the plea correctly meets part of the cause or causes of action intended, but restricts their full extent, it then becomes necessary to answer the plea by a replication, as well as to new assign. *Arlett v. Ellis*, 7 B. & C. 346. *Cross v. Johnson*, 9 id. 613. *Page v. Hatchett*, 8 Q. B. 187. *Monkman v. Shepherdson*, *supra*. So it may be where a single continuing act of trespass is sued for, and part of it is justified, the plaintiff, if he disputes the justification, must reply to the justification, and also new assign for the excess. *Lambert v. Hodgson*, 1 Bing. 317. *Loweth v. Smith*, 12 Mee. & W. 582. *Worth v. Terrington*, 13 Mee. & W. 781; B. & L. Pl. 284.

Previously to the C. L. P. Act, 1852, when the plaintiff wished to new assign to several pleas of the defendant, he might do so by pleading a new assignment to each plea separately, and it was frequently the practice so to do; and the defendant in pleading to each new assignment would sometimes repeat his former pleas, except that to which the particular new assignment was pleaded. This practice was quite unnecessary, because the plaintiff could gain his whole object by pleading one new assignment to the several pleas of the defendant collectively. He could thereby assign at once a cause of action other than that met by all the pleas, which he was ultimately obliged to do under the former practice, in order to succeed in the action. The practice of new assigning to the several pleas separately was attended with much intricacy and prolixity in the pleadings, and was therefore abolished by the C. L. P. Act, 1852. The alteration was effected by the following enactments, which now regulate the practice of new assignments:—

By sect. 87, "one new assignment only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with and confined by the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different

NEW Inn. *See ante*, p. 162.

Trial. *See post*, Trial.

NEWSPAPER.[1] *See* Advertisement, vol. i. p. 216; Gazette, vol. iv. p. 603; *post*, Printer.

Copyright in. *See* Copyright, vol. iii. p. 245.

NIL Capiat.[2]

Debet, Plea of. *See* Never Indebted, *ante*, p. 535. The plea of *nil debet* is abolished by R. H. T. 4 Wm. 4.

Dicet. *See* Judgment, *ante*, p. 262.

Habuit in Tenementis. *See* Covenant, vol. iii. p. 443; *post*, Replevin; Trespass.

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from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both."

And by sect. 88, "no plea which has already been pleaded to the declaration shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits."

Where defendant suffers judgment by default to the new assignment and succeeds on the issues, plaintiff is entitled to costs. *Thornton v. Williamson*, 13 East, 191.

A new assignment being in the nature of a new declaration, the defendant should plead to it precisely as to a declaration (*see* Goulds. 191; Moor, 540; Cro. Eliz. 590, 593, c.); either by denying the matter new assigned by the plea of not guilty, &c. or by answering it by a special plea of matter of justification; and he may plead several pleas. The defendant cannot justify at a different place, and traverse the place mentioned in the new assignment; and when the plaintiff traverses the plea as well as new assigns, the defendant cannot, as to the matter answered in the plea, plead new matter, but must stand by his plea. *See* Cro. Eliz. 812. When the defendant has no answer to the new assignment, the proper course is to suffer judgment by default thereto, in order to entitle the defendant to the general costs of the cause. He should take care to relinquish his plea of the general issue, and any other pleas already pleaded, so far as they relate to the matters newly assigned; for otherwise, in case of suffering judgment by default, any pleas pleaded to the whole declaration (including, of course, the matter of the new assignment) would compel the plaintiff to go to trial, and he would be entitled to his costs.

By new assigning, the plaintiff may frequently obtain full costs, which otherwise he would not recover. Thus, on a plea of not guilty to a new assignment of *extra viam*, the plaintiff, though he should obtain a verdict for less than forty shillings damages, is entitled to full costs without a judge's certificate, unless the way pleaded was set forth by metes and bounds.

[1] As to stamping, *see* 16 & 17 Vic. c. 63; and id. c. 71. On an indictment for a libel, it has been held that a newspaper may be read in evidence, though not stamped. *R. v. Pearse*, Peake, 75; 9 East, 358.

A publication containing public news, printed and published in London, for sale for less than sixpence, exceeding one sheet and not exceeding two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth, and published periodically in parts or in numbers, at intervals exceeding twenty-six days, is not liable to stamp-duty under the 6 & 7 Wm. 4, c. 76. *Per Pollock, C. B.: Platt and Martin, B.B.*, dissentients. *Parke, B.: Attorney-General v. Bradbury*, 7 Ex. 97; 16 Jur. 130; 21 L. J. Ex. 12.

A printer whose name does not appear on the paper as required by law, cannot recover for the price of printing it. *Marchant v. Evans*, 2 B. Moore, N.S.); nor can the proprietor maintain an action for the non-performance of a contract connected with publications before filing the affidavit required by 38 Geo. 3, c. 78. *Houston v. Mills*, 1 M. & Rob. 325.

L., the proprietor of a newspaper, had engaged the plaintiff to write articles for it. The defendants had been proprietors, but had ceased to be so before the contract was entered into, but their names appeared as proprietors in the declaration required to be filed by 6 & 7 Wm. 4, c. 67, which makes a copy of such declaration conclusive evidence of the matters set forth, and of their continuance to the matters in question. The jury, having found that the contract was made by L. on his own behalf, without authority from defendants, and that plaintiff did not at the time know defendants to be proprietors:—*Held*, that defendants were not liable on the contract. *Holcroft v. Hoggins*, 2 C. B. 488; 15 L. J. C. P. 129.

[2] Where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and

NISI Prius. *See* Arbitration, vol. i. p. 427; Jury, *ante*, p. 277; *post*, Puis Darrein Continuance.

Relative to the Court of.[1]

NOLLE Prosequi.[2]

NONAGE. *See* Infant, *ante*, p. 135.

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the demurrer is determined in favour of the plea, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action. If, where there are several pleas, one or more issues are joined, and there are one or more demurrers, if the demurrer be determined in favour of the defendant, judgment of *nil capiat* shall be given against the plaintiff. *Cooke v. Sayer*, 2 Burr. 749. *See* 1 Saund. 80, n. 1.

[1] The authority of a judge at Nisi is by commission of assize. *Bullock v. Parson*, 2 Salk. 454; 2 Ld. Raym. 1143. He acts in a ministerial and a judicial capacity. *Reg. v. Helston*, 10 Mod. 202. He may receive affidavits in support of an application to put off a trial. *Rex v. Jolliffe*, 4 T. R. 285. He has the power of fining a defendant for a contempt committed by him in the course of addressing the jury. *Rex v. Davison*, 4 B. & A. 329. But a judge at Nisi Prius must be considered to all intents as acting under the authority, and as an emanation of the court whence the record duly emanates. *Rex v. Jolliffe*, 4 T. R. 292. And a conviction at Nisi Prius on an information out of the court of Queen's Bench is, in legal operation, a conviction before the court itself. *Rex v. Read*, 6 East, 404.

There are no express words in the stat. 14 Hen. 6, c. 1, expressly empowering the judge at Nisi Prius to inquire of felonies, though such has been the uniform practice. *Rex v. Thomas*, 4 M. & S. 422.

The court will not set aside a verdict merely on the ground that the record of Nisi Prius varied from the issue, unless it appear that it also varied from the declaration. *Doe v. Cotterell*, 1 Chit. Rep. 277.

[2] A *nolle prosequi* is a notice or acknowledgment that the plaintiff does not intend to proceed any further, either in the suit altogether, or as to some part of it, or as to some of the defendants; but if entered as to part of the suit only, or as to some of the defendants, the plaintiff is at liberty to proceed as to the rest. 1 Saund. 207, b.

The effect of a *nolle prosequi* entered as to any portion of the plaintiff's demand before trial, is to withdraw that part of his claim from the consideration of the jury; but such entry leaves the part of the claim so withdrawn so entirely unaffected by the verdict, as to enable the plaintiff to maintain a fresh action in respect of it. *Amor v. Cuthbert*, 3 Man. & G. 1; 3 Scott, N. R. 325; 1 Dowl. N. S. 160.

A defendant having pleaded several pleas, to some of which the plaintiff demurred, and on others joined issue, the demurrers were argued, and judgment given for the defendant. The plaintiff not having proceeded to trial of the issue in fact, the defendant obtained a rule *nisi* for judgment, as in case of a nonsuit; and on showing cause the plaintiff offered a *stat. processus*. At the suggestion of the court a *nolle prosequi* was entered to so much of the declaration as applied to the issue in fact, the defendant waiving his right to costs upon such *nolle prosequi*. *Quarrington v. Arthur*, 3 Dowl. N. S. 1036; 11 Mee. & W. 491; 12 L. J. Ex. 311.

Where in an action on contract against two, one of the defendants pleaded never indebted, and the other never indebted and infancy, and the plaintiff took issue upon the other pleas, but to the plea of infancy entered a *nolle prosequi* against him who had pleaded it: — *Held*, that the plaintiff having thereby admitted upon the record that there never was any joint binding contract, could not recover against either defendant, and that he ought to have been nonsuited. *Boyle v. Webster*, 16 Jur. 683; 21 L. J. Q. B. 202.

If, in an action on a bill of exchange by indorsee against acceptor, containing a count upon an account stated, the defendant plead to the first count that he did not accept, and do not plead at all to the second count, the judge will try the issue joined; and if a verdict pass for the plaintiff, a *nolle prosequi* should be entered as to the count, upon an account stated. *Luckie v. Gompertz*, Car. & M. 55: *Abinger*. S. P. *Allsop v. Smith*, 7 C. & P. 708.

Plaintiff may enter a *nolle prosequi* to the whole cause of action; as, if on a plea of coverture, the plaintiff cannot answer it. *Cooper v. Tiffin*, 3 T. R. 511.

Where the defendant pleads one plea to the whole declaration, and that plea happens to be a complete bar to one or more of the counts, but not to others, the plaintiff may enter a *nolle prosequi* as to the counts to which the plea is a bar. *Merchant v. Driver*, 1 Saund. 307, b.

On a demurrer to the whole declaration, the plaintiff cannot enter a *nolle prosequi* as to some of the counts (*Drummond v. Dorant*, 4 T. R. 360); as, where there is no non-joinder. *Rose v. Mercy*, 1 H. Black. 108. But if the defendant demur or plead separately to several counts, the plaintiff may enter a *nolle prosequi* as to some of the counts, and proceed to trial or argument on the others. 1 Saund. 207, a, 203, 339; 2 Roll. Abr. 101 (G), pl. 6; 2 Leon. 177; Hob. 180; 1 Stra. 532; 7 T. R. 473; 1 B. & P. 157; 6 Taunt. 444; Clift. 425, pl. 14; Litt. Ent. 448, 455.

NON-Assumpsit.[1]

If the defendant plead to one count, and demur to another, the plaintiff, if he have judgment on the demurrer, and be content to take damages upon that judgment only, may execute a writ of inquiry as to it; or, in case of a bill of exchange, or the like, may have it referred to the master, and may enter a *nolle prosequi* as to the issue in fact.

A *nolle prosequi* may be entered as to part of a count; as in trespass, where the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a *nolle prosequi* as to the hay and grass, and proceed for the taking of the corn. 1 Saund. 207, b.

Formerly, where there was a demurrer to part, and issue to the other, and plaintiff succeeded on the demurrer, a *nolle prosequi* was essential to found a writ of inquiry. *Anon.* 1 Salk. 219; 12 Mod. 558. But now a different rule holds. *Fleming v. Langton*, 1 Stra. 532.

A *nolle prosequi* cannot be entered as to one of several defendants, after final judgment against the others in an action *ex delicto*. *Lover v. Salkeld*, 2 Salk. 455.

In trespass or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others. *See* Hob. 70; Cro. Car. 239, 243; 2 Roll. Abr. 100; 2 Salk. 455–457; 3 Salk. 244, 245; 1 Wils. 306.

In trespass against several defendants, where the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *nolle prosequi* as to one of the defendants, and taking judgment against the others. *See* 11 Co. 5; Cro. Car. 239, 243; Carth. 193; 2 Salk. 455.

A *nolle prosequi* is a bar to a future action. *Bowden v. Horne*, 7 Bing. 714.

In actions *ex contractu*, a *nolle prosequi* may be entered as to one of several defendants, when matter arises in his personal discharge. *Noke v. Ingham*, Wils. 89. But it cannot where one defendant pleads infancy. *Chandler v. Parkes*, 3 Esp. 76. It is placed at the commencement of the replication if used before issue joined; if after, it is entered with the final judgment. *Fleming v. Langton*, 1 Stra. 532. *Duperoy v. Johnson*, 7 T. R. 473. If entered to the whole declaration, defendant is entitled to costs. *Cooper v. Tiffin*, 3 id. 511. So, where there are several defendants, the one to whom it is entered is allowed costs. *See* 8 Taunt. 663; 3 & 4 Wm. 4, c. 42, ss. 2, 32. And where entered to one of several counts, plaintiff is not entitled to costs on that count, though he recover on all the rest. *Hubbard v. Biggs*, 16 East, 129.

[1] By r. 6, T. T. 1853, in all actions on simple contracts, except as hereinafter excepted (that is to say, actions in the form of *indebitatus* counts, and actions upon bills of exchange and promissory notes, in which it is inadmissible), the plea of non-assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or may be implied by law. *Ex. gr.* in an action on a warranty, such pleas will operate as a denial of the fact of the sale, and warranty having been given, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement, of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers, and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas shall operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

By r. 8, in every species of action on contract, all matters in confession, avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, or accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

The plea of non-assumpsit is, since the rules T. T. 1853, appropriate only to what is termed a special count, it being provided by those rules that, to causes of action to which the plea of "never indebted" is applicable, as provided in schedule B. (36) of the Common Law Procedure Act, 1852, "and to those of a like nature, the plea of non-assumpsit shall be inadmissible."

This plea puts in issue both the promise and the consideration for it, as alleged. *Raikes v. Todd*, 8 Ad. & E. 846. *Beech v. White*, 12 id. 670. *Sutherland v. Pratt*, 11 Mee. & W. 296. *Wheedon v. Woodbridge*, 13 Q. B, 462, 470.

A distinction was once drawn as to the effect of non-assumpsit upon the proof of a consideration executed and executory. But it is in all cases necessary to prove the consideration as stated. *Wallis v. Broadbent*, 3 H. & W. 40. Where it is executed, the promise results from the performance, and the plea of non-assumpsit clearly puts in issue all the circumstances necessary to raise that promise, but only those material for that purpose. *Bennion v. Davison*, 3 Mee. & W. 179. *Wright v. Newton*, 3 Scott, 595. Where the consideration is executory, however, the point is not so clear, though the principle is, when considered, quite as intelligible. An executory consideration imports that something is *to be* done by the plaintiff. If the

defendant admits that, relying upon that which was *to be* done by the plaintiff, he made the promise, and did not fulfil it, merely because the plaintiff did not or could not keep his part of the engagement, he in fact admits his own promise and also the consideration which induced him to make it, or, in other words, confesses and should avoid it, by pleading specially the ground of defence. The general issue merely denies that the promise was made for the consideration stated. For instance, where the declaration stated that the plaintiff was the composer of an opera, and had a right to sell it as such, and that, in consideration of the premises, and that the plaintiff would sell it to the defendant, he promised, &c., it was holden that, under the plea of non-assumpsit, the defendant could not dispute that the plaintiff was the author of and had a right to sell, and did in fact sell, the music to the defendant. *De Pinna v. Polhill*, 8 C. & P. 78. So, where the declaration stated that P. had agreed to grant a lease to the plaintiff; that the plaintiff had agreed to grant it to S. upon payment of a sum of money; that S. had sold his interest to the defendant; that S. had not paid the plaintiff; and that, in consideration of the plaintiff granting a lease to the defendant, the defendant promised — it was holden that the defendant could not, under the general issue, show that the plaintiff was bound to grant the lease to the defendant without the payment of the money. *Passenger v. Brooks*, 1 Scott, 760; 1 N. C. 587. *See* also *Gibson v. Harris*, 8 C. & P. 378.

Under this plea the defendant may prove that the agreement signed by him was only signed on condition that it should not operate as an agreement until the happening of an event which has not occurred, as that some third party should approve of the subject of the agreement (*Pym v. Campbell*, 25 L. J. Q. B. 277; 6 E. & B. 370); or that the other party should sign the agreement or counterpart (*Furness v. Meek*, 27 L. J. Ex. 34. *Liverpool Borough Bank v. Eccles*, 28 id. 122); or that some third party should join in signing the agreement (*Boyd v. Hind*, 25 id. 246; 1 H. & N. 938); or that a note given for a supposed balance of account should not be paid if no balance was in fact due. *Kearns v. Durell*, 6 C. B. 596.

Any qualification or condition of the contract not stated in the declaration may be taken advantage of as a variance under this issue. *Brind v. Dale*, 2 Mee. & W. 775. *Nash v. Breeze*, 11 id. 352. *Kemble v. Mills*, 1 Man. & G. 757. *Sharland v. Leifchild*, 4 C. B. 529. *Wheedon v. Woodbridge*, 13 Q. B. 462. So also the defence that the real contract was inconsistent with the one alleged. *Morgan v. Preber*, 3 Bing. N. C. 457. *Mounsey v. Perrott*, 2 Ex. 522; B. & L. Pl. 273.

The illegality of the contract, whether in respect of the consideration or of the promise, must be specially pleaded (*Fenwick v. Laycock*, 1 Q. B. 414. *Daintree v. Hutchinson*, 10 Mee. & W. 85. *Bull v. Chapman*, 22 L. J. Ex. 257); and it makes no difference though this illegality appear on the plaintiff's own case at the trial. *Fenwick v. Laycock*, *supra*. But a defence on the ground that the contract was made in a foreign country, and was illegal and not binding according to the law of that country may be set up under non-assumpsit, because the foreign law is taken cognisance of by English courts only as a matter of fact. *Hannic v. Goldner*, 11 Mee. & W. 849.

The defence that a written contract has been altered after it was made, must be specially pleaded when the instrument is declared upon in its original form, and the plaintiff is able to prove it. And wherever the contract is declared on in its altered form, as, the defendant did not in fact make the contract alleged, he may raise the defence under non-assumpsit. *Hemming v. Tunery*, 9 Ad. & E. 926. *Davidson v. Cooper*, 11 Mee. & W. 778. *Heath v. Durant*, 12 id. 438. *Crookewit v. Fletcher*, 26 L. J. Ex. 153; 1 H. & N. 893. *Mason v. Bradley*, 11 Mee. & W. 590; and *see* 2 Tayl. on Evid. 2d ed. p. 1406. *See* Alteration, vol. i. p. 308.

As to bills of exchange and notes, rule 7, H. T. 1853, directs that in all actions upon bills of exchange and promissory notes the plea of non-assumpsit, or never indebted, shall be inadmissible. It is nevertheless admissible in cases where a promise is stated which would not be the necessary legal effect of the bill or note; as, for example, where a promise by or to an executor is alleged. See *Rolleston v. Dixon*, 14 L. J. Ex. 304. In such actions, therefore, a plea in denial must traverse some matter of fact; *e. g.* the drawing or making, or indorsing, &c., and all matter in confession and avoidance must be specially pleaded, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law.

Before noticing the cases to which this rule does apply, it may be well to mention those cases to which it does not. It does not apply where the bill or note is but the inducement to the promise; as where, upon a note given to a testator in his lifetime, the promise is laid to the executor after his decease. *Timmis v. Platt*, 2 Mee. & W. 720; 5 Dowl. 748. So it does not apply, if the instrument in fact be not a note or bill, though the words "note of hand" be used in the body of the instrument. *Worley v. Harrison*, 3 Ad. & E. 669; 5 Nev. & M. 173. On the other hand, though the declaration profess to proceed on some other ground, if the cause of action be in fact a bill or note, the rule will apply, and the pleadings should be framed accordingly. *Hay v. Fisher*, 2 Mee. & W. 722. But if, notwithstanding this rule, the general issue be pleaded, all the facts from which the promise results will be put in issue, and the plaintiff can only object to it by special demurrer. *Hay v. Fisher*, *supra*. The effect of the rule is to compel the defendant to traverse or admit each *material allegation* from which

NON-Claim. *See* Limitations, Statute of, *ante*, p. 392.

NON Compos Mentis. *See* Lunacy, *ante*, p. 506.

NONCONFORMITY. See *Peters v. White*, 2 Show. 239. *Rex v. Grosvener*, Stra. 1193; id. 2745.

NON Damnificatus.[1]

NON Demisit. *See post*, Replevin; Use and Occupation.

NON est Factum.[2] *See* Bond, vol. ii. p. 504; Covenant, vol. iii. p. 443; Deeds, vol. iv. p. 1.

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the defendant's liability arises. *Sibley v. Fisher*, 2 Nev. & P. 430. In an action by indorsee against indorser of a bill, the defendant cannot deny the making, because the indorsement admits it. *Allen v. Walker*, 2 Mee. & W. 317; 5 Dowl. 460. So, in an action by an indorsee upon a bill against the drawer, upon non-payment by the acceptor, the defendant cannot plead that *the plaintiff* gave no notice. *Newen v. Gill*, 3 C. & P. 367. But if the defendant be charged as maker and deny it, he will succeed if he show that he was indorser only. *Gwinnell v. Herbert*, 5 Ad. & E. 436. Any plea which compels the plaintiff to produce the bill or note, will enable the defendant to take any objection apparent upon the face of the instrument. For instance, under the plea of non-acceptance, the defendant may show a material alteration (*Cox v. Coxwell*, 2 C., M. & R. 291; 5 Tyr. 1077. *Calvert v. Baker*, 4 Mee. & W. 417); or that the instrument is not stamped, or improperly stamped. *Dawson v. Macdonald*, 2 Mee. & W. 26. *M'Dowall v. Lyster*, id. 52. *Jenkins v. Creech*, 5 Dowl. 293. *Field v. Woods*, 7 Ad. & E. 6 Dowl. 23. It may be convenient here to notice the cases upon bills or notes which range themselves under the latter part of the rule. If the defence be that the bill or note was drawn, indorsed, or accepted by way of accommodation, or that it was obtained by fraud, or under any circumstances which disentitle the plaintiff to sue upon it, this defence must be pleaded specially. The plea of want of consideration must be proved by the defendant (*Lacy v. Forrester*, 2 C., M. & R. 59; 5 Tyr. 567. *Noel v. Boyd*, 4 Dowl. 415; Tyr. & Gr. 211); unless, indeed, the plaintiff state the consideration in his replication in answer to the plea. *Low v. Burrows*, 2 Ad. & E. 483; 4 Nev. & M. 366. The plea, in form, must show the real ground of the defence, and state the circumstances under which the bill or note was given; for it is not sufficient to state generally that the defendant received no consideration for the bill or note. *Stoughton v. Lord Kilmorey*, 2 C., M. & R. 72; 5 Tyr. 568; 3 Dowl. 705. *Trinder v. Smedley*, 3 Ad. & E. 522; 5 Nev. & M. 138. *Graham v. Pitman*, 3 Ad. & E. 521; 5 Nev. & M. 37. *Reynolds v. Ivimey*, 3 Dowl. 453. *French v. Archer*, 3 Dowl. 130. *Low v. Chifney*, 1 Scott, 95; 1 N. C. 267. If, however, the plaintiff take issue on a plea, "that there was not consideration for the bill," the defendant will be at liberty to give in evidence all matters of defence to which such plea is applicable. *Easton v. Pratchett*, 1 C., M. & R. 798; 4 Tyr. 472; 2 C., M. & R. 542; 5 Tyr. 1129. *Mills v. Oddy*, 2 C., M. & R. 103; 5 Tyr. 571. So it is not sufficient to cast a suspicion on the plaintiff's title, the circumstances which constitute the defence must be stated. *Stein v. Yglesias*, 1 C., M. & R. 565; 5 Tyr. 172. *Bramah v. Roberts*, 1 N. C. 469; 1 Scott, 350. It is a general rule, that a defendant cannot, in defence to an action upon a bill or note, allege a contract different from that which the bill or note imports. He may, however, impeach the consideration, or set up a collateral agreement, which may furnish an answer to the demand for payment. *Foster v. Jolly*, 1 C., M. & R. 703. For instance, he may show that the bill was to be renewed (*Thomson v. Clubley*, 1 Mee. & W. 212), either generally or upon a condition broken. *Byass v. Wylie*, 1 C., M. & R. 686; 5 Tyr. 377. It was before the new rules sufficient to cast suspicion upon a bill, in order to make the plaintiff prove consideration. The rule is now different. The *onus* lies on the defendant to prove want of illegality of consideration, and in each case to trace the vice of the bill to the plaintiff; although in one case (*Mills v. Barber*, 1 Mee. & W. 425), it was doubted whether this was necessary, where the bill had been obtained by fraud. *Percival v. Frampton*, 2 C., M. & R. 180; 5 Tyr. 579. *Lewis v. Lady Parker*, 6 Nev. & M. 294; 4 Ad. & E. 838. *Whitaker v. Edmunds*, 1 Ad. & E. 638. *Edmunds v. Groves*, 2 Mee. & W. 642; 5 Dowl. 775. Payment or tender by the acceptor, after the bill becomes due, is no answer to the action. *Poole v. Tumbridge*, 2 Mee. & W. 223. *Chapman v. Vandevelde*, 1 H. & W. 685. If the money has been accepted, it should be pleaded as an accord and satisfaction.

[1] *Non damnificatus* may be pleaded to an action on a bond to keep plaintiff harmless (2 Saund. 84; 1 H. Black. 253); but not to one to discharge or acquit the plaintiff. 1 Saund. 117, n.

[2] By rule 10, T. T. 1853, in actions on specialties and covenant, the plea of *non est*

NON est Inventus.[1] *See post*, Sheriff.

NON Impedit clausula derogatoria quo minus ab eadem potes- tate res dissolvantur a quibus (qua) constituuntur. *A derogatory clause* (that is a clause disabling a person to do some future act) *does not prevent things or acts from being dissolved by the same power by which they were originally made or done.* Bacon's *Max.* 74, reg. 19. Thus, if a man make a will, and in the end of it add a clause that unless he shall make the present will, or declare any new will, except in a certain form, such revocation or new declaration shall be utterly void; this clause, or any similar one, is of no force or efficacy to fortify the former will against the second, but the testator may revoke it and make a new one.

NON Infregit Conventionem (L. Lat.) is a bad plea, there being no general issue in an action of covenant. 1 Tidd, Pr. 648. *See* Covenant, vol. iii. p. 443.

NON-Joinder. *See* Abatement, vol. i. p. 7.

NON Jus, sed seisina facit stipitem. *Not right, but seisin makes a stock.* Fleta, lib. vi. c. 2, s. 2; 2 Bl. Com. 209. *See* 3 & 4 Wm. 4, c. 106; Descent, vol. iv. p. 47.

NON Observata forma infertur adnullatio actus. *Where form is not observed, an annulling of the act is inferred or follows.* 12 Co. 7. Where the law prescribes a form for an act or proceeding, the non-observance of such form makes the proceeding itself a nullity. This is a rule of evidence in English and French law. Best on Evid. Introd. 58, s. 59. Bonnier, *Tr. des Preuves*, s. 334.

NON Obstante Veredicto.[2] *See* Arrest of Judgment, vol. i. p. 521.

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factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. And by rule 12, all matters in confession and avoidance shall be pleaded specially as in actions on simple contract.

The plea of *non est factum* puts in issue that the defendant executed the deed alleged in the declaration. Under this plea, therefore, he has the benefit of any variance between the deed as alleged and the deed produced in evidence. *Trott v. Smith*, 12 Mee. & W. 688. Thus, where a deed is pleaded as a release, *non est factum* puts in issue not only the execution of the deed, but also its effect as a release. *North v. Wakefield*, 13 Q. B. 536. And this is the proper plea by which to dispute the alleged operation of the deed. *Smith v. Scott*, 28 L. J.C.P. 325. Under this plea the defendants, a corporation, were allowed to show that the execution of a deed having their seal was void, because not authorised by the provisions of their act of incorporation. *Hill v. Manchester and Tulford Waterworks Co.* 5 B. & Adol. 866. *See* a special plea to this effect, *Royal British Bank v. Turquand*, 24 L. J. Q. B. 327; 25 id. 317; 6 E. & B. 327.

[1] L. Lat. *Is not found.* In practice, the name of the return made by a sheriff to a writ of *capias*, or *ca. sa.*, where the party named in the writ is not found in his bailiwick or county. 3 Bl. Com. 283; 1 Tidd's Pr. 308; 2 id. 1028, 1098. The return, as actually made, is usually expressed by the English words "not found" indorsed upon the writ, and signed by the sheriff. *See post*, Sheriff.

[2] Where a plea confesses the action, and does not sufficiently avoid it, judgment shall be given upon the confession, without regard to a verdict for the defendant, which is called a judgment *non obstante veredicto*. And in such case a writ of inquiry shall issue. Tidd, 9th ed. 920; and cases cited id. n. g.

The distinction between a repleader and a judgment *non obstante veredicto* is this, that where the plea is good in form, though not in fact, or, in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, upon the defendant's own showing, that in any way of putting it he can have no merits, and the issue joined thereon be found for him, then, as the awarding of repleader could not mend the case, the court for the sake of the plaintiff, will at once give judgment *non obstante veredicto;* but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or the

NON Omittas. A clause inserted in a writ of *capias* and other process, in cases where a defendant resides within a liberty, empowering the sheriff to enter it. Every writ under the stat. 2 Wm. 4, c. 39, is framed as a *non omittas*. 3 Chitt. Gen. Pr. 190.

NON Omnium quæ a majoribus nostris constituta sunt ratio reddi potest. *There cannot be given a reason for all the things which have been established by our ancestors.* Dig. 1, 3, 20. Branch's *Prin.* 4 Co. 78.

NON Potest adduci exceptio ejus [idem] rei cujus petitur Dissolutio. *A plea of the same matter, the dissolution of which is sought* [by the action], *cannot be brought forward.* Bacon's *Max.* 6, reg. 2; Wingate's *Max.* 647; Max. 169. Where an action is brought to defeat, undo, or annul any matter or proceeding, the defendant cannot plead such matter or proceeding in bar of the action. *See* 3 P. Wms. 317. A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto. Broom's *Max.* 124.

NON Pros.[1] *See post*, Trial.

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defendant, then, for the more satisfactory administration of justice, they will award a repleader. A judgment, therefore, *non obstante veredicto*, is always upon the merits, and never granted but in a very clear case. A repleader is upon the form and manner of pleading. Tidd, 9th ed. 922; Bac. Abr. Pleas, M; Com. Dig. Plead. r. 18; 5 Taunt. 386; 1 Marsh. 95; S. C. 3 Taunt. 237.

If a plea be defective, and the defendant succeed at the trial thereon, the question whether the plaintiff can have judgment *non obstante veredicto*, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action: if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the plea do not confess a cause of action there must be a repleader. *Per Abbott, C. J.*: 4 B. & C. 152; 6 D. & R. 199; Steph. Pl. 108; 2 Saund. 319, b.

[1] An abbreviation of *Non prosequitur*—He does not prosecute. The name of an entry and judgment on the part of a defendant in an action at law. Where the plaintiff fails to declare in due time, by which the action is terminated with costs, the plaintiff in such case is said to be *non-prossed*. 3 Bl. Com. 296; 1 Tidd's Pr. 458. A similar judgment may be entered for not replying to the defendant's plea. Id. 676. This term is sometimes erroneously confounded with nonsuit.

Ift he defendant appears in due time to a writ of summons, and the appearance is entered in vacation, the plaintiff is bound to deliver his declaration before the end of the term next after the appearance is entered. If the appearance be entered in term time, the plaintiff has till the end of the following term to declare.

If the defendant be desirous to obtain judgment of *non pros.*, or to expedite the cause, his attorney should demand a declaration, and then the plaintiff must declare within four days, unless he obtain some further time by a judge's order. If he do neither, or, having obtained time, if he do not declare within the time allowed, the defendant may sign judgment of *non pros.*, on which he may tax the costs, and issue execution if necessary. In like manner, if the plaintiff do not proceed after the defendant has pleaded, his attorney should demand a replication, and in default of his replying, a similar judgment of *non pros.* may be signed. If, however, the plaintiff reply, and issue be joined (which, if the defendant desire to expedite the cause, the attorney should get done) the case is ripe for trial, and the plaintiff should proceed to try it; but if he neglect to do so the defendant may take steps to obtain judgment for his costs.

The time when the defendant may take such proceedings, and the proceedings themselves, are regulated by the Common-Law Procedure Act, 1852, which (sect. 100), repeals the old statute as to judgment, as in case of a nonsuit; and by sect. 101 makes new provisions in its stead.

If the action be against several defendants, plaintiff must be *non-prossed* by all. *Powell v. White*, 1 Dougl. 159.

If plaintiff do not reply in time, judgment of *non pros.* may be signed. *Hollis v. Buckingham*, 3 D. & R. 1.

Where proceedings in second action are stayed until payment of costs in the first, non-payment of the costs is no ground of *non pros.* *Sutton v. Ridgway*, 5 B. & A. 523.

One of two defendants, who have pleaded separately, might have signed judgment for not entering the issue. *Philpot v. Muller*, 2 Tidd. 78, n.

If the record be not certified in due time, defendant may enter judgment of *non pros.*, but no costs are allowed. *Sambridge v. Housley*, 2 T. R. 17. And for the costs, exe-

NONSUIT.[1]

NONSUIT: Judgment as in case of. *See post*, Trial.

NON Tenuit.[2]

Tenure.[3]

Valet impedimentum quod de jure non sortitur effectum.[4]

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cution may be taken out. *Murray v. Wilson*, 1 Wils. 316.

A new action may be brought after *non pros.*, and the defendant again, under a judge's order, holden to bail. *Turton v. Hayes*, 1 Stra. 439.

[1] A failure to follow up a cause, or a relinquishment of a cause on the part of a plaintiff at the trial.

Usually, if the plaintiff's counsel, after hearing the arguments and evidence on both sides, perceives that the judge and jury are decidedly against the plaintiff, or he apprehends that, owing to the absence of material evidence, it is probable that he will be able on a future occasion to establish a better case, he usually, at such a crisis, elects to be nonsuited; but if the case be not capable of improvement, and there is any chance of obtaining a verdict for the plaintiff, or the withdrawing of a juror (so that each party may pay his own costs), he does not interfere, but allows the judge to sum up.

A nonsuit must always be voluntary, *i. e.* by the plaintiff's counsel submitting to the same, or not appearing; and in no case can it be adverse, or without implied consent. *Dewer v. Purday*, 4 Nev. & M. 633.

A nonsuit is more eligible for the plaintiff than a verdict against him: for after a nonsuit, which is only a default, he may commence another suit for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is for ever barred.

It has been said, if it be clear that in point of law the action will not lie, the judge at *nisi prius* will nonsuit the plaintiff, although the objection appear on the record, and might be taken advantage of by motion in arrest of judgment, or on a writ of error. 1 Cro. Eliz. 616; and *see* Bull. N. P. 308. The practice is now otherwise; the course is to try the issues as if the record disclosed a cause of action.

Where the case turns on a question of fact, it ought to be submitted to the jury, unless the plaintiff's counsel expressly assent to his being nonsuited (9 Price, 291; and *see* 2 B. & C. 693; 4 id. 21; but *see* 6 id. 225), a mere tacit acquiescence not being, it seems, sufficient; and it appears that if the counsel for a plaintiff do not mean to submit to be nonsuited, they should intimate their dissent to the judge, on his expressing himself of opinion that the plaintiff ought to be called. 13 Price, 222; M'Clel. 69, S. C.

It was formerly holden that, after a plea of tender, the plaintiff could not be nonsuited (1 Camp. 327); and it was doubted whether there could be a nonsuit after payment of money into court. But it is now settled that he may be nonsuited after a plea of tender (3 Bing. 290; 2 C. & P. 85, S. C.; and *see* the note in 1 Camp. 327); or paying money into court (*see post*, Payment of Money into Court); and though the practice was formerly otherwise (3 D. & E. 662; and *see* 1 Burr. 358; Cowp. 483), yet it is now holden that after judgment by default against one of two defendants, the plaintiff may elect to be nonsuited upon the trial of an issue joined by the other defendant. 5 B. & C. 178; 7 D. & B. 619, S. C.; and *see* 5 B. & C. 768; 8 D. & R. 592, S. C. So he may be nonsuited in *scire facias*, as well as in other actions. 1 Camp. 484. The queen, however, cannot be nonsuited, because she is supposed to be always present in court. Com. Dig. Pleader, 3. And a nonsuit, it is said, can only be at the instance of the defendant; therefore, where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attornies, parties, or witnesses appeared on either side, it was held that the only way was to discharge the jury, for nobody has a right to demand the plaintiff but the defendant; the defendant not demanding him, the judge could not order him to be called. 1 Stra. 267; and *see* 2 id. 1117. But the plaintiff, it seems, may be nonsuited in an undefended cause, if he do not make out a proper case, or for a variance, &c. 3 Taunt. 81.

Where a cause is carried down by proviso, and the plaintiff does not appear at the trial, he should be nonsuited. 2 Wms. Saund. 5th ed. 336.

In replevin, where the plaintiff does not appear, the defendant cannot take a verdict, though the record be brought down by the latter; but a nonsuit must be entered. R. & M. 357.

After verdict given, though not recorded, it is too late to be nonsuited. *Blenkern v. Great Central Gas Co.* 2 F. & F. 437.

[2] The name of a plea in bar in replevin to an avowry for arrears of rent, that the plaintiff did not hold in manner and form as the avowry alleges. Roscoe's *Real Act.* 638. *See post*, Replevin.

[3] A plea in a real action (now abolished).

[4] An impediment or bar which does not derive its effect from law is of no force. 4 Co. 31, a.

NON valet exceptio ejusdem rei cujus petitur dissolutio. *A plea of the same matter, the dissolution of which is sought, is not valid.* Called a maxim of law and common sense. *Henley, Lord C.*, 2 Eden, 134.

NON videtur vim facere qui jure suo utitur et ordinaria actione experitur. *He is not considered to use force who exercises his own right, and proceeds by ordinary action.* Dig. 50, 17, 155.

NON videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit. *Where a person* [under duress] *has made any change from the terms of the party threatening him he is not* [for all that] *considered as having retained his consent* [to such terms]. Bacon's *Max.* 89, reg. 22; Broom's *Max.* 208.

NON videntur qui errant consentire. *They who mistake are not supposed to consent.* Dig. 50, 17, 116, 2. There can be no consent when the parties are in an error respecting the object of their agreement. Pothier, Obl. part i. ch. i. s. 1, art. 3, s. 1. A contract entered into under a mistake of facts or circumstances going to the essence of it is not considered as made by consent, and is therefore no contract. 2 Kent's *Com.* 477. "This is a clear principle of universal justice." Id. *See* Broom's *Max.* 197. Another form is, *Non consentit qui errat.*

NOSCITUR a Sociis. *See* 1 Vent. 225; 3 T. R. 87; 9 East, 267; 13 id. 431; 1 B. & C. 644.

NOTARY, or Notary Public.[1]

NOTE, Bought and Sold.[2] *See* also *post*, Sale; Vendor and Purchaser.

[1] A public officer, by or before whom various acts, chiefly in mercantile matters, are required to be done; such as the protest of negotiable paper, marine protests in cases of loss, and the acknowledgment of certain instruments, and who collects or certifies the same in writing under his official seal.

The stat. 41 Geo. 3 (U. K.) c. 79, was passed for regulating public notaries in England. By this act, no person shall act as a notary unless duly admitted; nor shall he be admitted as notary unless he shall have served seven years' apprenticeship to a notary, on penalty of 50*l.* Notaries shall not permit unqualified persons to act in their names. Persons applying to become notaries within the jurisdiction of the Company of Scriveners in London, shall be free of the said company.

Notarial certificates are not evidence of the facts certified. See *Ex-parte Church*, 1 D. & R. 234. *Waldron v. Combe*, 3 Taunt. 162, a. *See post*, Protest.

[2] When bought-and-sold notes have been delivered by the broker to the parties they are the proper evidence of the contract (*Rucker v. Cammeyer*, 1 Esp. 105. *Chapman v. Partridge*, 5 id. 256. *Thornton v. Meux*, M. & M. 43. *Trueman v. Loder*, 11 Ad. & E. 589. *Hawes v. Forster*, 1 M. & R. 368), and are admissible though the broker has neglected to sign the entry in his book, or, indeed, made no entry. *Dickenson v. Lilwal*, 1 Stark. 128; 4 Camp. 279. If the notes materially differ there will be no contract (*Grant v. Fletcher*, 5 B. & C. 436. *Thornton v. Meux*, *supra*. *Greyson v. Ruck*, 4 Q. B. 737. *Townend v. Drakeford*. 1 C. & Kir. 20. *Hanks v. Ford*, 1 M. & R. 36. *Thornton v. Kempster*, 5 Taunt. 786); nor, if the broker draw up a different contract from that agreed upon, and send a sold note to the plaintiff only, will that bind the defendant. *Pitts v. Beckett*, 13 Mee. & W. 743. And mercantile usage is admissible to explain any variances between these notes; and being so explained, where not material, they do not avoid the contract. *Bold v. Rayner*, 1 id. 343. Thus: "We have this day bought for your use from J. O. B. 100 tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowance, &c. in cash, at fourteen days from delivery, less two-and-a half per cent discount, to be delivered from the Speedy or Charlotte, expected to arrive about November or December next." "We have this day sold for your use (payment in fourteen days by cash, less two-and-a-half per cent discount from delivery), 100 tons palm oil, at 31*l.* 10*s.* per ton, ex Speedy or Charlotte, to arrive, &c." *Bold v. Rayner*, 1 Mee. & W. 343. And where the bought note was made out in the name of the agent, parol evidence was received on behalf of the plaintiff, to show that the defendant had contracted in the agent's name in all previous dealings with the plaintiff. *Trueman v. Loder*, 11 Ad. & E. 589. The terms of the contract cannot be varied by parol. *Marshall v. Lynn*, 6 Mee. & W. 109. *Stead v. Dawber*, 1 Ad. & E. 57. *Stowell v. Robin-*

NOTE of Protest.[1]

or **Memorandum.** *See* Fraud, Statute of, vol. iv. p. 535.

Promissory. *See* Bills and Notes, vol. ii. p. 400.

NOTICE of Action. *See* also *post*, Not Guilty by Statute, p. 566.

I. In General, p. 548.

II. Form and Requisites of, p. 549. *See* also Justices of Peace, *ante*, p. 291, n.

III. To Particular Persons, p. 550.

(A) *Army, Navy, or Marines*, p. 550.

(B) *Bread, Proceedings connected with Sale of*, p. 550. *See* 6 & 7 Wm. 4, c. 37.

(C) *Clergymen for Non-Residence*, p. 550. *See* 57 Geo. 3, c. 99, s. 40.

(D) *Building Act*, p. 550.

(E) *Statute as to Cruelty to Animals*, p. 550.

(F) *Customs and Excise*, p. 550.

(G) *County Court, Proceedings connected with*, p. 551.

(H) *Gaming-House*, p. 551.

(I) *Highway and Turnpike Acts*, p. 551.

(J) *Juvenile Offenders*, p. 551. *See* 10 & 11 Vic. c. 82, s. 17.

(K) *Justices of Peace. See ante*, p. 285.

(L) *Land-Tax. See* 5 & 6 Wm. 4, c. 20, s. 19.

(M) *Larceny, Coin, &c.* p. 551.

(N) *Malicious Trespass Act*, p. 551.

(O) *Passengers by Sea*, p. 551.

(P) *Police Officers and Constables*, p. 551.

(Q) *Post Office*, p. 552.

(R) *Public Health Act*, p. 552.

(S) *Railway Company*, p. 552.

(T) *Tithes*, p. 552.

(U) *Tolls and Taxes*, p. 552.

IV. Effect of not Giving when Required, p. 552.

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son, 3 Bing. N. C. 928. But where the price is ambiguous, the plaintiff was permitted to explain it by evidence. Thus, where hops were sold at 100*s.*, evidence was admitted to show that it meant 5*l.* per cwt. *Spicer v. Cooper*, 1 Q. B. 424.

Where the broker, in the bought-and-sold notes, described the sellers' firm as A., B., and C., but the firm had in fact, unknown to him, changed to A., D., and E.:—*Held*, that the latter might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Mitchell v. Lapidge*, Holt, N. P. 253.

A material alteration in the sale-note by the broker, at the instance of the seller, after the bargain made, and without the consent of the purchaser, will preclude the seller from recovering. *Powell v. Divett*, 15 East, 29. See *Mollett v. Wackerbarth*, 17 L. J. C. P. 47.

[1] A memorandum of a protest made by a notary preliminary to drawing up the protest in form, or extending it, as it is termed. Practically it is of no avail as a substitute for a formal protest.

I. In General.[1]

[1] In order to maintain an action, it is sometimes necessary before it is brought to serve the intended defendant with a notice, stating the cause of the action, and the plaintiff's intention to commence proceedings. This obligation is imposed by a variety of statutes passed for the protection of official persons, or others who have public duties to fulfil, as justices of the peace, revenue officers, &c. These enactments usually require, first, a notice of action to be duly served a calendar month before its commencement; secondly, enabling the defendant to tender amends before action; thirdly, to pay into court a sum sufficient to cover the damages when he has neglected to tender in due time; fourthly, requiring the action to be commenced within a short limited time after the injury; fifthly, rendering it essential that the venue be laid in the proper county where the injury was committed; sixthly, enabling the defendant to plead the general issue or the tender, and give special matter in evidence. We have already considered some of the provisions of these acts, under the plea of "Not Guilty by Statute."

The time is prescribed by the stat. 5 & 6 Vic. c. 97, s. 4, to be in all cases one calendar month; but in some statutes subsequently passed this general enactment has escaped attention, and a different period prescribed. The notice is never necessary except where it is required by act of parliament. The stat. 5 & 6 Vic. c. 97, s. 3, repeals so much of any clause or provision in any public, local, and personal act, or local and personal act, or in any act of a local and personal nature, as enables any party to plead the general issue only, and to give any special matter in evidence. The plea of not guilty by statute, therefore, is not available for railway companies, gas companies, trading corporations, local commissioners, or their subordinates, or any person acting in the execution of local acts for the improvement, lighting, and paving of towns, unless there be some special enactment in that behalf overruling the provisions of the last-named statute. Whenever, therefore, the defence of the want of notice of action is founded on the provisions of a local and personal act, it must be specially pleaded, and cannot be given in evidence under the plea of not guilty by statute. *Davey v. Warne*, 14 Mee. & W. 208.

Where the statute directs that notice of action shall be given where it is intended to proceed "in respect of anything done, or omitted to be done, in pursuance of the act," a thing is done in pursuance of the act where the person who does it is acting honestly and *bonâ fide*, either under the powers which the act gives, or in discharge of the duties which it imposes; though he may, erroneously, exceed the powers given by the act, or inadequately discharge the duties, yet if he act *bonâ fide*, in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is to be entitled to the protection conferred upon persons whilst so acting. *Gaby v. Wilts and Berks Canal Co.* 3 M. & S. 580. *Theobald v. Crichmore*, 1 B. & A. 227. *Parton v. Williams*, 3 B. & A. 330. See *Smith v. Shaw*, 10 B. & C. 284: *per Bayley, J. Graves v. Arnold*, 3 Camp. 242. *Booth v. Clive*, 10 C. B. 827. See *Jervis, C. J.*, remarks, id. 851. *Cox v. Read*, 13 Q. B. 558. *Arnould v. Hamel*, 9 Ex. 404. *Kirby v. Simpson*, 10 id. 366. *Read v. Coker*, 22 L. J. C. P. 201. *Jones v. Howell*, 29 L. J. Ex. 19. *Hazeldine v. Grove*, 3 Q. B. 997. *Hailes v. Marks*, 30 L. J. Ex. 389. Whether the party had reasonable cause for making a charge is immaterial; it suffices that he really believed that the facts existed which brought the statute into operation, and honestly intended to enforce the law. *Herman v. Seneschall*, 32 L. J. C. P. 43; 6 L. T. (N. S.) 646. See *Hardwick v. Moss*, 7 H. & W. 136; 31 L. J. Ex. These statutes do not apply to actions of replevin. *Gay v. Matthews*, 7 L. T. (N. S.) 504. Impropriety in giving orders and acts of negligence would seem to be within the statutes. See *Smith v. Shaw*, 10 B. & C. 277. Where the West India Dock Company had wrongfully prevented the plaintiffs, as brokers or agents, from landing goods from ships in the docks, and delivering them to the owners, and the question was, whether 39 Geo. 3, c. 69, s. 185, which required fourteen days' notice before any action was brought against the company, for "anything done in pursuance, or under colour" of the act, was a bar to the action, notice not having been given:—*Held*, that it was. *Wallace v. Smith*, 5 East, 115. See *Edge v. Parker*, 8 B. & C. 697. *Carruthers v. Payne*, 5 Bing. 270. *Waterhouse v. Keene*, 4 B. & C. 200. *Cooke v. Clark*, 10 Bing. 19. *Butler v. Ford*, 1 C. & M. 662. *Fletcher v. Greenwell*, 1 C., M. & R. 754. *Cave v. Chapman*, 5 Ad. & E. 647. *Wedge v. Berkeley*, 6 id. 663.

Whether the clause applies to actions on contract is doubted. *Wallace v. Smith, supra.* It applies to cases of mere *nonfeasance.* (Id.) So, under a similar provision, the court held, that the treasurer of the West India Dock Company was entitled to notice of an action of trover, for refusing to deliver articles deposited in their docks, although he had taken a bond of indemnity from other parties at the time of refusing to deliver. *Sellick v. Smith*, 2 C. & P. 282. But see *Smith v. Shaw*, 10 B. & C. 287, where *Bayley, J.*, said, "that it was not necessary to go the length of *Sellick v. Smith*, nor to say, whether a mere *nonfeasance* would be an act done within this and similar statutes." That it would, *see post*, p. 549. But, where a railway company become common carriers, that is, carriers not in the way prescribed by their

II. Form and Requisites of Notice.[1]

statute, they will not be entitled to notice of action mentioned therein; therefore, in an action against the company (alleging them to be owners and proprietors of the railway), for not safely carrying and conveying some horses in their carriages on the railway, whereby one was killed and others were injured:—*Held*, that a breach of their duty, in the character of common carriers, was not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it. *Palmer v. Grand Junction Railway Co.* 4 Mee. & W. 749. So, where the act provided that "no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done, or omitted to be done, in pursuance of this act, or in execution of the powers or authorities, or any of the orders made, given, or directed, in, by, or under this act, unless twenty-one days' previous notice in writing shall be given by the party intending to commence and prosecute such action, &c. to the intended defendant, nor unless such action, &c. shall be brought or commenced within," &c.: it was held, in an action against the company, as owners and proprietors of the railway, who had become themselves carriers upon the line, for not safely carrying and conveying the plaintiff in one of their carriages upon the railway, whereby the plaintiff was much injured and wounded, that they were not entitled to notice of action, as for a thing done, or omitted to be done, in pursuance of the act. *Carpue v. London and Brighton Railway Co.* 5 Q. B. 747.

A company incorporated will be entitled to notice, although the clause would seem to extend to persons only; and, although the word "person," in other parts of the statute, cannot include the company; as where it is opposed to the word company. *Boyd v. Croydon Railway Co.* 4 Bing. N. C. 69. Notice must be given in cases of *nonfeasance* as well as *misfeasance*. *Joule v. Taylor*, 7 Ex. 58.

[1] As the statutes require notice of the intended writ, the notice must state the writ and the court (*Elstobe v. Wright*, 3 C. & Kir. 35) from which it will be issued, and the subsequent proceeding must correspond (*Taylor v. Fenwick*, 7 T. R. 635. *Lovelace v. Curry*, id. 631); and it was decided that a letter from the plaintiff's attorney, stating that he was instructed to take legal proceedings unless goods were delivered up, was insufficient, although the local act merely required notice of action. *Lewis v. Smith*, Holt, C. N. P. 27. It should distinctly state the intention to bring an action. *Mason v. Birkenhead Commissioners*, 6 H. & N. 72. But a slight want of technicality in the description of the writ will not prejudice. *Robson v. Spearman*, 3 B. & A. 493.

The act expressly requires, that in such notice shall be clearly and expressly contained the cause of action which the party hath or claimeth against the party, and further enacts, that no evidence shall be permitted to be given of any cause of action not contained in the notice; and it will be obvious, that as the object of the statute was to enable the magistrate to know the full extent of the injury complained of, in order that he may tender or pay into court a sum sufficient to cover every ground of damage, the notice ought to communicate not only the very trespass or other cause of action, but every ground of special damage intended to be proceeded for (*Breese v. Jerdon*, 4 Q. B. 585. *Jones v. Nichole*, 13 Mee. & W. 361. *Martin v. Andrews*, 3 Q. B. 668); and, at all events, the plaintiff will be confined to the claim expressed in the served notice. It was therefore held, that under a notice of action of trespass for seizing goods, value 2*l.*, in plaintiff's dwelling-house, he could only recover to that extent for the value of the goods, and nothing for the trespass in the dwelling-house (*Stringer v. Martyr*, 6 Esp. R. 134); and a notice of action for demanding and taking of the plaintiff toll for and in respect of certain things exempted from toll, was too uncertain (*Freeman v. Line*, 2 Chit. R. 673; Lofft's Rep. 58, S. P.); and even if a particular statute require only notice of action, without saying cause of action, still the notice must state the ground. *Towsey v. White*, 3 B. & C. 133. But it has been held, that in stating the cause of action the same precision and technicality that has been required in pleading will not be necessary, and that it suffices if there be sufficient cause shown upon the face of the notice so as to apprise the defendant of what is intended to be proceeded for; and where a local trespass on land is referred to, and the particulars of which might be ascertained by the party himself on view, Mr. *Justice Bayley* seems to have considered it sufficient to point the defendant's attention to the general nature of the injury, so that he might go upon the premises and himself ascertain the full extent of the damage. *Jones v. Bird*, 5 B. & Ald. 837. Where a notice was of process "for the said imprisonment and sum of money," and the declaration was for "an assault, battery, and imprisonment," it was held, that at most the plaintiff was only precluded from recovering any damages for the battery. *Robson v. Spearman*, 3 B. & A. 493.

It seems to be established to be sufficient to state the facts complained of, and their prejudicial consequences, without suggesting any point of law or legal ground of objection upon which it is intended to be insisted that the conduct of the justice was illegal. *Rex v. Justices of Devon*, 1 M. & S. 412. *Jones v. Bird*, 1 D. & R. 503; 5 B. & A. 837; Add. Torts, 404. It has been expressly decided, that although the name

III. To Particular Persons.

(A) *Army, Navy, or Marines.*[1]

(B) *Bread, Proceedings connected with Sale of.* *See* 6 & 7 Wm. 4, c. 37.

(C) *Clergymen for Non-Residence.* *See* 57 Geo. 3, c. 99, s. 40.

(D) *Building Act.*[2]

(E) *Statute as to Cruelty to Animals.*[3]

(F) *Customs and Excise.*[4]

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of the writ must be stated (this was before the Uniformity Process Act), still the form of the action, as whether it is intended to be trespass, case, trover, or detinue, need not be disclosed, but that if the form of action be unnecessarily stated and yet be misdescribed, and the subsequent declaration vary from the notice, then the latter has been considered insufficient (*Sabin v. De Burgh*, 2 Camp. 196. *Strickland v. Ward*, 7 T. R. 631; *see* 4 M. & R. 300, in note; but *see* Chit. Col. Stat. 647, note o); and a notice complaining of a distress as made under a warrant directed to A. B., when the warrant afterwards appeared to have been directed to C. D., was held a fatal misdescription, because it was calculated to mislead. *Aked v. Stocks*, 1 Moore, 346; 4 Bing. 509.

Although the act requires notice to the party of the intended writ to be served upon him, it has nevertheless been holden that it was not necessary to name in the notice all the parties intended thereafter to be included as defendants in such writ, or to express, where several parties are named in the notice, whether it is intended to sue them jointly or severally. *Rex v. Jones*, 5 Price, R. 168; and see *Agar v. Morgan and others*, 2 Price, R. 126. *Jones v. Simpson and others*, 1 Tyr. R. 32; 1 C. & J. 174. But where a notice of action was served upon a person who acted as a clerk to two parties of public officers, and the notice was addressed to him as clerk of one body, but the cause of action occurred in respect of something done by the other body, such notice was held insufficient. *Heiler v. Torrell*, 1 Taunt. 383. The very object of requiring the notice of action was to enable the party to know to whom he might apply before the commencement of an action and tender amends; it was therefore required, that on the back of the notice shall be indorsed the name of the attorney or agent for the intended plaintiff, together with the place of his abode. The 24 Geo. 2, c. 44, does not also require the place of the plaintiff's abode to be stated, but only of that of the attorney, that being considered sufficient to enable the party to go and make a tender. But the Customs and Excise Acts expressly require the abode of the plaintiff to be stated. It has been held sufficient if the surname of the attorney be stated, although only the initial of his Christian name be given (*Mayhew v. Locke*, 7 Taunt. 63; 2 Marsh. 377. S. C. *James v. Swift*, 4 B. & C. 681). And although acts in protection of public officers are generally to be considered strictly, yet it has been holden that if the name and place of the attorney's abode be stated in the body, it suffices, although the statute, in terms, requires an indorsement of the same. *Crooke v. Curry*, Tidd, 9th ed. 30; 7 T. R. 634, in note: *sed quære?* It usually suffices to describe the place of abode of the attorney, as generally of a particular town, however considerable, as of "Birmingham;" but this does not extend to such a metropolis as London (see *Ward v. Folliott*, 3 Bos. & P. 551. *Stears v. Smith*, 6 Esp. R. 138; 6 Bing. 90); and at least of "London" when the residence was in Westminster, was considered insufficient (*Mills v. Collis*, 2 M. & R. M. C. 262); and certainly the preferable course is to name the number of the house and the street, and the part of the town where the street lies, when there is the least risk of there being several streets of the same name. The act requires one calendar month's notice, and, therefore, the day of service of the notice, and that on which it expires, ought to be excluded. 3 T. R. 623; 2 Camp. 294. *See* 4 M. & R. 330, note b; 3 B. & A. 581; 5 Bing. 339. The six months are reckoned exclusive of the first day. See *Hardy v. Ryle*, 9 B. & C. 603. *Semble*, overruling 4 Moore, 465. *Young v. Higgon*, 6 Mee. & W. 49.

In all cases where the wrong complained of may by any possibility have been committed under colour of some local act, great care must be observed to comply with its regulations, as well as those of any general act, before the commencement of any action or other proceedings.

[1] The stats. 6 Geo. 4, c. 108, s. 93, and 16 & 17 Vic. c. 107, s. 313, require a notice to be given where the intended action is against any officer of the army, navy, or marines, for anything done in the execution of or by reason of his office, and the action must be brought within two lunar months next after the cause of action has arisen.

[2] A notice is required by the Building Act (18 & 19 Vic. c. 122, s. 108) to be given in respect of anything done, or intended to be done, in pursuance of that act. The action must be brought within six calendar months.

[3] 12 & 13 Vic. c. 92, s. 27. Notice of action required, and action must be within two months after fact committed.

[4] The stat. 28 Geo. 3, c. 37, is similar

(G) *County Court, Proceedings connected with.*[1]

(H) *Gaming-House.*[2]

(I) *Highway and Turnpike Acts.*[3]

(J) *Juvenile Offenders.* *See* 10 & 11 Vic. c. 82, s. 17.

(K) *Justices of Peace.* *See ante*, p. 285.

(L) *Land Tax.* *See* 5 & 6 Wm. 4, c. 20, s. 19.

(M) *Larceny, Coin, &c.*[4]

(N) *Malicious Trespass Act.*[5]

(O) *Passengers by Sea.*[6]

(P) *Police Officers and Constables.*[7]

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as to notice as 11 & 12 Vic. c. 44, s. 9. The persons who are entitled to the notice by virtue of this statute are, "any officer of the customs or excise, or any person or persons acting by his or their order in his or their aid," and the notice is required where the action is to be brought "for anything done in the execution, or by reason of that or any other act or acts of parliament then in force, or thereafter to be made, relating to the said revenues, or either of them. This act requires the name and place of abode of the person or persons in whose name or names the action is intended to be brought to be stated in the notice; and by sect. 23 the action must be brought within three lunar months next after the matter or thing done, where the action is to be brought against any officer of excise or person employed in the revenue or excise, or any person acting in the aid and assistance of any such officer or person so employed. It is further required, by stat. 7 & 8 Geo. 4, c. 53, s. 114, that the notice shall state the time when, and the place where, the cause of action arose. The limitation in this act is three calendar months after the cause of action shall have arisen, but as the limit in 28 Geo. 3, c. 37, s. 23, is three lunar months, the action should be brought within the three lunar months to escape the difficulty.

[1] By stat. 9 & 10 Vic. c. 95 (being the act establishing county courts) it is enacted (sect. 138) "that all actions and prosecutions to be commenced against any person for anything done in pursuance of that act shall be commenced within three calendar months next after the fact committed, and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action." See *Booth v. Clive*, 10 C. B. 827.

It is questionable whether an execution-creditor interfering in the execution of process of the court is entitled to such notice. *Cranshaw v. Chapman*, 31 L. J. Ex. 277.

[2] The act for the suppression of gaming-houses (17 & 18 Vic. c. 38), requires one calendar month's notice in writing before prosecuting an action against any person for anything done or omitted to be done in pursuance of that act; and the time for bringing such action is limited to three calendar months.

[3] By the Turnpike Act (3 Geo. 4, c. 126, s. 143), a notice must be given before commencing an action for any forfeiture or penalty imposed by that or any other act made for erecting turnpikes, or for repairing or amending turnpike-roads, and the action must be brought within three calendar months; and by the Highway Act (5 & 6 Wm. 4, c. 50, s. 109), notice of action is required before commencing an action against any justice, surveyor, or other person for anything done in pursuance of that act, and the action must be brought within three calendar months.

A surveyor of highways sued for negligence in leaving heaps of gravel in the highway is entitled to notice. *Davis v. Curling*, 8 Q. B. 286); or whenever he has reasonable ground for thinking he is acting pursuant to statutory authority. *Hardwick v. Moss*, 7 Jur. N. S. 804; 7 H. & N. 136; 31 L. J. Ex. 205.

[4] The several acts consolidating the criminal law contain provisions as to notice of action to parties believing they are acting under the powers given by the statute. See *Hermann v. Seneschall*, 32 L. J. C. P. 43; and 24 & 25 Vic. c. 99.

[5] 7 & 8 Geo. 4, c. 30, s. 24. See *Read v. Coker*, 13 C. B. 850. *Jones v. Howell*, 29 L. J. Ex. 19.

[6] By 18 & 19 Vic. c. 119, s. 93, it is enacted, that no action or suit shall be commenced against any emigration officer, his assistant, government emigration agent, officer of customs, or other person, for anything done in pursuance of or under the authority of that act, until ten clear days' notice in writing, specifying distinctly the cause of action, has been given to the officer, agent, or person as aforesaid, against whom such action or suit is intended to be brought, nor after three calendar months next after the act committed and mentioned in such notice for which such action or suit shall be so brought.

[7] These are not, in general, entitled to notice of action, but special constables are by 1 & 2 Wm. 4, c. 41, s. 19, and may show the omission to give it under not guilty by statute. *See* Metropolitan Police Act, 10 Geo. 4, c. 44; 2 & 3 Vic. c. 47, s. 5. But a demand of the perusal, and a copy of the warrant, are necessary where the illegal act which has been committed, and which is complained of, was authorised by a warrant; for though the person who

(Q) *Post Office.*[1]

(R) *Public Health Act.*[2]

(S) *Railway Company.*[3]

(T) *Tithes.*[4]

(U) *Tolls and Taxes.*[5]

IV. Effect of not giving Notice when Required.[6]

executed the warrant has committed an illegal act, yet the blame is considered to rest with him who issued or procured the issuing of the warrant authorising that act; and the object of the demand, as will presently be seen, is to cast the responsibility where the fault lies. But where the warrant itself is legal, and the illegal act complained of consists in some excess not authorised by the warrant, notwithstanding it may have been committed under colour of it, a perusal and copy of the warrant need not be demanded before commencing an action against a party who has been guilty of that excess. *Sturch v. Clarke*, 4 B. & Adol. 113. It is, however, necessary in most, and advisable in all cases, to make a demand; for there may be a doubt whether a case may not possibly occur where the warrant may be legal, and yet the want of a demand of the perusal, and a copy of it, subject the plaintiff to failure in his action. *Price v. Messenger*, 2 B. & P. 158.

Constables sued for excessive violence in the performance of their duty have been held entitled to notice, as being sued for a thing done under or by virtue of the act under which they were appointed. *Butler v. Ford*, 1 C. & M. 662.

[1] By stat. 1 Vic. c. 36, s. 46, it is, for the protection of persons acting in the execution of the post acts, enacted, that all legal proceedings, whether by action or by prosecution, which shall be commenced against any person for anything done in pursuance of or under the post-office acts, shall be commenced within three calendar months next after the commission of the act, and not afterwards; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action. See *Newton v. Ellis*, 5 E. & B. 115.

[2] By the act for promoting the public health (11 & 12 Vic. c. 63, s. 139) it is enacted, that no writ or process shall be sued out against or served upon any superintending inspector, or any officer or person acting in his aid, or under the direction of the General Board of Health [the General Board of Health has ceased to exist since 1st September, 1858, and several of its powers have been transferred to the Privy Council by 21 & 22 Vic. c. 97], nor against the local board of health, or any member thereof, or the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, for anything done, or intended to be done, under the provisions of that act, until the expiration of one month next after notice in writing shall have been delivered to him, or left at their or his office or usual place of abode, clearly and explicitly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause.

[3] A railway company, sued for default of duty as common carriers, were held not to be entitled to notice of action, as not being sued for any thing done, or omitted to be done, in pursuance of their act, or in the execution of the powers and authorities given by it. *Carpue v. London and Brighton Railway Co.* 5 Q. B. 747. *Palmer v. Grand Junction Railway Co.* 4 Mee. & W. 749. But in an action to recover back excessive charges for the carriage of goods, a railway company was held to be entitled to such notice. *Kent v. Great Western Railway Co.* 3 C. B. 714.

[4] By the act for the commutation of tithes (6 & 7 Wm. 4, c. 71, s. 94), notice is required before commencing any action against any commissioner, assistant-commissioner, justice of the peace, valuer, umpire, or surveyor, for anything done under the authority of that act, and the time for commencing the action is limited to three calendar months.

[5] If a toll or tax, though not legally payable, is demanded *bonâ fide* by a collector who intends to act right, and has fair and reasonable grounds for believing that he has a right to demand the money, the collector is entitled to the statutory protection, and must have notice of action. *Waterhouse v. Keen*, 4 B. & C. 211. But if a revenue officer, toll or tax collector, improperly and without colour of right, extorts money by virtue of his office, and in plain and manifest abuse of the statute under which he acts, he will then lose the statutory protection, and will not be entitled to any notice of action. If he makes an improper seizure of goods, and then takes money as a bribe to deliver them up again, there is no statutory protection. *Irving v. Wilson*, 4 T. R. 486. If he makes a wholly unauthorised charge, and is guilty of manifest extortion under a threat of legal proceedings or the pressure of a distress (*Umphelby v. M'Lean*, 1 B. & A. 42), he cannot shelter himself under the provisions of the statute.

If the officer has reasonable grounds for thinking that his duty required him to do the injurious act complained of, he is entitled to notice of action. *Daniel v. Wilson*, 5 T. R. 1. *See ante*, p. 548.

[6] The omission of a notice when required is a defence to the action, but must be specially pleaded (2 Chit. Pr. 10th ed. 1214.

NOTICE of Bail. *See* Bail, vol. ii. p. 74.

of Trial. *See post*, Trial.

to Carriers. *See* Carriers, vol. iii. p. 29.

to Produce. *See* Evidence, vol. iv. pp. 289, 305.

to Quit.

I. General Nature and Operation of, p. 553.
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I. General Nature and Operation of.[1]
II. When Requisite to be Given.[2]

Davey v. Warne, 14 Mee. & W. 199. *Edwards v. Great Western Railway Co.* 11 C. B. 588), unless by the act the defendant is privileged to give in evidence the want of it under the plea of the general issue by statute. *Kirby v. Simpson*, 10 Ex. 358. *Taylor v. Nerfield*, 3 E. & B. 724. *See* form, B. & L. Pl. 452.

[1] A notice to quit is a certain reasonable notice required by law or by custom, or by special agreement, to enable either the landlord or tenant, or assignees or representatives of either of them, without the consent of the other, to determine the tenancy from year to year, or from two years to two years, or other different periods. Cole, Ejec. 30. Without such notice, or an actual or implied surrender, or merger, a tenancy of the above nature would continue in the tenant and his assigns or representatives (Id.), and the immediate reversion would continue in the landlord and his assigns or representatives (*Madden d. Baker v. White*, 2 T. R. 159), until extinguished by the Statute of Limitations, 3 & 4 Wm. 4, c. 27. *Doe d. Landsdell v. Gower*, 17 Q. B. 589. Still the right to recover more than six years' arrears of rent in an action for use and occupation may be barred by the Statute of Limitations. *Leigh v. Thornton*, 1 B. & A. 625.

[2] A notice to quit is necessary:—1. Where there is some express stipulation on the subject. 2. By local custom. 3. By the common law.

Where there is any express stipulation as to the notice to be given by either party to determine the tenancy, such notice, whether more or less than that usually required by law, must be given, and will be sufficient. *Doe d. Green v. Baker*, 8 Taunt. 241. *Doe d. Robinson v. Dobell*, 1 Q. B. 806; 1 Gale & D. 218; Cole, Ejec. 31, 32. But less than the stipulated notice will not in such case be of any avail. *Doe d. Peacock v. Raffan*, 6 Esp. 4. *Richardson v. Clifford*, 1 Ad. & E. 52. *Doe d. Davenish v. Moffatt*, 15 Q. B. 257; Cole, Ejec. 32.

Where there is a special local custom regulating the notice to be given to determine the tenancy, and there is no express stipulation on the subject, such custom will be deemed part of the contract, as an implied term or condition thereof, and notice to quit must be given accordingly. Cole, Ejec. 32, 37. *Tyley v. Seed*, Skin. 649. *Doe d. Henderson v. Charnock*, Peake, 6. The *onus* of proving such custom lies on the party asserting its existence (*Doe d. Brown v. Wilkinson*, Co. Litt. 270, b, n. 228. *Caldecott v. Smythies*, 7 C. & P. 808); and the witnesses must speak not to opinions but facts. *Doe d. Henderson v. Charnock*, Peake, 4.

A tenant of apartments is not justified in quitting without giving notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. *Rickett v. Tullick*, 6 C. & P. 66. But there may be an express stipulation, reserving to him leave to quit at any time without no-

III. When not Required to be Given.[1]

tice, if he find anything that may at all lead him to suspect that there is any embarrassment in his landlord. *Bethell v. Blencowe*, 3 Man. & G. 119; 3 Scott, N. R. 568.

A husband cannot maintain ejectment for his wife's lands, let from year to year with his express or implied assent, without first giving due notice to quit. *Doe d. Leicester v. Biggs*, 1 Taunt. 367.

Where an infant becomes entitled to the reversion of an estate, leased from year to year, he cannot eject the tenant without giving him the same notice to quit as the lessor must have given. *Madden d. Baker v. White, supra.* For where an infant becomes of age he cannot, without the usual notice to quit, eject a tenant who has attorned to him during his infancy (*Doe d. Miller v. Noden*, 2 Esp. 530; Cole, Ejec. 35); for, generally speaking, a lease reserving rent to an infant is presumed to be for his benefit (in the absence of proof to the contrary), and shall bind him when of age. *Drury v. Drury*, 5 Bro. P. C. 570. *See* Infant, *ante*, p. 135; Lease, p. 338.

A notice to quit is not rendered unnecessary by the death of the landlord (*Madden d. Baker v. White, supra*); or of the tenant (*Doe d. Shore v. Porter*, 3 T. R. 13. *Doe d. Hull v. Wood*, 14 Mee. & W. 682. *Mackay v. Mackreth*, 1 Dougl. 213; 15 Ves. 241. *Gulliver d. Tasker v. Burr*, 1 W. Black. 596); nor by an assignment of the term. *Doe d. Castleton v. Samuel*, 5 Esp. 173); or of the reversion. *Birch v. Wright*, 1 T. R. 378. *Burrowes v. Gradin*, 1 D. & L. 213, 218. But in all such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be. Cole, Ejec. 35.

Where notice to quit is duly given by the landlord or other person for the time being legally entitled to the reversion, and he afterwards assigns his reversion, the assignee may avail himself of the notice. *Doe d. Earl of Egremont v. Forwood*, 3 Q. B. 627. So the churchwardens and overseers of a parish may avail themselves of a notice to quit, duly given by their predecessors. *Doe d. Higgs v. Terry*, 4 Ad. & E. 274. *Doe d. Hobbs v. Cockell*, id. 478.

A proper notice to quit, given to the tenant or his assignee, will operate against or in favour of any subsequent assignee. *Doe d. Castleton v. Samuel, supra.*

Where there is a tenancy from year to year subsisting, it can only be put an end to by a notice to quit, which may be given by either party, and must be given six months previously to the expiration of the current year of tenancy, so as to expire at the same period of the year in which the tenant entered upon the premises. This rule is to be invariably followed in all cases, except where there is some special agreement between the parties to a different effect; or, it would seem, where a particular local custom intervenes. We shall now point out in what cases a notice to quit is necessary, what should be its form, and how it should be served; at what period of the year it should expire; and what acts amount to a waiver of its effect.

If the tenant continue in possession for a year after his lease has expired, or rent has been received, a notice must be given before he can be turned out (*Doe d. Hollingsworth v. Stennett*, 2 Esp. 717); for where, by consent of both parties, the tenant continues in possession after the expiration of his term, the law implies a tacit renovation of the contract; and in such cases the tenant holds upon the former terms. *Right d. Flower v. Darby*, 1 T. R. 162. No fresh notice is, however, necessary where a tenant, after having given a notice, holds over for a year and pays double rent, according to the statute 11 Geo. 2 c. 19, s. 18. *Booth v. Macfarlane*, 1 B. & Adol. 904.

[1] No notice is essential where the tenancy is determined by effluxion of time, or the happening of a particular event. *Doe d. Jordon v. Ward*, 1 H. Black. 79. *Cobb v. Stokes*, 8 East, 358. *Messenger v. Armstrong*, 1 T. R. 54. *Right d. Flower v. Darby*, id. 162. So where a party occupies under an agreement for a lease, during the whole term of which the lease was to be granted; the lease never having been executed, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the tenancy, as well as of the other terms of the letting. *Doe d. Tilt v. Stratton*, 4 Bing. 446; 1 M. & P. 183; 3 Car. & P. 164; and see *Doe d. Bromfield v. Smith*, 6 East, 530; 2 Smith, 570.

Where a person held under an agreement for a lease for twenty-one years, determinable at the end of the first seven and fourteen years, a notice to quit at the end of the first seven years is necessary. *Chapman v. Towner*, 6 M. & M. 100.

Where the relation of landlord and tenant does not in fact subsist, a notice to quit is not required. It is not necessary, therefore, previously to bringing an ejectment on the demise of one partner against another, after a dissolution of the partnership, for a house agreed to be occupied by the partners during its continuance. *Doe d. Waithman v. Miles*, 1 Stark. 181. *Doe d. Colnaghi v. Bluck*, 8 C. & P. 464. So where the lessor agreed to manage a farm for the lessee, the latter allowing him and his family to reside and have the use of the dwelling-house and furniture free of rent; and either party was to put an end to the agreement on giving three months' notice or paying three months' wages; it is not necessary to give a notice to quit. *Doe d. Hughes v. Derry*, 9 C. & P. 494); nor is it necessary to be given to one who had got into possession of a house without the privity of the landlord, although they afterwards entered into a negotiation for a lease, but differed as to the terms (*Doe d. Knight v.*

Quigley, 2 Camp. 505); nor to a vendee in possession who has agreed to pay the purchase-money by instalments, where the vendor was not to be compelled to convey if default were made in any of the payments of any of the instalments. *Doe d. Moore v. Lawder*, 1 Stark. 308; and see *Right d. Lewis v. Beard*, 13 East, 210. And where the vendor of a term, before the whole of the purchase-money was paid, agreed with the purchaser that the latter should have possession of the premises till a given day, paying the reserved rent in the meantime, and that if he did not pay the residue of the purchase-money on that day he should forfeit the instalments already paid, and not be entitled to an assignment of the lease; and the purchaser being thus put into possession, and the residue of the purchase-money not paid at the day appointed, it was held that the vendor might maintain ejectment without any notice to quit, or demand of possession. *Doe d. Leeson v. Sayer*, 3 Camp. 8. Although tithes be let by parol only, still it seems the holder is entitled to a notice to put an end to the agreement. *Doe d. Morgan v. Church*, 3 Camp. 71.

No notice to quit is necessary where the tenant does an act which amounts to a disavowal of the title of the lessor (*Doe d. Williams v. Pasquali*, Peake, 19, S. P. *Doe d. Jefferies v. Whittick*, Gow. 195; Bull. N. P. 96; Esp. N. R. 463. *Doe d. Calvert v. Frowd*, 4 Bing. 557; 1 M. & P. 480); as, where the tenant has attorned to some other person, or answered an application for rent by saying that his connexion as tenant with the party applying has ceased. *Doe d. Grubb v. Grubb*, 4 B. & C. 816; 5 M. & R. 666); but a refusal to pay rent to a devisee in a will which was contested, is not such a disavowal of the title as to empower such devisee to maintain an ejectment without giving a previous notice. *See* Disclaimer, vol. iv. p. 72; and *Jones v. Mills*, 10 C. B. (N. S.) 788; 31 L. J. C. P. 66.

In case of an adverse possession, it is not necessary to give a notice to quit to the tenant in possession. Where, therefore, a party defended an action of ejectment as landlord, and the occupiers suffered judgment by default, it was held that the defendant could not object that the occupiers had not received notice to quit from the lessors of the plaintiff, and who claimed adversely to the party under whom the tenants occupied. In such cases as the tenant sets his landlord at defiance, the latter may consider him either as his tenant or as a trespasser; and in the latter case need not give him a notice to quit before he brings his action of ejectment. *Doe d. Cheese v. Creed*, 2 M. & R. 648, S. P. *Doe d. Foster v. Williams*, Cowp. 622.

It is not necessary for a mortgagee to give notice previously to bringing an ejectment, either to the mortgagor or to a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee (*Keech d. Warne v. Hall*, 1 Dougl. 21); nor where the tenant was let into possession after the original mortgage was made, but before an assignment of it, for the purpose of bringing an ejectment. *Thunder d. Weaver v. Belcher*, 3 East, 449. So a mortgagee need not give notice to a tenant to quit before bringing his ejectment, if he mean only to get into the receipt of the rent and profits of the estate, though the mortgage be made subsequently to the tenant's lease; but in such case he shall not be suffered to turn the tenant out of possession by the execution. Bull. N. P. 96.

A tenant from year to year, before a mortgage or grant of the reversion, is entitled to a notice to quit before he can be ejected by the mortgagee or grantee. Thus, where a tenant held from the 22d of November, as a yearly tenant under a mortgagee, who became such in July, and was desirous of ousting him, it was held to be too late to give notice for the tenant to quit at the end of the current year; for the tenant, at the time that the mortgagee's title accrued, had as permanent an interest in the estate till the 22d of November, as if it had been leased to him by deed till that period. *Birch v. Wright*, 1 T. R. 380. *Rogers v. Humphreys*, 4 Ad. & E. 314. *Doe v. Hales*, 7 Bing. 322.

Where a mortgage deed contained a covenant, that if the principal sum remained unpaid on a given day the mortgagee might enter, and that if not paid within a certain number of days from the day fixed for payment he might sell without the concurrence of the mortgagor, it was held that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit or demanding possession. *Doe d. Fisher v. Giles*, 2 M. & P. 749. *See* also *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553.

Where a mortgage deed contained a covenant that the mortgagor, during his occupation, should pay half-yearly a rent rather larger than the interest, and that the mortgagee should have power to distrain, provided that this reservation should not prejudice the mortgagee's right to enter, it was held that, after distraining for one half-year's rent, the mortgagee might yet maintain ejectment after a subsequent default, without giving a notice to quit. *Doe d. Garrod v. Olley*, 4 Per. & D. 275; 12 Ad. & E. 481.

Where there was an agreement between P. & W. for the sale of lands to the latter, to be completed on the 25th of March, and before that day W. agreed to let to the defendant from that day, and the defendant was let into possession before the day by consent of P., upon notice to him of the agreement to let; and on the 29th of May a conveyance was executed as of the 25th of March, subject to a term redeemable on payment by W. of the purchase-money with interest, with a power to P. to enter for default of payment by W., it was held that P. might bring ejectment for default of payment, without giving the defendant any notice to quit. *Doe d. Parker v. Boulton*, 6 M. & S. 148.

IV. By Whom to be Given.[1]

It has been thought, that a tenant of a house not under an agreement to repair may quit without previous notice to his landlord, on the premises becoming unsafe and useless. *Edward v. Hetherington*, 7 D. & R. 117. *Collins v. Barrow*, 1 M. & Rob. 112. This, however, is clearly inconsistent with the recent decisions, that a landlord does not warrant that the premises are at the time of the demise, or that they shall continue to be during the term, in any particular state or condition, or fit for any particular purpose. *Sutton v. Temple*, 12 M. & S. 52. *Hart v. Windsor*, id. 68. He must therefore continue tenant, unless due notice be given, and is liable to rent, though the premises be ruinous and uninhabitable, or destroyed by flood, lightning, or accidental fire. *Carter v. Cummins*, 1 Ch. C. 84. *Arden v. Pullen*, 10 Mee. & W. 321. *Marquis of Bute v. Thompson*, 13 id. 493. *Taylor v. Caldwell*, E. T. 1863, Q. B. And it is now fully settled, that there is no implied duty or obligation on a landlord to repair (*Loft v. Dennis*, 28 L. J. Q. B. 168. *Bennett v. Ireland*, id. 48. *Keates v. Earl Cadogan*, 10 C. B. 591; 20 L. J. C. P. 76), even if actual damage arise from the neglect. *Gott v. Gondey*, 23 id. 1; 2 E. & B. 845. As to where landlord expressly agrees to do repairs, or is bound by custom, see *Surplice v. Farnsworth*, 8 Scott, N. S. 307; and with respect to furnished houses, see *Smith v. Marrable*, 11 Mee. & W. 5. *Vaughan v. Hancock*, 3 C. B. 766. *Michileu v. Wallace*, 7 Ad. & E. 49; and Frauds, Stat. of, vol. iv. p. 541.

Where a regular notice to quit has expired, and the tenant has abandoned the premises, leaving only a few articles of furniture therein, the landlord may peaceably, in his absence, and when no person is in the house, break open the door, and take possession. *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158. *Taunton v. Costar*, 7 T. R. 431. *Hillary v. Gay*, 6 C. & P. 284. *Newton v. Horland*, 2 Scott, N. R. 474; *see* 8 B. & C. 4.

[1] The notice should be given by the person interested, or his authorised agent; and where several are jointly interested they should all join. *Right d. Fisher v. Cuthell*, 5 East, 491. Therefore, to entitle joint-tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint-tenants at the time it is served; but if the notice be given by an agent it is sufficient, if his authority be subsequently recognised; and consequently where such notice was given by an agent under written authority, which, at the time of the service of the notice, had been signed only by some of the several joint-tenants, but afterwards was signed by all the others: — *Held*, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient. *Goodtitle v. Woodward*, 3 B. & A. 689.

A notice to quit by one of several joint-tenants has been held to be sufficient. *Doe d. Aslin v. Sumersett*, 1 B. & Adol. 135. So a notice by authority of one of several trustees joint-tenants, in behalf of all, is good for all. *Doe d. Kindersley v. Hughes*, 7 Mee. & W. 139. So by one of several partners enures to the benefit of his co-partners. *Doe v. Hulme*, 2 M. & R. 433. As to parish lands, *see* 6 M. & S. 40.

The steward of a corporation may give a notice to quit, without a power under the corporation seal for so doing; and if the corporation afterwards bring an ejectment upon such notice, it will not be necessary to give any other evidence of his authority than that he is steward for the corporation: by bringing the ejectment they show that they authorise and adopt the act of their officer. *Roe d. Dean of Rochester v. Pearce*, 2 Camp. 96. And a receiver appointed by the Court of Chancery, with a power to let land, is an agent sufficiently authorised to give a notice to quit; for, if he have an authority to let, he must be taken to have a power of determining the letting. *Williamson v. Colley*, Burr, 2694; S. P. *Doe d. Green v. Baker*, 8 Taunt. 241. So, the parties in a declaration in ejectment need not correspond with the notice to quit, so as to make it necessary, where there are several lessees who sign the notice to quit, that they should all be joined. *Doe d. Joliffe v. Joliffe*, 2 Esp. 377. So, where a lease contained a proviso that, if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do, upon twelve months' notice to the other of them, his heirs, executors, or administrators, it was considered that the words "executors or administrators" were put for representatives in general, and that a notice might be given by an assignee of either party, or by the heir or devisee, as well as by the parties themselves, their executors or administrators (*Roe d. Bamford v. Hayley*), because otherwise, in case of an assignment or devise, the right of determining the term would be taken from the persons interested in it, and given to a mere stranger having no interest therein. *See* 12 East, 464. But where the demise was for twenty-one years, if both parties should so long live; but if either should die before the end of the term, then the heirs and executors, &c. of the party so dying might determine the lease, by so giving twelve months' notice to quit; it was holden that this power extended only to the representatives of the party dying, and that the lease could not be determined by a notice to quit, given by the lessor, after the lessee's death, to his representative. See *Legg d. Scott v. Benion*, Willes, 43.

A notice by an agent of an agent is unavailing. *Doe d. Robinson*, 10 B. & C. 626.

V. To Whom to be Given.[1]

VI. When to Expire.[2]

[1] The notice should be addressed to the original tenant (*Doe d. Mitchell v. Levi*, cited Adams on Ejectment, 115); for if the premises are underlet, a notice from the original landlord to the sub-tenant is unavailing. *Roe v. Wiggs*, 2 N. R. 330; S. P. *Pleasant d. Pleasant v. Benson*, 14 East, 234.

When premises are in the possession of two or more, as joint-tenants or tenants in common, a written notice to quit, addressed to all, and served upon one only, will be good notice. *Doe d. Bradford v. Watkins*, 7 East, 551; S. C. 3 Smith, 517. But it has been said, notice to quit may be given to a tenant by parol, and when there are two parts of the premises held in common, verbal notice to one is sufficient. *Doe d. Macartney v. Crick*, 5 Esp. 196. And in ejectment against the bailiffs of a corporation, the tenancy may be determined by a notice to quit served on its officers (*Doe d. Carlisle v. Woodman*, 8 East, 228.)

[2] In the absence of a stipulation to the contrary, the notice should be given six months before the tenancy expires. *Right d. Flower v. Darby*, 1 T. R. 159; S. P. *Gulliver v. Tasker*, *v. Burr*, 1 Black. 596. The notice must terminate at the end of the year of the tenancy, unless there be an express agreement to the contrary (*Doe d. Pitcher v. Donovan*, 1 Taunt. 555); that is, the exact day the tenancy commenced; the next or subsequent day renders it insufficient. *Doe d. Spicer v. Lea*, 11 East, 312.

Where the period of entry is doubtful, it is always safest to give a general notice to quit at the end of the year of tenancy, which shall expire after one half year from the time of service of the notice. In one case, where a party took possession of premises on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days, it was held by *Parke, J.*, that in such case a notice to quit at Michaelmas was sufficient, and that, although the landlord had at first given a notice, expiring with the half quarter, it was not necessarily presumable from thence that the tenancy was from year to year, commencing with the half quarter. *Savage v. Stapleton*, 3 C. & P. 275. A demise for a term of three years, determinable on a six months' previous notice, is a demise for three years, and cannot be determined sooner by notice. *Jones v. Nixon*, 31 L. J. Ex. 503.

Where the house and land are let together, to be entered upon at different times, and it does not appear from the terms of the demise from what time the whole is to be taken as let together, the notice to quit must be given to quit at the period at which the tenant entered upon that part of the premises which form the principal subject of demise; it is a question of fact for the jury which is the principal and which is the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time. *Doe d. Heapy v. Howard*, 11 East, 498. Therefore, where a tenant held the land from the 2d of February, and the house, &c. from the 2d of May, a notice on the 16th of February to quit at the end of his present year's holding is good for the following spring, it not being shown by the tenant that the land was not the principal subject of demise. *Doe d. Kindersley v. Hughes*, 7 Mee. & W. 139.

The case of lodgings depends upon a particular contract, and is an exception to the general rule, that in the case of a yearly tenancy, a notice to quit must be given half a year before the expiration of the year. The agreement between the parties may be for a month, or less time, and then much shorter notice would be sufficient if the tenant has held over the time agreed upon. *Right d. Flower v. Darby*, 1 T. R. 162. The whole question depends upon the nature of the first contract, for in all cases the notice to quit must have reference to the terms of the letting; therefore, where the tenant has taken the house by the month, a month's notice to quit is sufficient. *Doe d. Parry v. Hasell*, 1 Esp. 94. A weekly taking may be determined by a week's notice. *Jones v. Mills*, 10 C. B. 788; 31 L. J. C. P. 66.

Where there was an agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning if no default was made in payment of the rent, but the lessor afterwards refused to execute the agreement and the tenant paid his rent weekly, it was held that he was entitled to a month's notice to quit, although the agreement was not executed, and although, if he had been a weekly tenant, a week's notice would have been sufficient. *Doe d. Peacock v. Raffan*, 6 Esp. 4. *See ante*, Lodgings, p. 402.

Although no new tenancy is created by a mere agreement for an increase of rent in the middle of the year of a tenancy, yet a notice to quit, after the receipt of the increased rent, must expire at the time when the tenant originally entered. *Doe d. Bedford v. Hendrick*, Add. Ejec. 144, 3d ed.; and see *Doe d. Holcombe v. Johnson*, 6 Esp. 10. And where a tenant under a lease continues to hold after the expiration of it as a tenant at will, and assigns to another, the tenancy of the assignee shall be held to commence at the day on which the original tenancy commenced under the lease, and notice to quit on that day only is good, notwithstanding the assignee came in on a different day. *Doe d. Castleton v. Samuel*, 5 Esp. 173.

As an agreement to take a farm, the arable from Old Candlemas, the pasture from Old Lady-day, and the meadow from Old May-day, paying rent half-yearly at Old Michaelmas and Lady-day, is a taking from Old Lady-day, and the notice to quit delivered

VII. Form of.[1]

before Old Michaelmas-day is sufficient. *Doe d. Daggat v. Snowdon*, 2 Black. 1224. So, under an agreement by a tenant of a farm to enter on the tillage land at Candlemas, and on the pasture, &c. at Lady-day, and that he should quit according to the time of entering, and the rent was payable at Michaelmas and Lady-day:—*Held*, that a notice to quit delivered half a year before Lady-day, but less than half a year before Candlemas, was good. *Doe d. Strickland v. Spence*, 2 Smith, 225; S. C. 6 East, 120. And the court said, in all such cases the notice must refer to the substantive time of entering. See *Doe d. Bradford v. Watkins*, 7 East, 551; and *ante*, p. 557. And where house and land are let together, to be entered upon at different times, and it do not appear from the terms of the demise from what time the whole is to be taken as let together, it is a question of fact for the jury which is the principal and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time. *Doe v. Howard*, 11 East, 498.

Where tenant for life grants a lease for years, which is void against the remainderman, and the latter, before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created, yet it is with reference to the old term, and, therefore, a half-year's notice to quit from the remainderman, ending with the old year, is good. *Doe d. Collins v. Weller*, 7 T. R. 478; S. P. *Right d. Flower v. Darby*, 1 T. R. 159. And under an agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning, the agreement may be put an end to by a month's notice. *Doe d. Peacock v. Raffan*, 6 Esp. 4. And if at the end of the year, when the tenancy is from year to year, the landlord accepts another farmer as tenant, in the room of the former tenant, without any agreement in writing, such acceptance shall be a dispensation of any notice to quit. *Taylor v. Chapman*, 2 Esp. 506.

If the exact day be uncertain, the time when the tenant actually entered is the test of the period of commencing. *Kemp v. Derrett*, 3 Camp. 511.

Where a holding is general from Michaelmas, the custom of the country, as to whether it shall be deemed Old or New Michaelmas, is admissible evidence (see *Farley d. Canterbury v. Wood*, 1 Esp. 198); but not admissible to prove that a notice to quit served on the 5th of April is a good notice to leave, by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case. *Hogg v. Norris*, 2 F. & F. 246.

Where the tenancy expires at Michaelmas old style, a notice to quit at Michaelmas generally suffices. *Doe d. Hinde v. Vince*, 2 Camp. 256; S. P. *Doe d. Harrop v. Green*, 4 Esp. 198; S. P. *Howard v. Wemsley*, 6 Esp. 53. So where a notice was given on the 20th September to quit at the end of six calendar months, it was held good to determine a holding commencing on the 25th March. And if a tenant comes in the middle of a quarter, and afterwards pays for the time to the beginning of a succeeding regular quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter day to which he paid up. *Doe d. Holcombe v. Johnson*, 6 Esp. 10. So, if premises are taken for twelve months certain, and six months' notice to quit afterwards, the tenancy may be determined by a six months' notice to quit, expiring at the end of the first year. *Thompson v. Maberley*, 2 Camp. 573.

There is no distinction in notices to quit between houses and land. *Right v. Darby*, 1 T. R. 159.

[1] A verbal notice to quit by a tenant under a parol lease is sufficient (*Timmins v. Rowlison*, 3 Burr. 1603; 1 W. Black. 533; S. P. *Doe d. Macartney* (*Lord*) *v. Crick*, 5 Esp. 196), though given on behalf of a corporation (*Roe d. Dean and Chapter of Rochester v. Pearce*, 2 Camp. 96); but where a power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by giving a parol notice. *Legg d. Scott v. Benion*, Willes, 45. In all cases, however, the notice to quit had better be in writing, so that the contents of it may be readily proved, and no dispute may arise as to the sufficiency of its terms. It is advisable that it should be examined previously to the service, and a copy kept by some one who may be called as a witness to prove the terms of it. It was formerly held that a notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for. *Doe d. Sykes v. Durnford*, 2 M. & S. 62. This is no longer required. Any person who has a competent knowledge of the facts may be called to prove the necessary service.

A notice to quit should be clear and certain in its terms, and not ambiguous or optional; therefore, if a notice to quit be in these words, "I desire you to quit, *or* else that you agree to pay double rent," the tenant having an option, the notice would not be sufficient: but where the notice in writing was served on a tenant, and was in the following words, "I desire you to quit possession on Lady-day next, or I shall insist upon double rent," the court held it to be sufficiently positive, and that the latter words were added only by way of threat of the consequence of holding over the possession. *Doe d. Matthews v. Jackson*, 1 Dougl. 175.

A notice given by the grantor of a license to mine, that unless the grantee kept a certain number of miners at work, as he was bound to do, the grantor would re-enter, is not a good notice to avoid the license, which the grantee was entitled to do. *Muskett v. Hill*, 7 Scott, 855; 5 Bing. N. C. 694.

VIII. Service of.[1]

IX. Effect of giving Sufficient or Insufficient Notice.[2]

A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognise a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession. *Doe d. Godsell v. Inglis*, 3 Taunt. 54.

A misdescription of the premises is not fatal if they are otherwise sufficiently designated, so that the party to whom the notice has been given has not been misled. *Doe d. Cox v.* ——, 4 Esp. 185. Therefore a notice to quit a farm at D., the farm being in the adjoining township of H., is good if it does not appear that the tenant was misled. *Doe d. Armstrong v. Wilkinson*, 4 Per. & D. 323; Arn. & H. 39; 12 Ad. & E. 743. But a notice to quit a part only of premises leased together is bad; although, where a farm was leased for twenty-one years, at a rent of 180*l.* per annum, consisting, as described in the lease, of the Town Barton, and its several parcels described by name, at the rent of 83*l.*; other closes named at the rent of 5*l.* 5*s.* and 1*l.*; and the Shippen Barton, and its several parcels described by name, at 86*l.*, with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice, it was held that a notice by the landlord to his tenant to quit "Town Barton, &c. agreeably to the terms of the covenant between us, on the expiration of the fourteenth year of your term," given in due time, was sufficient. *Doe d. Rodd v. Archer*, 14 East, 245.

Where a house, lands, and tithes are held under a parol demise, at a joint rent, a notice to quit the house, land, and premises, with the appurtenances, includes the tithes, and is sufficient to put an end to the tenancy. *Doe d. Morgan v. Church*, 3 Camp. 71.

It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him at the proper time. *Doe d. Matthewson v. Wrightman*, 4 Esp. 5. In this case *Lord Kenyon* said that it was sufficient to show that the defendant was the tenant of the plaintiff, and that the service was on him in that character. And if a notice to quit be directed to the tenant by a wrong Christian name, and he keep, and do not send it back, it is a waiver of the misdirection, and the lessor may recover on it if there was no other tenant of the name. *Doe d. Spiller*, 6 Esp. 70. And where two tenants hold premises in common, a notice to quit to one of them is sufficient to determine the tenancy (*Doe d. Macartney* (*Lord*) *v. Crick*, 5 Esp. 196); at least it is evidence that the notice reached the other tenant, who lived elsewhere. *Doe d. Bradford* (*Lord*) *v. Watkins*, 7 East, 551; 3 Smith, 517.

Where tenant from year to year underlets part of the premises, and then gives up to his landlord the part remaining in his own possession, the landlord cannot entitle himself to recover against the under-lessee, no notice to quit having been given to the lessee, but only a notice to the under-lessee, and that by the landlord in his own name, and not in the name of the first lessee. *Pleasant d. Hayton v. Benson*, 14 East, 234.

In ejectment against T. & F., where it is shown that B., not a party to the cause, came into possession of the premises under an unperformed contract of sale, and that T. & F. held under him, notice to quit served upon T. & F. is sufficient. *Doe d. Blair v. Street*, 2 Ad. & E. 329.

[1] The merely leaving a notice at the tenant's house with a servant, without further proof of its having been explained to the servant, or that it came to the tenant's hands, is not sufficient. *Doe d. Buross v. Lucas*, 5 Esp. 153. But where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery and explanation of a notice to quit to his servant at the dwelling-house is strong presumptive evidence that the master received the notice, and ought to be left to the jury (*Jones d. Griffiths v. Marsh*, 4 T. R. 464), though such a presumption may of course be rebutted by the evidence of the servant.

A delivery of a notice to quit to the servant has been held sufficient, though the tenant might not have been informed of it till within the half-year after its expiration, especially where the servant might have been called, but was not. *Doe d. Neville v. Dunbar*, M. & M. 10.

Notice to quit served upon a wife on the premises held by the husband is sufficient. *Doe d. Blair v. Street*, 2 Ad. & E. 329. *Smith v. Clark*, 9 Dowl. 202.

A notice to quit put under the door of the tenant's house, and afterwards shown to have come into his possession within the proper time, is well served. *Alford v. Vickery*, 1 Car. & M. 280. So, a notice sent by post suffices. *Papillon v. Brunton*, 29 L. J. Ex. 265.

An ejectment against the bailiffs *pro tempore* of a corporation cannot be maintained by the annual predecessors of the defendants in the same office for several years before, and service of a notice to quit on the defendants, the existing bailiffs, for the payment of such rent by the bailiffs in succession, is merely evidence of a tenancy in the corporation: but at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers. *Doe d. Carlisle* (*Earl*) *v. Woodman*, 8 East, 227.

[2] An insufficient notice to quit given by the tenant, and assented to by the landlord, will not determine the tenancy or operate as a surrender on the expiration of

X. Waiver of.[1]

such notice. *Doe d. Huddlestone v. Johnstone*, 1 M'Clel. & Y. 141. *Johnstone v. Huddlestone*, 4 B. & C. 922. *Doe d. Murrell v. Milward*, 3 Mee. & W. 328. *Bessell v. Landsberg*, 7 Q. B. 638; Cole, Ejec. 32.

A tenancy from year to year created by parol, is not determined by a parol license from the landlord to quit in the middle of a quarter, and the tenant quitting the premises accordingly without the landlord taking possession. *Mollet v. Brayne*, 2 Camp. 103. *See post*, Surrender.

An agreement for a new lease, upon different terms (not amounting to an actual demise), will not be sufficient, without a notice to quit, to determine a previous yearly tenancy. *John v. Jenkins*, 1 C. & M. 227; 3 Tyr. 170. *Jones v. Reynolds*, 1 Q. B. 506.

Upon the expiration of a notice to quit, duly given by either party, the tenancy ceases, and unless a fresh tenancy be afterwards created, the landlord cannot distrain for subsequent rent, notwithstanding the tenant continues in possession for a year or more after the expiration of the notice. *Alford v. Vickery*, Car. & M. 280. The remedy in such case is by action for use and occupation, or for double value or double rent. *See* vol. iv. p. 128.

The notice should be directed to the tenant, and may be delivered to his attorney or agent. *Doe d. Prior v. Ongley*, 10 C. B. 25, 34. If served upon the tenant personally, it need not be directed to him by name. *Doe d. Matthewson v. Wrightman*, 4 Esp. 5.

The tenant, on being served with the notice, should give a similar notice to his under-tenant, if he have any, and he will be liable to an ejectment if his under-tenant hold over. *Roe v. Wiggs*, 2 B. & P. (N. R.) 330.

In the absence of proof to the contrary, a person who has obtained possession from a tenant will be presumed to be in possession as assignee of the term, and not as a mere under-tenant. *Doe d. Morris v. Williams*, 6 B. & C. 41; 9 D. & R. 30. *Roe d. Blair v. Street*, 2 Ad. & E. 329, 331. *Hindley v. Rickarby*, 5 Esp. 4; Cole, Ejec. 45, 46.

Upon the death of a tenant from year to year his widow remained in possession, and a notice to quit was given to her: — *Held* sufficient, in the absence of any evidence of probate or letters of administration granted to some other person. *Rees d. Mears v. Perrot*, 4 C. & P. 230.

Where there are two or more joint lessees, a notice to quit given to one of them, even by parol, is sufficient for all. *Doe d. Lord Macartney v. J. & W. Crick*, 5 Esp. 196. *Doe d. Lord Bradford v. Watkins*, 7 East, 551; 3 Smith, 517.

Where a corporation aggregate is the tenant, and a notice to quit is necessary, it should be addressed to the corporation, and not to the officers. *Doe d. Lord Carlisle v. Woodman*, 8 East, 228; Cole, Ejec. 46.

[1] A notice to quit can be waived, and a new or continued tenancy created by the express or implied consent of both parties (Cole, Ejec. 55); as by receipt of rent after expiration of the notice (this is a question for the jury. 6 T. R. 219; 2 Camp. 387); or distraining for rent accruing after expiration of notice. 1 H. Black. 311.

There is this difference between a termination of a tenancy by a notice to quit, and a forfeiture. In the former case the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both; but in the case of a forfeiture the lease is voidable only at the election of the lessor. In the one case the estate continues though voidable; in the other the tenancy is at an end. *Blyth v. Dennett*, 13 C. B. 180: *Maule, J. Dendy v. Nicholl*, 4 C. B. (N. S.) 381: *Crowder, J.*

Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given. Thus, a second notice to a defendant to quit at Michaelmas, 1811, has been held to be a waiver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit at Michaelmas, 1810. *Doe d. Brierly v. Palmer*, 16 East, 53.

Where a landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment, and before the last period mentioned in the notice was expired the landlord, apprehending that the witness, by whom he was to prove the notice, would die, gave another notice to quit at the same respective times in the following year, but continued to proceed with his ejectment; it was held that the second notice was not a waiver of the first. *Doe d. Williams v. Humphrey*, 2 East, 237.

If, after the expiration of a notice to quit, the landlord give the tenant a fresh notice, that unless he quit in fourteen days he will be required to pay double value, the second notice is no waiver of the first. *Doe d. Digby v. Steel*, 3 Camp. 117. So, if a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, and a second notice be delivered to the tenant after the expiration of such notice "to quit on a subsequent day, or to pay double rent," it is no waiver of the first notice. *Messenger v. Armstrong*, 1 T. R. 53.

If the landlord has given a notice to quit and the tenant holds over, the landlord cannot waive his notice and distrain for rent subsequently accruing. *Jenner v. Clegg*, 1 M. & Rob. 213. *Alford v. Vickery*, 1 Car. & M. 280.

Where a three-months' notice was given, the rent being reserved quarterly, and the landlord expressed neither his assent or

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I. Actions for Torts.

By r. 16, T. T. 1853, in actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.[1]

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dissent to admit it, and took the rent up to the time when his tenant quitted, it was construed to be such an acquiescence as amounted to presumptive evidence that the parties intended to dispense with the notice, and was therefore deemed a waiver of it. *Shirley v. Newman*, 1 Esp. 266.

If at the end of the year (where there has been a tenancy from year to year) the landlord accept another person as his tenant, in the room of the former tenant, without any surrender in writing, such acceptance shall be a dispensation with the notice to quit. *Sparrow v. Hawkes*, 2 Esp. 505.

Where a landlord of premises, about to sell them, gave his tenant notice to quit on the 11th October, 1806, but promised not to turn him out unless they were sold, and not being sold till February, 1807, the tenant refused on demand to deliver up possession. On ejectment brought, it was held that the promise (which was performed) was no waiver of the notice, as it did not operate as a license to be on the premises, otherwise than subject to the landlord's right of acting on such notice if necessary, and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. *Whiteacre d. Boult v. Symonds*, 10 East, 13.

[1] The instances which are put in this rule are merely illustrations of its general application. The plea of not guilty, which operates as a denial only of the breach of duty or wrongful act, and admits the inducement, does not admit circumstances irrelevantly stated, nor preclude the defendant from disputing, under that plea, the character of the act upon which frequently the action is founded. For instance, in an action for a malicious arrest, not guilty denies the malice and want of probable cause, though it admits the arrest. *Cotton v. Browne*, 3 Ad. & E. 312. *Drummond v. Pigou*, 2 N. C. 114; 2 Scott, 228. So in an action for keeping mischievous animals, it denies the *scienter*. *Thomas v. Morgan*, 2 C., M. & R. 496. So, in libel, the defendant may prove that the communication was privileged, under not guilty. *Stockdale v. Tarte*, 7 C. & P. 506. *Stokes v. White*, 1 C., M. & R. 223; 4 Tyr. 786. So, in an action for running down the plaintiff's carriage, it may, under not guilty, be proved to have resulted from accident, or the plaintiff's negligence. *See* also *Dodd v. Holme*, 1 Ad. & E. 493. *Dawson v. Moore*, 7 C. & P. 25. *Whalley v. Pepper*, id. 506. It is to be observed, however, as an established rule of pleading, not affected by the new rules, that matters of inducement not material to the action cannot be traversed, and, therefore, are not admitted by the plea of not guilty. But it must not be supposed that not guilty admits only so much of the inducement as is necessary to found the action if the wrongful act be done. Additional duties may be created by subsequent and additional facts, and if such subsequent statement raise an additional duty, it is admitted by the general issue, even though without it an action might be maintained. For instance, in an action against a sheriff for a breach of duty in executing process, upon the delivery of the writ he is bound to look out for the goods: if he find them, he is bound to levy; and if he levy, he is bound to pay over the money: for the breach of each of these duties an action would lie, but if all are stated in the inducement, all are admitted by the general issue. *Wright v. Lainson*, 2 Mee. & W. 739; 6 Dowl. 146. Facts stated by way of inducement are not altered by their position in the declaration. See *Lewis v. Alcock*, 3 Mee. & W. 188; 6 Dowl. 389. It has been decided, in an action for running down the plaintiff's chaise, that if the declaration allege that the defendant was possessed of a horse, &c., such possession is admitted by not guilty. *Wheatley v. Patrick*, 2 Mee. & W. 650. But this seems not to be consistent with other cases, for, if the defendant was guilty of the wrongful act, by himself or his

Ex. gr. In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade: but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting, the goods, but not of the plaintiff's property therein.

2. All matters in confession and avoidance shall be pleaded specially, as in actions on contract.

II. In Trespass to Land.

In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

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servant, the possession is immaterial, and therefore ought not to be traversed. And See *Bennion v. Davison*, 3 id. 179. Subject to these distinctions, every material allegation in the inducement must be specially traversed, even though it be improperly incorporated with the breach. See *Frankum v. Lord Falmouth*, 2 Ad. & E. 452. *Dukes v. Gosling*, 1 N. C. 588; 1 Scott, 750. *Drummond v. Pigou*, 2 N. C. 114; 2 Scott, 228.

In an action for taking goods, not guilty merely puts in issue, whether the defendant has wrongfully dealt with the chattel. *Stancliffe v. Hardwick*, 2 C., M. & R. 1; 3 Dowl. 762. *Vernon v. Shipton*, 2 Mee. & W. 9. The defendant may, however, under that plea, prove a tenancy in common with the plaintiff, unless he have destroyed the article. *Stancliffe v. Hardwick, supra. Farrar v. Beswick*, 1 Mee. & W. 682.

Under a plea denying the plaintiff's property, the defendant cannot show an execution as his justification. *Samuel v. Duke*, 3 id. 622. He may, however, show that a sale to the plaintiff of the goods was fraudulent. *Ashby v. Minnett*, 3 Nev. & P. 231. *Nicolls v. Bastard*, 2 C., M. & R. 659. See *Picard v. Sears*, 6 Ad. & E. 469. He may also prove under this plea that the plaintiff has no right of immediate possession. *Owen v. Knight*, 4 Nev. & M. 54; 5 Scott, 307; 4 N. C. 54; 6 Dowl. 245. Thus he may show that the goods were, with the consent of the plaintiff, handed over to the third party (*Vernon v. Shipton, supra*), or pledged by the plaintiff to a third party, because the plea raises the question of right of possession as well as of right of property. *Samuel v. Morris*, 6 C. & P. 620.

Where the breach of duty or wrongful act is admitted, and the defendant seeks to protect himself from the consequences thereof by other circumstances, he must plead them specially. Hence a carrier, to avail himself of the statute, which requires notice, must plead it (*Syms v. Chaplin*, 5 Ad. & E. 634; 1 Nev. & P. 129; and in libel or slander, a justification must be pleaded. In cases, however, where the damage is the essence of the action, as for words actionable only by reason of special damage, and in actions for escape, &c., the rule is not so clear. In the latter, it has been decided that it is not necessary to plead to the damage (*Williams v. Mostyn*, 4 Mee. & W. 145); but in the former it is doubtful whether the special damage ought not to be traversed. *Smith v. Thomas*, 2 N. C. 372; 4 Dowl. 33. *Perring v. Harris*, 2 M. & Rob. 5.

In an action for detention of goods, a lien cannot be given in evidence. *Mason v. Farrell*, 12 Mee. & W. 674. *Barnwell v. Wil-*

liams, 7 Man. & G. 403. *Stancliffe v. Hardwick*, 2 C., M. & R. 1; 5 Tyr. 551; 3 Dowl. 762. But in action for a wrongful conversion, a lien may be proved under a traverse of the property in the goods. *Owen v. Knight*, 4 Bing. N. C. 54. *Dorrington v. Carter*, 1 Ex. 666. A special plea asserting a lien would be bad.

The plea of not possessed in trespass to land, denies not the title, but the possession, stated in the declaration, *i. e.* a sufficient possession to sustain the action. *Heath v. Milward*, 2 N. C. 98; 2 Scott, 160.

The plaintiff complained of an injury to a messuage and premises in his possession, and the defendant pleaded not possessed; and it being found that the plaintiff had only part of the house, the defendant occupying the rest, it was holden that the plaintiff was entitled to a verdict. *Fenn v. Grafton*, 2 N. C. 617.

Where the plaintiff complained of throwing down a wall, and the defendant pleaded that it was not the wall of the plaintiff, and proved that it was a party-wall, the court held that, the complaint being of a trespass to the whole wall, the defendant was entitled to a verdict. *Murley v. M'Dermott*, 3 Nev. & P. 356.

The plea puts in issue the possession of the close described in the declaration (*Bond v. Downton*, 2 Ad. & E. 26); and if more than one be stated, the issue upon this plea is divisible, and the defendant will be entitled to a verdict as to so much as is not proved. *Phythian v. White*, 1 Mee. & W. 216; Tyr. & G. 515.

In an action for seizing goods, the plea of no property puts in issue merely the property as stated in the declaration, *i. e.* a sufficient property to maintain the action as against a wrongdoer. Therefore bare possession is enough (*Ashmore v. Hardy*, 7 C. & P. 501); but if the defendant claim the goods, he may, under this, show his title, and that the plaintiff's title is fraudulent: for in such a case, as against the defendant, the plaintiff has no property. *Ashby v. Minnett*, 3 Nev. & P. 231. *Nicholls v. Bastard*, 2 C., M. & R. 659.

In such an action, the defendants justified as assignees of a bankrupt; the plaintiff replied that the goods belonged to him, and not to the bankrupt; and the court held that the defendants were not by this replication required to prove the bankruptcy and their appointment. *Jones v. Brown*, 1 N. C. 484; 1 Scott, 453.

Not guilty puts in issue the malice and want of probable cause in an action for a malicious prosecution. *Cotton v. Brown*, 3 Ad. & E. 312. But in case for maliciously suing out a fiat in bankruptcy, which was afterwards superseded, and the proceedings terminated:—*Held*, that this plea merely put in issue the issuing of the fiat, but not the rescinding of it; which, not being denied, was admitted (*Atkinson v. Raleigh*, 11 L. J. 165); nor does the plea in an action for a malicious arrest put in issue the statement of the termination of the suit, which should be traversed specially. *Watkins v. Lee*, 5 Mee. & W. 270. So, the fact of the reversal of an outlawry is not put in issue by this plea in an action for maliciously proceeding to outlaw the plaintiff, though the original debt and reasonable and probable cause for proceeding are. *Drummond v. Pigou*, 2 Bing. N. C. 114.

The plea puts in issue the *scienter*, as well as the injury, in an action for keeping dogs, well knowing them to be used and accustomed to bite cattle. *Thomas v. Morgan*, 2 C., M. & R. 496. *Hogan v. Sharpe*, 7 C. & P. 755. And in an action on the case for doing an injury to a pond of water of the plaintiff, stating as part of the inducement that the defendant was possessed of a close adjoining the plaintiff's land, where the pond was, and used by the defendant as a private way:—*Held*, that this part of the inducement was not put in issue by this plea, and that a variance between the proof and this statement was not material. *Dukes v. Gostling*, 1 Bing. N. C. 588. See *Bennion v. Davison*, 3 Mee. & W. 179.

In an action on the case for making a cesspool so near the well and pump of the plaintiff, that the water was contaminated and rendered useless by the oozing out of the soil and filth of the cesspool, the contamination of the water by the oozing, &c., as well as the making of the cesspool, are put in issue by not guilty. *Norton v. Scholefield*, 1 Dowl. N. S. 638.

Where the declaration alleges by way of inducement that the defendant was possessed of a carriage, and then states the negligent driving, &c., not guilty does not put in issue the property in the carriage; and *quære* whether it would have done so if plaintiff had omitted the inducement, and only stated the driving of defendant's carriage? *Taverner v. Little*, 5 Bing. N. C. 678. *Hart v. Crowley*, 12 Ad. & E. 378.

The defendant may show, under the plea of not guilty, that the immediate or proximate cause of the injury was the unskilfulness or negligence of the plaintiff (*Flower v. Adam*, 2 Taunt. 315. *Williams v. Holland*, 10 Bing. 110. *Vennell v. Garner*, 1 C. & M. 21. *Bridge v. Grand Junction Railway Co.* 3 Mee. & W. 244. *Gough v. Bryan*, 2 id. 770. *Sills v. Brown*, 9 C. & P. 601. *Smith v. Dobson*, 3 Man. & G. 59. *Holden v. Liverpool New Gas and Coke Co.* 3 C. B. 1); and although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided this, he is the author of his own wrong. *Bridge v. Grand Junction Railway Co.* 3 Mee. & W. 244: *per Parke, B.*

Where the plaintiff relies on the presumption of negligence arising from the circumstance of the coach breaking down, the defendant may show that the coach was examined a few days before the accident, and that no defect was discovered; that the coachman was a skilful driver, and was

driving at a moderate pace in the usual track. *Christie v. Griggs*, 2 Camp. 81.

In an action for keeping a mischievous animal, it is a good defence under not guilty that the animal was properly at large, and that the accident happened through the plaintiff's own misconduct. *Brock v. Copeland*, 1 Esp. 203. *Deane v. Clayton*, 1 Moo. 225, 245.

In an action on the case for placing lighted brimstone in a church tower, whereby the plaintiff, who, with others, was ringing the bells, was annoyed by the fumes. *Plea*, general issue; 2ndly, that the plaintiff was wrongfully in the church tower making a disturbance, and that the rector desired him to depart, and that as he would not, the defendant, by command of the rector, placed and lighted the brimstone, to cause the plaintiff to depart: — *Held*, that to support the special plea, evidence must be given of the request to depart, and of the rector's authority to put the brimstone; and that to entitle the plaintiff to a verdict on the general issue, the jury must be satisfied that the defendant sustained some substantial damage from the fumes of the brimstone. *Evans v. Lisle*, 7 C. & P. 562.

In an action for maliciously suing out a fiat in bankruptcy against the plaintiff, the declaration averred that it was duly ordered, to wit, by the Court of Review, such court having competent power and authority in that behalf, that the fiat should be rescinded and annulled, and the proceedings upon the fiat were not thereupon wholly ended and determined: — *Held*, that the plea of not guilty put in issue the malicious suing out of the fiat without reasonable or probable cause, and that a variance between the evidence of the determination of the proceedings, and the allegation thereof in the declaration, was therefore immaterial after verdict. *Atkinson v. Raleigh*, 6 Jur. 431. *Semble*, this allegation is supported by evidence that the Lord Chancellor had made an order confirming an order of the Court of Review, which purported to annul the fiat if the Lord Chancellor should think fit to confirm that order. (Id.)

In an action by the executors of a stockholder against the Bank of England for refusing to transfer stock to the testatrix, and to pay dividends, the plea of not guilty will let in evidence of the fact that nearly all the stock had been sold and transferred by a relative in the lifetime of the testatrix, her name being forged, and that she had the means of knowing of the transfer, and had been guilty of gross negligence, and that the defendants were not to blame. *Coles v. England* (*Bank of*), 10 Ad. & E. 437.

We have seen when the breach of duty or wrongful act is admitted, and the defendant seeks to protect himself from the consequences thereof by other circumstances, he must plead them specially. Hence, in an action for the negligent management of a train of railway carriages, whereby it ran against another train, in which the plaintiff was riding, and injured him, a plea that the parties having the management of the other train managed it so negligently and improperly, that in part by their negligence the defendant's train ran against the other, and caused the injury, was held to amount to not guilty, being nothing more than a simple negation of the negligence which makes the defendant liable. *Bridge v. Grand Junction Railway Co.* 3 Mee. & W. 244.

If the defendant plead specially to an action for maliciously indicting the plaintiff without probable cause, the court will order such plea to be struck out. *Cotton v. Brown*, 3 Ad. & E. 312; 4 Nev. & M. 83); it being admissible under the general issue. So, in an action for maliciously, and without probable cause, refusing to accept from the plaintiff the amount of debt and costs for which he was a prisoner. *Houndsfield v. Drury*, 11 Ad. & E. 98; 4 Jur. 24.

In an action for negligently driving, the defendant's possession of the carriage is admitted by not guilty. *Emery v. Clark*, 2 M. & R. 260. But *see supra.*

In an action for negligently driving the defendant's cart and horse against the plaintiff's horse in the usual form: — *Held*, that the defendant could not, under not guilty, show that he was not the person driving, and that the cart did not belong to him (*Taverner v. Little*, 5 Bing. N. C. 678. *Hart v. Crowley*, 12 Ad. & E. 378. *See* also *Wheatley v. Patrick*, 2 Mee. & W. 650); nor that the servant was not the defendant's (*Hart v. Crowley*, *supra*); and permission to amend, refused on argument upon a rule for entering a nonsuit. If the plaintiff were to blame, the defendant ought not to show the particulars of plaintiff's negligence, and conclude with a special traverse, but should plead not guilty. *Gough v. Bryan*, 2 Mee. & W. 770; 5 Dowl. 765; 1 Jur. 802. *Plea*, that the accident was the result of the negligence of both parties is bad, as amounting to the general issue. *Bridge v. Grand Junction Railway Co.* 3 Mee. & W. 244; 6 Dowl. 340. *Woolf v. Beard*, 8 C. & P. 373.

In case for an injury to plaintiff's bridge by carelessly navigating a ship, the defendants pleaded that the plaintiffs had wrongfully narrowed the channel and increased the rapidity of the current, and thereby rendered the passage of vessels difficult and dangerous; without this, that the vessel struck the bridge through the carelessness of the defendant, with a conclusion to the country: — *Held*, that the defendants under this issue might show that the injury had not been caused through their negligence, although they had failed in showing any default on the part of the plaintiffs. *Cross-Keys Bridge Co. v. Rawlings*, 3 Bing. N. C. 71; 3 Scott, 400.

In an action by a reversioner for an injury to his land in the possession of his lessee, the injurious act alone is put in issue. The reversionary interest of the plaintiff, the demise and the tenancy, are admitted. *Raine v. Alderson*, 4 Bing. N. C. 702.

It is not unfrequently a matter of doubt whether a declaration is framed as upon a contract or for a tort. To obviate this difficulty, the 74th sect. C. L. P. Act, 1852, after reciting that certain causes of actions may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of plea in such actions, and it is expedient to remove such doubts, enacts, that any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong. In such doubtful cases, either form of general issue, *non-assumpsit* or *not guilty*, may be pleaded, without objection, but with a different result, as the latter denies the breach or wrongful act, and admits the contract or duty charged; the former denies the contract or duty, and admits the breach or wrongful act. B. & L. Pl. 411.

In trespass, whether to the person, or personal or real property, the defendant can, under not guilty, give in evidence any matter which directly controverts the fact of his having committed the acts complained of. *Weatherell v. Howard*, 3 Bing. 135. *Pearcey v. Walter*, 6 C. & P. 232; 2 Saund. 159, n. 10. *Ross v. Litton*, 6 C. & P. 407. *Goodman v. Taylor*, 5 id. 410. Thus, in trespass for driving the shaft of a gig into the plaintiff's horse, if in fact the plaintiff drove his horse against such shaft, and thereby himself occasioned the injury, or if the injury, it has been said, were accidental, it may be given in evidence under this plea. *Pearcey v. Walter*, *supra*. But see *Hall v. Fearnley*, 3 Q. B. 919. *Christopher v. Bare*, 11 id. 473. So, in trespass for assault, &c., with a tearing of clothes, a plea of not guilty of the assault *modo*, &c., was held to operate as a denial of the battery and *laceravit*, as well as the assault. *Weatherell v. Howard*, *supra*. So, he may show, that he simply touched the plaintiff in conversation or joke (*Williams v. Jones*, Hardw. 301. *Kingsbury v. Collins*, 4 Bing. 206.); or for the purpose of calling his attention. *Coward v. Baddeley*, 28 L. J. Ex. 260. In trespass *de bonis asportavit*, this plea operates as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

In all actions of trespass to the person, personal or real property, matters in discharge, or in confession or avoidance of the action, must be specially pleaded (*Bird v. Randall*, 3 Burr. 1353. *Barber v. Dixon*, 1 Wils. 45); or in an action for a trespass by a collision, that it was caused by the plaintiff's negligent driving (*M'Laughlan v. Pryor*, 4 Man. & G. 48); as award and satisfaction (*Bird v. Randall*, *supra*. *Doe v. Leo*, 4 Taunt. 459); arbitrament, release (*Bird v. Randall*, *supra*); former recovery (1 Ch. Pl. 88, 89, 535); or to assault, a magistrate's certificate of acquittal (*Harding v. King*, *ante*; Assault, vol. i. p. 562); or tender of amends (21 Jac. 1, c. 16; Com. Dig. Plead. 3 M, 36; Vin. Abr. Trespass, S, a, 542. *Baseley v. Clarkson*, 3 Lev. 37); or the Statute of Limitations (21 Jac. 1, c. 52); which in trespass to persons is four years, to personal or real property, six years. See *Macfadzen v. Olivant*, 6 East, 390.

In trespass to the person, not guilty denies that the defendant committed any assault, battery, or imprisonment but *son assault demesne* (*Gregory v. Hill*, 8 T. R. 299; 1 Saund. 77, 296, n. 1); moderate correction of a servant, &c. (*Watson v. Christie*, 2 B. & P. 224); *molliter manus imposuit* to preserve the peace, or justification in defence of the possession of real or personal property (*Weaver v. Bush*, 8 T. R. 78. *Holmes v. Bagge*, 1 E. & B. 782; 22 L. J. Q. B. 301. *Booth v. Packer*, 1 Bing. N. C. 72. *Hayley v. Okey*, 8 Ex. 531); or by authority of law without process, as a private individual (*Smith v. Edge*, 6 T. R. 562); or under civil process of superior, inferior, or foreign courts, must always have been specially pleaded. *Barker v. Braham*, 3 Wils. 370. *Collet v. Keith* (*Lord*), 2 East, 260. *Rowland v. Veale*, Cowp. 18.

No person is bound to justify who is not *primâ facie* a trespasser (*Badkin v. Powell*, Cowp. 478); but where the act would at common law *primâ facie* appear to be a trespass, or done by virtue of a warrant or authority, it must in general be specially pleaded. Co. Litt. 282 b; 283 a; Dougl. 611; 2 Roll. Abr. 682; 12 Mod. 120; 1 Saund. 298; Com. Dig. Pleader, E. 15–17. A plea of justification is to enumerate and cover the whole, or the plaintiff, without a special replication or new assignment, will be entitled to a verdict for the trespasses proved, and not justified. *Bush v. Parker*, 1 Bing. N. C. 72. But if the plea consist of two facts, each of which would, when separately pleaded, amount to a good defence, it would (unless in pleas of prescription) support the justification if one of these facts be found by the jury. *Spilsbury v. Micklethwaite*, 1 Taunt. 146. A plea justifying an imprisonment on the ground of felony should state the grounds of suspicion, and the averment that the plaintiff suspiciously did such an act is not sufficient. *Mure v. Kay*, 4 Taunt. 34. *Hedges v. Chapman*, 2 Bing. 523.

In order to justify a private individual for causing an arrest without a warrant, he must show a reasonable ground of suspicion, and that a felony has been actually committed. *Allen v. Wright*, 8 C. & P. 522. *Matthew v. Biddulph*, 3 Man. & G. 390.

Although all matters of justification must be pleaded specially, and, if not pleaded, cannot be given in evidence, even in mitigation of damages, yet extenuating circumstances, not amounting to a justification, may be proved in order to reduce the damages without a plea. *Linford v. Lake*, 27 L.J.Ex. 334; 3 H. & N. 276.

There are cases where a justification had better be pleaded, without the additional plea of the general issue: thus, in some cases where the committing the trespasses complained of cannot be disputed, but can

III. By particular Persons by Statute.[1]

be justified, it is advisable to plead such justification alone, for by that means the defendant's counsel may, on the trial, have the general reply. *Hodges v. Holder*, 3 Camp. 366.

When the form of *son assault demesne* is pleaded, as given in schedule C. L. P. Act, 1852, under a replication, taking issue on it, the plaintiff may prove excess. *Dean v. Taylor*, 11 Ex. 68.

Where, in trespass *q. c. f.*, plaintiff's possession cannot be disputed, and the defendant relies upon a right of way, it is advisable not to plead the general issue, for if only the right of way were pleaded and traversed, then the defendant's counsel has a right to plead at the trial, and thereby in case the plaintiff should examine any witness in chief, the defendant's counsel would have the advantage of the reply. *Hodges v. Holder, supra.*

In actions for injuries to personal property, which do not involve a taking of the subject-matter, the general issue only denies the fact of the commission of the act complained of; so that, even where the defendant did the act complained of at the request of the plaintiff, that defence must be specially pleaded. Therefore where, to trespass for moving the plaintiff's barge, the defendant pleaded only not guilty, it was held he could not give in evidence that he removed the barge from a situation of danger by the plaintiff's authority, or that, being frozen to the barge of a third person, which the defendant was authorised to remove, the one was necessarily removed with the other, and that they were both brought together to a place of safety. *Milman v. Dolwell*, 2 Camp. 378.

[1] By 21 Jac. 1, c. 12, s. 5, an action against justices of the peace, mayors, constables, and other peace-officers, or any others acting in their aid and assistance, or by their command, for anything done by them by virtue or by reason of their offices, the special matter may be given in evidence under the general issue. This is repealed by 11 & 12 Vic. c. 44, s. 10, so far as relates to justices of the peace, which enacts that in every action against any justice of the peace, for anything done by him in the execution of his office, the defendant shall be allowed to plead the general issue, and to give any special matter of defence, excuse, or justification in evidence, under such plea at the trial of such action. Co. Litt. 283; Vaugh. 111. See *Nathan v. Cohen*, 3 Camp. 257. *M'Cloughan v. Clayton*, Holt, N. P. 478. So, for anything done in pursuance of the Bankrupt Act (6 Geo. 4, c. 16, s. 44); although this defence is usually specially pleaded. *See* 1 Mont. B. L. 410. So, the Lord Chancellor, if sued for committing a person, may plead the general issue. *Decas v. Brougham* (*Lord*), 6 C. & P. 249. So, under the Highway Act, Turnpike, Poor-Law, Municipal Corporations Act, Militia, and Assessed Tax Acts, building and other acts protecting persons acting in the execution of their office, or others in aid of them. 1 Ch. Pl. 546. *Wells v. Ody*, 2 C., M. & R. 128. But see *per Alderson, B.*, id. But this power cannot now be exercised in those cases where the privilege is exercised under acts commonly called public, local, and personal, or local and personal, or acts of a local and personal nature. 5 & 6 Vic. c. 97, s. 3. *See post*, 567. An act for establishing a local court of requests is within this statute, though the act contained a clause making it a public act. *Cock v. Gent*, 12 Mee. & W. 234. But neither the Metropolitan Building nor Police Act is local and personal within the statute. *Richards v. Easto*, 15 id. 244. *Barnett v. Cox*, 16 L.J. 27, M.C.; 9 Q.B. 617. Military officers, &c., acting officially (6 Geo. 4, c. 108, s. 97); constables (7 Jac. 1, c. 5); special constables (1 & 2 Wm. 4, c. 41); metropolitan police (10 Geo. 4, c. 44, s. 41; 2 & 3 Vic. c. 47, s. 5); Thames police (3 & 4 Wm. 4, c. 19); the horse patrol (6 & 7 Wm. 4, c, 50, s. 1); police constables in corporate boroughs (5 & 6 Wm. 4, c. 76, s. 19), and those who act in their aid, may plead the general issue to an action for anything done in the execution of their office, and give the special matter in evidence. See *Hedges v. Chapman*, 2 Bing. 523. So, parties distraining for rent in arrear (11 Geo. 2, c. 19, s. 21); or officers of county court (13 & 14 Vic. c. 61, s. 19); actions for malicious injuries to property (7 & 8 Geo. 4, c. 30); for acts done under Public Health Act, 11 & 12 Vic. c. 63, s. 139.

The general issue by statute lets in not only defences given by the statute, but also those which would have arisen at common law (*Ross v. Clifton*, 11 Ad. & E. 631; 9 Dowl. 1033; and *Langford v. Woods*, 7 Man. & G. 629); and likewise defences resting partly on the statute, and partly at common law (Id.; and *Maund v. Monmouthshire Canal Co.* 4 C. & M. 606); and it extends also to new assignments. *Mason v. Newland*, 9 C. & P. 575. Special pleas making defences, which by the statute might be given in evidence under the above plea, will not be allowed along with it. *Legge v. Boyd*, 1 Man. & G. 902; 9 Dowl. 39; and see *Williams v. Jones*, 11 Ad. & E. 643. *Eagleton v. Gutteridge*, 11 Mee. & W. 465.

Formerly the privilege of pleading the general issue and giving special defences in evidence under it was conferred by a great variety of acts, public, local, and personal, and local and personal; but by the 5 & 6 Vic. c. 97, s. 3, it is enacted, that so much of any clause or provision, in any act or acts, commonly called public, local, and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be, and the same is hereby repealed." This statute does not

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apply to local and personal acts passed subsequently to its date. *Boden v. Smith*, 18 L. J. C. P. 120. As to what statutes come within this description, see *Cock v. Gent*, 12 Mee. & W. 234. *Richards v. Easto*, 15 id. 244. *Moore v. Shepherd*, 10 Ex. 424.

A person is considered as acting under, or by virtue of, or in pursuance of a statute, or in exercise of an office, so as to be entitled to the privilege of pleading the general issue by statute, when he has a *bonâ fide* belief that he is so acting, and notwithstanding that he may not be justified in such belief upon reasonable grounds. *Booth v. Clive*, 10 C. B. 827. *Reed v. Coker*, 13 id. 850. *Jones v. Howell*, 29 L. J. Ex. 19. *Norwood v. Pitt*, 29 L. J. Ex. 127; and *see ante*, Notice of Action, p. 547.

By rule 21, T. T. 1853, in every case which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the act or acts of parliament by which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the *nisi prius* record. Under this rule all the statutes under which the defence arises must be inserted in the margin, or the defendant will not be able to avail himself of them. *Edwards v. Hodges*, 15 C. B. 477. If one or more of the statutes are omitted from the margin, their insertion is an amendment, which may be allowed under the C. L. P. Act, 1852, s. 222 (Id.) The plea of the general issue by statute is not affected by the rules of pleading, which have restricted the plea of the general issue at common law; consequently all the defences which were admissible under the general issue at common law, in addition to all the special matters arising under the statute, may be relied on under this plea; and no special pleas of such defences will in general be allowed to be pleaded, together with the plea of the general issue by statute. *Ross v. Clifton*, 11 Ad. & E. 631. *Maund v. Monmouthshire Canal Co.* 1 C. & Marsh. 606, 608. *Fisher v. Thames Junction Railway Co.* 5 Dowl. 773: but see *Langford v. Woods*, 7 Man. & G. 625. In actions for illegal and irregular distresses for rent, this plea puts in issue all matters of inducement, as the tenancy, the distress, the irregularities complained of, and admits proof of all matters of justification. *Williams v. Jones*, 11 Ad. & E. 643. In action for trespasses to land, or for the taking, conversion, or detention of goods, the general issue by statute enables the defendant to prove a justification under a right of distress; and every justification at common law or by statute, arising out of the distress, may be given in evidence, and need not be pleaded specially. *Eagleton v. Gutteridge*, 11 Mee. & W. 465. A plea of justification under a statute in the general terms, that the acts complained of were done by the defendant under the powers given them by a particular act of parliament, was held good on demurrer, although the defendants had no privilege of pleading the general issue by statute. *Beaver v. Mayor of Manchester*, 8 E. & B. 44; 26 L. J. Q. B. 311; B. & L. Pl. 418.

[1] Not guilty; by which plea, without further form, every person not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy, is deemed to have put himself upon the country for trial. 7 & 8 Geo. 4, c. 28, s. 1. "And if any person, being arraigned upon or charged by any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same" (Id. s. 2.) A prisoner who had been previously tried and convicted, but whose trial was deemed a nullity, on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried; *Littledale, J.* and *Vaughan, B.* ordered a plea of not guilty to be entered for him under this section. *R. v. Pitton*, 6 C. & P. 92. A person deaf and dumb was to be tried for a felony; the judge ordered a jury to be impannelled, to try whether he was mute by the visitation of God: the jury found that he was; so they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant, by a sign, pleaded not guilty; the judge then ordered the jury to be impannelled, to try whether the defendant was now sane or not, and on this question directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings to make a proper defence, to challenge the jurors, and comprehend the details of the evidence; and that if they thought he had not, they should find him of non-sane mind. *R. v. Pritchard*, 7 C. & P. 303.

Where a prisoner has pleaded guilty to a charge of felony, and sentence has been passed upon him, he cannot afterwards retract his plea and plead not guilty. *Reg. v. Sell*, 9 id. 346.

In informations and in indictments for not repairing roads and bridges, &c., where the defendant is allowed, *e. g.* to appear by attorney, the general issue is regularly engrossed and filed with the proper officer.

Not guilty makes it incumbent upon the

NOVELTY.[1] *See* Patent.

NUDA Pactio obligationem non parit. *A naked promise does not create an obligation.* Dig. 2, 14, 7, 4; Broom's *Max.* 584.

NUDO Ratio et unda pactio non legant aliquum debitorem. *Naked reason and naked promise do not bind any debtor.* Fleta, lib. ii. c. 60, s. 25.

NUDUM Pactum.[2] A naked, bare, or mere pact or promise; one that stands within the bare limits of convention and pleasure. *Quod in nudis placiti et conventionis finibus subsistit.* s. 777.

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prosecutor to prove every fact and circumstance constituting the offence as stated in the indictment or information. On the other hand, the defendant may give in evidence under this plea, not only everything which negatives the allegation in the indictment, but also all matter of excuse and justification. Arch. C. Pl. 127.

[1] *Novitas non tam utilitate prodest quam novitate perturbat.* A novelty does not benefit so much by its utility as it disturbs by its novelty. Jenk. Cent. 167, c. 23.

It is no objection to an action that it be new in its application, if it be not new in its principle. *Pasley v. Freeman*, 3 T. R. 63. *See* Deceit, vol. iii. p. 561. *Chamberlain v. Williamson*, 2 M. & S. 415.

[2] In modern law, *nudum pactum* is constantly used to denote a contract without consideration. 2 Bl. Com. 445; Kent's Com. 464. This is founded on the broad terms of the civil law (*nudum pactum* [or rather, *nuda pactio*] *est ubi nulla subest causa præter* [*propter*] *conventionem*), without reference to the stricter and technical meaning of the words. Dig. 2. 147; 4 Plowd. 339 a; Broom's *Max.* 336 [583]. *See* 1 Spence's *Chancery*, 186, n. f.

A *nudum pactum* in the civil law afforded no ground for an action, but it might be the subject of an exception or plea. *Nuda pactio obligationem non parit sed parit exceptionem.* Dig. 2, 14, 74. *See* Contract, vol. iii. p. 193, where the cases illustrating this doctrine are fully stated.

END OF VOL. V.

LONDON:
STRANGEWAYS AND WALDEN, PRINTERS,
28 Castle St. Leicester Sq.